A New Beginning: A Case for Establishing a Sexual and Gender-Based Violence Truth Commission in South Africa

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DECLARATION

I, Stephanie Wild, hereby declare that the work which this thesis is based on is my original work (except where acknowledgment indicate otherwise) and that neither the whole work nor any part of it has been, or is being, or is to be submitted for another degree in this or any other university.

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ABSTRACT

Globally, civil society and the media have drawn increasing attention to alarmingly high sexual and gender-based violence (SGBV) and femicide rates. This is particularly true for South Africa, having hosted two presidential summits on the topic, having produced a national action plan (NAP) detailing intervention and prevention strategies, as well as having nationwide protests against SGBV and femicide between 2018 and 2019. This thesis hopes to contribute to existing literature regarding potential intervention and response strategies to minimise SGBV and femicide, particularly in South Africa. More specifically, this thesis seeks to determine whether the novel approach of a SGBV truth commission (TC) would be an effective method to respond to and minimise the widespread femicide and SGBV violations in South Africa.

This research project is a desktop thesis, drawing on existing literature in the transitional justice (TJ), gendered transitional justice (GTJ), and radical feminism fields to determine if a TJ strategy would be appropriate in the context of an established democracy and in the context of SGBV and femicide, whether a TC in particular would be the most effective TJ strategy over a reparations programme, institutional reforms, and a SGBV tribunal, as well as whether a TC would be effective, justified, and/or necessary after the Truth and Reconciliation Commission (TRC). Ultimately, this thesis suggests that a SGBV TC, if adopting an intersectional-gendered framework and if working with the National Prosecuting Authority (NPA) to pursue criminal prosecutions, would be an effective intervention strategy to both pursue justice for SGBV and femicide victims, as well as to address the root cause, patriarchy. Ultimately, this thesis concludes that a SGBV TC could pursue restorative justice goals for victims and alleviate pressure on investigative authorities through evidence collection; promote more inclusive shared narratives on SGBV to counterbalance prolific ‘rape myths’; encourage positive changes in patriarchal attitudes/beliefs within broader society and the criminal justice system; guide the implementation of well-crafted reparations and institutional reforms. This implies that TJ strategies could be implemented not only in post-war/authoritarianism contexts, but also in countries battling pervasive SGBV and femicide levels by beginning to dismantle patriarchy.

TRANSITIONAL JUSTICE, TRUTH COMMISSION, GENDER, SGBV, FEMICIDE, INTERSECTIONALITY, PATRIARCHY

TABLE OF CONTENTS

ABREVIATIONS

ANC: African National Congress
CEH: Commission for Historical Clarification
CODESA: Convention for a Democratic South Africa
CONADEP: Argentine National Commission on the Disappeared
ERC: Equity and Reconciliation Commission
GTJ: Gendered transitional justice
ICC: International Criminal Court
ICCPR: International Covenant on Civil and Political Rights
ICTJ: International Centre for Transitional Justice
ICTR: International Criminal Tribunal for Rwanda
ICTY: International Criminal Tribunal for the Former Yugoslavia
IRS: Indian Residential School
MK: uMkhonto we Sizwe
NAP: National action plan
NGO: Non-governmental organisation
NPA: National prosecuting authority
NP: National Party
SADF: South African Defence Force
SAPS: South African Police Service
SGBV: Sexual and gender-based violence
TC: Truth commission
TJ: Transitional justice
TRC: Truth and Reconciliation Commission
UN: United Nations
WPS: Women, Peace, and Security
WWI: World War I
WWII: World War II

CHAPTER 1 – INTRODUCTION AND MOTIVATION

1.1 Introduction

Globally, the question of how to reduce sexual and gender-based violence (SGBV) is more relevant than ever, with civil society groups and the media drawing increasing attention to SGBV rates and the need for intervention initiatives. For instance, although the term was first coined in 2006, the #MeToo movement gained widespread recognition in 2017.[1] More specifically, recognition of the movement came after a *New York Times* article reported that Hollywood producer Harvey Weinstein was guilty of sexual assault, after which more and more women came forward to make their SGBV cases public, using the #MeToo tag.[2] This then turned into a global movement, which was aimed at raising awareness of sexual assault and harassment, encouraging victims to come forward, as well as preventing future sexual violence.[3]

Over the course of the past five decades or so, there has also been an increasing number of international institutions, governments, and civil society organisations that have distinguished between female victims of homicide and victims of 'femicide'. The word femicide was initially first coined in 1801 by John Corry in his book *View of London at the Commencement of the Nineteenth Century*.[4] At the time, the term was used more metaphorically, referring to relations between married men and young, single women,[5] essentially referring to the 'social death' of women when their involvement in extramarital affairs came to light. Later, in 1972, the term was revived by feminist activist Diana Russel when discussing discrimination against women and SGBV at the

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[1] Sherri Gordon 'The #MeToo Movement: Hisotry, Sexual Assualt Statistics, Impact' *VeryWell* 2023 available at *https://www.verywellmind.com/what-is-the-metoo-movement-4774817#:~:text=The%20History%20of%20the%20%23MeToo,had%20suffered%20the%20same%20experience.*, accessed on 27 June 2023.
[2] Jodi Kantor 'Harvey Weinstein Paid Off Sexual Harrasment Accusers' *The New York Times* 2017 available at *https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html*, accessed on 27 June 2023.
[3] Sherri Gordon 'The #MeToo Movement: Hisotry, Sexual Assualt Statistics, Impact' *VeryWell* 2023 available at *https://www.verywellmind.com/what-is-the-metoo-movement-4774817#:~:text=The%20History%20of%20the%20%23MeToo,had%20suffered%20the%20same%20experience.*, accessed on 27 June 2023.
[4] Canadian Femicide Observatory for Justice and Accountability 'The history of the term 'femicide'' available at *https://www.femicideincanada.ca/about/history*, accessed on 15 August 2023.
[5] John Corry *A satirical view of London at the commencement of the nineteenth century* London, G. Kearsley (1801) 60.

International Tribunal of Crimes Against Women.[6] Since then, 'femicide' has been defined as the "intentional murder of women", usually perpetrated by men, and very often by partners or ex-partners.[7] Notably, in the past decade, a growing number of states have publicly acknowledged extremely high and pervasive femicide rates in their respective countries, raising awareness of how modern patriarchy can escalate to lethal forms of violence that target women because of their gender. This is particularly true of the countries in Latin America and the Caribbean, which publish a Gender Equality Observatory for the region each year, publishing the annual femicide and SGBV rates for each country in the region.[8] More than that, 17 states involved in the publication, namely, Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela, have adopted laws or reforms to their criminal codes in the direction of criminalising femicide as a specific crime separate from homicide.[9]

Countries have also increasingly adopted National Action Plans (NAPs) to both combat SGBV and femicide, as well as to improve women's representation in the workplace and educational settings.[10] In fact, South Africa implemented its Gender-based Violence and Femicide Emergency Response Action Plan in 2019, followed by its first official NAP in 2020, which will run until 2025.[11] The development of the NAP was first announced at a presidential summit on the topic of femicide and SGBV in 2018.[12] Despite these efforts, however, citizens and civil society groups continued to be dissatisfied with government intervention initiatives in the period following the

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[6] Canadian Femicide Observatory for Justice and Accountability op cit note 4.
[7] Department of Statistics South Africa 'Crimes against women in South Africa, an analysis of the phenomenon of GBV and femicide' available at *https://www.parliament.gov.za/storage/app/media/1_Stock/Events_Institutional/2020/womens_charter_2020/docs/30-07-2020/A_Statistical_Overview_R_Maluleke.pdf*, accessed on 21 Febraury 2022.
[8] Economic Commission for Latin America and the Carribean *The pandemic in the shadows: femicides or feminicides in 2020 in Latin America and the Caribbean* (2021) available at *https://www.cepal.org/sites/default/files/infographic/files/21-00792_folleto_the_pandemic_in_the_shadows_web.pdf*, accessed on 27 June 2023.
[9] Ibid.
[10] SecurityWomen 'UNSCR 1325 and National Action Plans' available at *https://www.securitywomen.org/united-nations/unscr-1325-and-national-action-plans-nap*, accessed on 27 June 2023.
[11] South African Government 'President Cyrial Ramaphosa: Second Presidential Summit on Gender-Based Violence and Femicide' available at *https://www.gov.za/speeches/president-cyril-ramaphosa-second-presidential-summit-gender-based-violence-and-femicide-1*, accessed on 27 June 2023.
[12] Ibid.

summit. Nationwide protests against femicide and SGBV followed in 2019.[13] A second presidential summit was then held in 2022 to assess the government's progress regarding the NAP's implementation and success.[14] It is in this environment in which calls for robust interventions that effectively reduce SGBV and femicide rates, that I propose the implementation of a SGBV truth commission (TC) in South Africa.

1.2 Motivation for this study

South Africa has a long history of high and pervasive levels of SGBV. In fact, according to the Gender Security Project, citing Glanz,[15] South Africa's rape statistics increased by 132 per cent between 1955 and 1990.[16] This is reflected by statistics of reported rapes in the country between 1980 and 1993. While 9 365 rapes were reported in 1980, the figure rose to 27 056 in 1993.[17] Notably, the Truth and Reconciliation Commission (TRC)'s Head of the Commission on Gender, Thenjiwe Mtintso, highlighted this very problem during TRC proceedings, stating that violence against women (and children) had reached "genocide levels" in the country.[18] Unfortunately, these figures have only continued to rise. In the 2012/13 period, as many as 48 408 rapes were reported.[19] According to the latest annual statistics during the 2021/2022 period, 41 739 rapes were reported,[20] while, in the first quarter of 2023 alone, 10 512 rapes were reported.[21] Furthermore, in this same 2021/2022 period, 3 198 women were

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[13] Robin-Lee Francke 'Thousands protest in South Africa over rising violence against women' *The Gaurdian* 2019 available at *https://www.theguardian.com/world/2019/sep/05/thousands-protest-in-south-africa-over-rising-violence-against-women*, accessed on 17 March 2023.
[14] South African Government op cit note 11.
[15] To access the original statistics, see Lorraine Glanz 'Crime in South Africa: Incidence, trends and projections' (1994) *Managing Crime in the New South Africa: Selected Readings. Human Sciences Research Council, Pretoria*.
[16] The Gender Secuirty Project 'CRSV: South Africa during Apartheid' available at *https://www.gendersecurityproject.com/post/crsv-south-africa-during-apartheid*, accessed on 27 June 2023.
[17] Human Rights Watch 'South Africa: The State Response to Domestic Violence and Rape' available at *https://www.hrw.org/legacy/reports/1995/Safricawm-02.htm*, accessed on 27 June 2023.
[18] Truth and Reconciliation Commission of South Africa. Truth and Reconciliation Commission of South Africa Report. 7 vols. Cape Town: Truth and Reconciliation Commission vol 5, p 418.
[19] South African Police Service 'Crime Statistics: Integrity' available at *https://www.saps.gov.za/services/crimestats.php*, accessed on 16 February 2022.
[20] South African Police Services 'Police Recorded Crimes Statistics: 2021/2022 Financial year' available at *https://www.saps.gov.za/services/downloads/Annual-Crime-2021_2022-web.pdf*, accessed on 27 June 2023.
[21] South African Police Services 'Police Recorded Crime Statistics: Fourth Quarter of 2022-2023 Financial year' available at *https://www.saps.gov.za/services/downloads/4th-Quarter-January%202023-March%202023.pdf*, accessed on 27 June 2023.

murdered in South Africa (an average of nine women killed each day).[22] An additional 4 015 attempted murders of women were also reported to the police in this period.[23] Overall, crimes committed against women rose by 15.6 per cent from the year prior (the 2020/2021 period) to 179 208 in this 2021/2022 period.[24] Therefore, violent, contact crimes targeting women continue to rise in the country.

Furthermore, women from disenfranchised communities and formerly disadvantaged groups tend to be the most vulnerable to SGBV in South Africa, disproportionately affected by rape, SGBV and femicide.[25] While this is largely based on anecdotal evidence, with recent race-disaggregated data hard to come by, a study published in 2000 indicated that 2.7 per cent of Coloured women aged 16 years or more reported experiencing some kind of sexual abuse between the beginning of 1993 and March 1998, 2.7 per cent of Indian women, 2.2 per cent of African women, and 0.9 per cent of white women.[26] Similarly, a study from 2004 revealed that the femicide rate for white women was 2.8 per 100 000; the rate for Indian women was 7.5; the rate for African women was 8.9; while the rate for Coloured women was as high as 18.3.[27] It is worth noting here that white men were not prosecuted for rape during apartheid; moreover, only perpetrators guilty of raping white women were prosecuted.[28] As a result, women from communities discriminated against by the apartheid government have, historically, been the most vulnerable targets of SGBV in the country, with impunity for crimes committed against them being extremely high and violence committed against them perceived as rather justified.

Ultimately, it is clear that some kind of intervention is necessary to protect South Africa's women given SGBV and femicide rates continue to rise, with women from formerly disadvantaged groups bearing the brunt of this violence. My thesis posits a

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[22] South African Police Service. Submission of the Annual Report to the Minister of Police 2021/2022. Pretoria: Department of Police at 162.
[23] Ibid. at 162.
[24] Ibid. at 162.
[25] Mbalenhle Matandela 'Freedom in a Time of Femicide' *Heinrich Boll Stiftung* 2022 available at *https://za.boell.org/en/2022/05/04/freedom-time-femicide*, accessed on 27 June 2023.
[26] Statistics South Africa. Quantitative Research Findings on Rape 2000. Pretoria: Statistics South Africa at 10.
[27] Shanaaz Mathews et al '"Every six hours a woman is killed by her intimate": A National Study of Female Homicide in South Africa' (2004) 5 *MRC Policy Brief* 2.
[28] The Gender Security Project note 16.

novel intervention approach, namely the implementation of a transitional justice (TJ) strategy in the form of a SGBV TC.

1.3 Relevance of this study

This thesis seeks to determine whether a SGBV TC is the best way to address and reduce femicide and other forms of SGBV in South Africa, while also pursuing justice goals. To do so, it focuses on the novel implementation of a TJ strategy, and more specifically a TC, as part of a broader femicide intervention strategy to pursue restorative justice for SGBV victims, promote more inclusive shared narratives of femicide and SGBV in South Africa, promote positive changes in patriarchal attitudes and behaviours, as well as to guide reparations and institutional reforms to reduce future gendered forms of violence.

Notably, there is legal precedent for pervasive and high femicide rates in a country constituting a government's breach of its duties under international law to protect its citizens and prevent violence against marginalised groups, which would entitle the victims thereof to both the TJ right to truth-seeking (the "freedom to seek, receive and impart information and ideas of all kinds"),[29] and/or reparations ("effective remedy") under the International Covenant on Civil and Political Rights.[30] For example, the Inter-American court ruled in 2009 that the surviving loved ones of femicide victims in Juarez, Mexico were entitled to reparations.[31] More specifically, the court ruled that Mexico had failed to diligently investigate femicide cases, as well as prevent femicide cases, which, according to the court, constituted a breach of its duties under international law, requiring the state to pay reparations to surviving loved ones.[32] To this end, Sosa, an expert on intersectional discrimination, argues that femicide represents massive systematic or generalised attacks against one sector of the population, as a result of which the state has an international responsibility to assess the need for a reparations programme.[33] She then goes on to call for a more

[29] Rights first enshrined in the International Covenant on Civil and Political Rights 1966 art 19(2).
[30] Ibid. art 2(3)(a).
[31] Lorena PA Sosa 'Inter-American case law on femicide: Obscuring intersections?' (2017) 35 *Netherlands Quarterly of Human Rights* 85.
[32] Jorge Calderón Gamboa 'Seeking Integral Reparations for the Murders and Disappearances of Women in Ciudad Juárez: A Gender and Cultural Perspective' (2007) 14 *Human Rights Brief* 31.
[33] Sosa op cit note 31 at 94.

intersectional view on femicide to better understand how socio-economic class impacts women's vulnerability to femicide, as well as how reparations can aim for a "transformative effect" to reduce future femicide rates by taking these socio-economic factors into account.[34] Gamboa makes a similar argument, suggesting that where states fail to stop systematic SGBV, they have a duty under national and international law to provide reparations.[35] He then goes on to argue for a reparations programme that compensates both direct femicide victims and indirect victims of institutionalised patriarchy, with the aim of reducing future SGBV by addressing the root causes of femicide.[36] Gamboa emphasises that to do so, reparations should not be restricted to monetary reparations, but also extend to the redistributing of public goods and symbolic reparations such as public apologies, memorials, commemoration ceremonies and reburials.[37] That being said, there has been insufficient research into femicide victims' right to truth-seeking under international criminal law and the implementation of a TC aimed at reducing future femicide and SGBV rates while also pursuing justice for said victims.

Therefore, in this thesis, I hope to contribute to academic research in the TJ field by proposing and assessing the viability of such a SGBV TC. Further studies can then draw on my research, either by adding a quantitative element, conducting interviews, or building more on the theory I have presented, to further determine the feasibility of a SGBV TC in South Africa and elsewhere. Below – in sections 1.3.1, 1.3.2 and 1.3.3 – I will outline why my research is so important by highlighting how widespread femicide in South Africa is and how this problem is linked to patriarchy, the extent to which civil society is demanding increased government-led intervention in femicide, and how apartheid's legacy has contributed to the normalisation of SGBV, respectively.

1.3.1 Femicide and patriarchy

[34] Gamboa op cit note 32 at 31.
[35] Ibid. at 32.
[36] Ibid. at 31.
[37] Ibid. at 31-34.

Interpol labelled South Africa the rape capital of the world in 2020.[38] That following year, in 2021, the South African President, Cyril Ramaphosa, identified rape to be the country's 'second pandemic' after Covid-19.[39] When considering that gendered harms like intimate partner violence have been observed to lead to long-term mental health problems such as suicide and post-traumatic stress disorder,[40] and that access to psycho-social support is scarce in the South African communities most effected by such gendered violence,[41] these statistics are even more concerning. Notably, the South African government has also formally recognised the severity of SGBV in the country, acknowledging that the high rates of SGBV committed against women in South Africa have exacerbated and perpetuated the conditions that lead to femicide.[42] In this way, the government has recognised that the drivers behind femicide and SGBV are linked. According to some feminists working in the radical tradition, this common driver is the expression and maintaining of male superiority, dominance and control over women in society, ie, patriarchy. However, before expanding on radical feminism and the different arguments posed by its various authors, I will first focus on defining patriarchy to provide the necessary context for the discussion on radical feminism and SGBV to follow.

1.3.1 (a) Defining patriarchy

Above, I alluded to patriarchy as the expression and maintaining of male superiority, dominance and control over women in society. Pease, for one, describes patriarchy as "an 'umbrella' term for describing men's systemic dominance of women".[43] Ali and Naylor, building on his work, suggest patriarchy to be a value and belief system justifying male dominance and rejecting egalitarian societal structures in both private

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[38] Tears 'Interpol has named South Africa the 'Rape Capital of the World'' available at *https://www.tears.co.za/wp-content/uploads/2020/07/presentation.pdf*, accessed on 16 Febraury 2022.
[39] Human Rights Watch 'South Africa: Broken Promises to Aid Gender-Based Violence and Rape' available at *https://www.hrw.org/news/2021/11/24/south-africa-broken-promises-aid-gender-based-violence-survivors*, accessed on 4 April 2022.
[40] Susan Lagdon et al 'Adult experience of mental health outcomes as a result of intimate partner violence victimisation: a systematic review' (2014) 5 *European journal of psychotraumatology* 2.
[41] For information regarding the scarcity of psycho-social support in South Africa, see Dean Peacock 'Moving beyond a reliance on criminal legal strategies to address the root causes of domestic and sexual violence' (2022) 28 *Violence against women* 1896.
[42] Department of Statistics South Africa op cit note 7.
[43] Bob Pease 'Recreating men: Postmodern masculinity politics' (1999) 20.

(inside the home/family structure) and public spheres.[44] Citing Haj-Yahia and Schiff, Ali and Naylor go on to suggest that in the public sphere, men share power amongst themselves, while in the private sphere, the senior man holds power over all other members of the family (including younger men and boys, as well as, of course, women and girls).[45] Arneil makes a similar observation, suggesting that the public sphere has historically been populated only by male citizens, while their "non-citizen wives" have populated the private, non-political sphere.[46] Notably, Auclair argues that this system of domination is upheld by the devaluation of all things feminine and through macho demonstrations.[47] In other words, by devaluing femineity and celebrating masculinity, the patriarchal system justifies masculine superiority and male dominance. Moreover, Edstrom *et al.* suggest that this gender hierarchy also intersects with hierarchies of race, class, sexuality, nationality, disability, and coloniality, thereby suggesting that patriarchy goes beyond gender extending to the "maintenance and management of a multidimensional hierarchical status quo".[48] Ultimately, this then suggests that, while femineity is devalued in patriarchal societies, different demographics will experience patriarchy and patriarchal systems slightly differently. This is particularly relevant to my discussions around intersectionality in Chapters 3 and 4.

Furthermore, the concept of 'hegemonic masculinity' illustrates how societal norms uphold male dominance as described above. First coined by Connell at the end of the 20th century, the term 'hegemonic masculinity' "is defined in relation to the legitimacy of patriarchy".[49] Borrowing from Marxist definitions of hegemony used to describe how the ruling class establishes and maintains its power/domination, the term hegemony refers to the way social institutions are organised so that any dominance appears normal and even natural.[50] In the case of 'hegemonic masculinity', this is made

[44] Parveen Azam Ali & Paul B Naylor 'Intimate partner violence: A narrative review of the feminist, social and ecological explanations for its causation' (2013) 18 *Aggression and Violent Behavior* 614.
[45] Ibid. See also Muhammad M Haj-Yahia & Miriam Schiff 'Definitions of and beliefs about wife abuse among undergraduate students of social work' (2007) 51 *International Journal of Offender Therapy and Comparative Criminology*.
[46] Barbara Arneil 'Women as wives, servants and slaves: Rethinking the public/private divide' (2001) 34 *Canadian Journal of Political Science/Revue canadienne de science politique* 29.
[47] Isabelle Auclair 'Féminismes' (2021) *Anthropen* 2.
[48] Jerker Edström et al 'Patriarchal (Dis) orders: Backlash as Crisis Management' (2024) 49 *Signs: Journal of Women in Culture and Society* 281.
[49] Robert W Connell 'RW Connell's" Masculinities": Reply' (1998) 12 *Gender and Society* 476.
[50] Mike Donaldson 'What is hegemonic masculinity?' (1993) *Theory and society* 3.

particularly possible when certain patterns of behaviour and ways of being (typically understood to be toxic and oppressive) become culturally dominant to the extent they are viewed as a generalised pattern of masculinity.[51] While it is worth noting that the concept of 'hegemonic masculinity' has been used and redefined by a number of authors since Connell's initial publication,[52] these, unfortunately, fall outside of the scope of this thesis. Notably, Connell highlights that 'hegemonic masculinity' should not be understood as inherently bad, arguing that a hegemony of "less toxic, more cooperative and peaceable" masculinities could, theoretically, be constructed.[53] In the following chapters, particularly in Chapter 3, I will argue that a SGBV TC stands to provide an opportunity to help construct such masculinities through promoting more inclusive shared narratives on SGBV.

1.3.1 (b) Defining femicide using a radical feminist lens

Having established a basic understanding of patriarchy, I will now consider how some in the radical feminist tradition conceptualise patriarchy as a root cause of femicide. Legal and criminology expert Shaka Yesufu, for instance, points out that, within the radical tradition, domestic violence is usually viewed as a symptom of living in a patriarchal society.[54] In fact, Jane Caputi, a leading author in the gender studies field, argues that sexual violence can be understood as a "continuation" of patriarchal, structural violence.[55] Caputi attributes this to the fact that the thoughts/beliefs, entertainment and institutions associated with modern patriarchy depict, embed, romanticise, eroticise, and legitimise violent acts such as harassment, molestation, incest, battery, rape, torture, mutilation and femicide in society regardless of their being criminalised in most countries.[56] Essentially, according to this thinking, the physical carrying out of these acts is simply an escalation of the patriarchal attitudes and beliefs that justify violence against women by reaffirming the gendered power

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[51] Nikki Wedgwood 'Connell's theory of masculinity–its origins and influences on the study of gender' (2009) 18 *Journal of gender studies* 331. See also RW Connell et al 'Ockers disco-maniacs: A discussion of sex, gender and secondary schooling' (1982) *Stanmore: New South Wales*.
[52] Wedgwood op cit note 51 at 335.
[53] Connell op cit note 49 at 476.
[54] Shaka Yesufu 'The scourge of gender-based violence (GBV) on women plaguing South Africa' (2022) 1 *EUREKA: Social and Humanities* 95.
[55] Jane Caputi *The age of sex crime* Ohio, Popular Press (1987) 120.
[56] Ibid. at 120-121.

inequality between men and women in society. Similarly, Judy Dlamini argues that "systemic institutionalised patriarchy legitimises violence against women", calling for a transdisciplinary approach to "eradicating" SGBV by addressing the underlying factor of gendered power inequality.[57] A 2011 South African study by leading authors in the gender studies field, Jewkes *et al.,* shows practically how modern patriarchy influences and informs SGBV in this way. More specifically, the researchers found that the men that had admitted to rape in their questionnaire typically had less equitable views on gender relations; the most common motive given by the rapists that filled out the questionnaire was sexual entitlement.[58] Similarly, criminology expert Caitlin Jade van Niekerk points to this same concept of sexual entitlement and the notion that women's bodies are "objects for others to use" as the central driver of sex trafficking.[59] Moreover, when studying intimate partner violence, Saez *et al.* found that the sexual objectification of women hinders "attributions of humanity to women", which was then found to be associated with increased propensities for violence against women.[60]

In a study of SGBV in Jordon, Nour Daoud makes a more overt connection between patriarchy and SGBV, arguing that while it is impossible to generalise and state that patriarchy is a core reason for SGBV, patriarchy is "a rooted element that determines the manifestations" of SGBV, ultimately calling for a holistic approach to eradicating SGBV in Jordon, one that can "overcome" patriarchy.[61] Dlamini points out that South Africa has never taken such a holistic approach. More specifically, she highlights that South Africa has not yet adequately acknowledged or addressed how apartheid "dehumanised many and broke family units" by "condoning violence…along racial and gender lines".[62] She elaborates further, suggesting that patriarchy and masculine toxicity normalise all forms of violence against women (and children). More

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[57] Judy Dlamini 'A Case Study on Transdisciplinary Approach to Eradicating Sexual Violence: Thuthuzela Care Centres' in Monahan Kathleen (ed) *Sexual Violence - Issues in Prevention, Treatment, and Policy [Working Title]* London, IntechOpen(2023) 1-2.
[58] Rachel Jewkes et al 'Gender inequitable masculinity and sexual entitlement in rape perpetration South Africa: findings of a cross-sectional study' (2011) 6 *PloS one* 1.
[59] Caitlin Jade Van Niekerk 'Interrogating sex trafficking discourses using a feminist approach' (2018) 32 *Agenda* 25.
[60] Gemma Sáez et al 'The role of interpersonal sexual objectification in heterosexual intimate partner violence from perspectives of perceivers and targets' (2022) 37 *Journal of interpersonal violence* 1448.
[61] Nour Daoud *Debating the Role of Patriarchy in the Incidence of Gender-based Violence in Jordan–Systematic Review of the Literature* (2018) 41.
[62] Dlamini op cit note 57 at 11-12.

specifically, she argues that SGBV can be a reaction by some men with poor self-esteem to "perceived threats" to their masculinity.[63] Because masculinity is traditionally valued, and femininity devalued, when men with poor self-esteem do not receive external validation of their masculinity and when their positions in the gendered hierarchy are questioned, they are motivated to reclaim their masculinity.[64] To do so, some men turn to perpetrating violent acts against women, externally displaying their superiority or dominance over women, and therefore proving their superiority.[65] This is further aggravated by toxic understandings of masculinity in patriarchal societies, which equate being a man with power, control, and sexual aggression.[66] More specifically, when a society adopts toxic definitions of masculinity, SGBV and femicide are further normalised as natural manifestations of masculinity in society.[67] Essentially, therefore, patriarchy tends to justify violence against women as natural and ordinary occurrences in society.

In this thesis, I will be advocating for a holistic approach to reducing gendered violence, one that seeks to dismantle the patriarchal structures in society that drive high femicide and SGBV rates, namely a TC. Therefore, the logic underpinning my research focus is that patriarchal values, which are underlying conditions for and drivers of pervasive femicide and SGBV, must be addressed first to remedy gendered violence and harms in the country.[68] In other words, to address femicide, one must not simply improve legislation and policing, but also pursue complete societal transformation towards more equitable gender relations and the dismantling of patriarchy. Afterall, as Yesufu points out when calling for a more holistic approach to combatting femicide, femicide and SGBV rates continue to rise globally, particularly in South Africa, despite the presence of a constitutional legal framework to prosecute perpetrators.[69] Essentially, more is needed to address the "social norms, religious and

[63] Ibid. at 3.
[64] Ibid. at 3.
[65] Ibid. at 3.
[66] Ibid. at 3.
[67] Ibid. at 3.
[68] South Africa's 2020 National Action Plan makes a similar argument when referencing the country's 2015 Beijing +20 report. See in Youth and Persons with Disabilities Interim Steering Committee on GBVF. National Strategic Plan on Gender-Based Violence & Femicide 2020. 1 vol. Pretoria: Department of Women at 39.
[69] Yesufu op cit 54 at 90.

traditional values, patriarchy, and gender relationships" that contribute to notions of male superiority and female subordination.[70] In summary, improved policing and legislation alone is not enough to significantly reduce femicide rates.

1.3.2 Civil society action: Anti-SGBV protests

Civil society groups and individuals have increasingly aired their frustrations at the high levels of SGBV and femicide in South Africa. In 2018 this culminated in what became known as the #TotalShutdown protests against femicide, rape and SGBV.[71] Similar protests took place in 2019.[72] The 2019 protests in particular were triggered by what has become known as the deadliest month for women in the country's history, August 2019.[73] This is because the month averaged 137 sexual offences per day, with more than 30 women killed by their spouses over the course of August 2019.[74] As a result, protestors did not only demonstrate against SGBV, but they also called for a state of emergency to be declared.[75] While, as I already mentioned, there have been two presidential summits on the topic of femicide and SGBV (one in 2018, the other in 2022) as well as the development of a NAP on Gender-Based Violence and Femicide in 2020, civil society groups continue to feel that the government has not done enough. In fact, many remain sceptical of the government's progress in reducing the levels of SGBV in South Africa.[76] Therefore, I propose a SGBV TC to respond to civil society's calls for more robust intervention, and more specifically, an intervention strategy that engages with the root causes of femicide.

1.3.3 SGBV during apartheid

The use of SGBV to exert power over women was already all too common during apartheid. For one, sexual violence was used by the South African Defence Forces

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[70] Ibid. at 90.
[71] Sonke Gender Justice 'The Total Shutdown' available at *https://genderjustice.org.za/photo-gallery/the-total-shutdown/*, accessed on 27 June 2023.
[72] Francke op cit note 13.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Gugu Resha & Nandipha Mabindisa 'Presidential Summit on Gender-Based Violence and Femicide was a big red herring' *Daily Maverick* 2022 available at *https://www.dailymaverick.co.za/article/2022-12-01-presidential-summit-on-gbv-was-a-big-red-herring/*, accessed on 27 June 2023.

(SADF), South African Police Services (SAPS) and by prison wardens to extract information from dissidents, as well as to suppress community revolts and mobilised opposition forces.[77] This suggests that apartheid was not only a racial system, but also a patriarchal one. Notably, in the last ten to fifteen years of apartheid, it became clear that this patriarchal culture was embedded in South African society across racial and class lines. For example, SGBV was also common within liberation armies; rape and other forms of SGBV were commonly committed against fellow soldiers in the ANC's military wing, the uMkhonto we Sizwe (MK).[78] Additionally, township youth violence at the time also included rampant SGBV, leading to the coining of the term "jackrolling", which was used to describe the abduction and gang rape of young girls in townships.[79] More than that, women and girls accused of practicing witchcraft in townships were targeted and burnt to death by their communities.[80] Essentially, not only was SGBV used by men to exert power over women as a way to protect and sustain the apartheid state, but also by men in liberation armies and by boys in township communities to reassert their power – undermined by apartheid subjugation – using "distorted masculine sexuality".[81] In this thesis, I propose a SGBV TC to undermine the normalisation of sexual violence in South Africa that can be linked (at least in part) to the culture of violence fostered by the apartheid system across class and racial lines either to sustain the apartheid system itself or to rebel against it by reasserting lost power.

1.4 Research question

Given the concerns raised in section 1.3 above, namely the alarming rates of SGBV in South Africa, anti-SGBV mobilisation by civil society, the links between SGBV/femicide and patriarchy, and the legacy of SGBV left by the apartheid regime, there is a deep need for some form of intervention in South Africa to reduce the rates of gendered violence in the country, while also pursuing justice for past and present

[77] Michelle J Anderson 'Rape in South Africa' (1999) 1 *Geo. J. Gender & L.* 797-798.
[78] Beth Goldblatt & Sheila Meintjes 'Dealing with the aftermath: sexual violence and the Truth and Reconciliation Commission' (1998) 13 *Agenda* 12.
[79] Tina Hamrin-Dahl 'Witch accusations, rapes and burnings in South Africa' (2003) 18 *Scripta Instituti Donneriani Aboensis* 64.
[80] Ibid. 64.
[81] Ibid. 64.

victims. I therefore aim to answer the following question in this thesis: Is a SGBV TC an effective method through which to respond to the widespread femicide and SGBV human rights violations committed in South Africa by pursuing restorative justice for SGBV victims, promoting more inclusive shared narratives of patriarchy and past and present violence, promoting positive changes in patriarchal attitudes and behaviours, as well as by informing reparations and institutional reform recommendations aimed at preventing/reducing future violence?

1.5 Limitations

Regarding the limitations of this study, firstly, this thesis focuses on sexual violence as heterogenous sexual coercion. In other words, this refers to sexual violence perpetrated by men against women. As a result, this thesis adopts a generalised understanding of sexual violence that understands men to typically be the aggressor, and women the victims. While I do acknowledge that sexual violence can take many forms – men targeting other men, adults targeting children, and sexual violence that targets members of the LGBTQ+ community, these considerations fall outside the scope of this thesis.

Similarly, this thesis focuses on gendered harms that effect women under patriarchy. Again, while gendered harms also affect sexual minorities and non-binary individuals in a patriarchal society, these nuances fall outside the scope of this thesis, focusing rather on the gendered harms women experience for the sake of brevity.

Moreover, assessing the relative success of a hypothetical TC is limited by many unknown variables, such as the scope of the crimes committed to be investigated, the period during which crimes should be investigated, and the legislation that would be passed to govern the TC. As a result, this thesis makes a more general argument for a TC relying on TJ theory.

1.6 Methodology

This thesis presents a novel application of TJ to femicide, proposing a SGBV TC tasked with investigating gendered institutional harms, SGBV and femicide committed in South Africa. This thesis is a desktop study, relying on existing literature and

theories from the following disciplines: transitional justice, gendered transitional justice and radical feminism. As no interviews, nor data collection were performed as part of this study, no ethical clearance was required. Below, I will give more detail on some scholars that I relied on to make my argument. However, Chapter 1 does not include a literature review because I make my arguments in each chapter by reviewing existing literature, rather than through interviewing, surveying or collecting data.

Specific examples of the literature consulted in TJ theory include Priscilla Hayner's 1994 *Fifteen Truth Commissions,*[82] Neil Kritz's 1995 *Transitional Justice: How Emerging Democracies Reckon with Former Regimes,*[83] Trudy Govier's 1999 *Forgiveness and the Unforgiveable,*[84] Charles Villa-Vicencio's 1999 *The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet,*[85] as well as Ruti Teitel's 2000 *Transitional Justice,*[86] and her 2003 *Genealogy of Transitional Justice*;[87] examples in the more recent gendered TJ (GTJ) literature consulted include Christine Bell & Catherine O'Rourke's 2007 *Does feminism need a theory of transitional justice? An introductory essay*,[88] Catherine O'Rourke's 2008 *The Shifting Signifier of Community in Transitional Justice: A Feminist Analysis*,[89] Abigail Gyimah's 2008 *Gender and transitional justice in West Africa: The cases of Ghana and Sierra Leone*,[90] Helen Scanlon & Kelli Muddell's 2009 *Gender and transitional justice in Africa: Progress and prospects*,[91] Fionnuala Ni Aolain & Catherine O'Rourke's 2010 *Gendered Transitional Justice and the Non-state Actor*,[92] as well as

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[82] Priscilla B Hayner 'Fifteen truth commissions-1974 to 1994: A comparative study' (1994) 16 *Hum. Rts. Q.*
[83] Neil J Kritz *Transitional justice: how emerging democracies reckon with former regimes* Washington, US Institute of Peace Press (1995)
[84] Trudy Govier 'Forgiveness and the Unforgivable' (1999) 36 *American Philosophical Quarterly*
[85] Charles Villa-Vicencio 'The Reek of Cruelty and the Quest for Healing—Where Retributive and Restorative Justice Meet' (1999) 14 *Journal of Law and Religion*
[86] Ruti G Teitel *Transitional justice* Oxford, Oxford University Press on Demand (2000)
[87] Ruti G Teitel 'Genealogía de la justicia transicional' (2003) 16 *Harvard Human Rights Journal*
[88] Christine Bell & Catherine O'Rourke 'Does feminism need a theory of transitional justice? An introductory essay' (2007) 1 *The International Journal of Transitional Justice*
[89] Catherine O'Rourke 'The Shifting Signifier of Community in Transitional Justice: A Feminist Analysis' (2008) 23 *Wis. JL Gender, & Soc'y*
[90] Abigail Gyimah 'Gender and transitional justice in West Africa: The cases of Ghana and Sierra Leone' (2008) 65 *Conflict, Security & Development*
[91] Helen Scanlon & Kelli Muddell 'Gender and transitional justice in Africa: Progress and prospects' (2009) 9 *African journal on conflict resolution*
[92] Fionnuala D Ni Aolain & Catherine O'Rourke 'Chapter 4: Gendered Transitional Justice and the Non-state actor' in M Reed and Lyons A (eds), *Contested Transitions: Dilemmas of Transitional Justice in Comparative Experience* New York, International Center for Transitional Justice(2010)

Lorena Sosa's 2017 *Inter-American case law on femicide: Obscuring intersections?*;[93] examples of literature in the radical feminism discipline that are consulted include Jane Caputi's 1987 *The age of sex crime*,[94] Nour Daoud's 2018 *Debating the Role of Patriarchy in the Incidence of Gender-based Violence in Jordan – Systematic Review of the Literature,*[95] and Judy Dlamini's 2023 *A Case Study on Transdisciplinary Approach to Eradicating Sexual Violence: Thuthuzela Care Centres*.[96]

1.7 Chapter outline

Chapter 1: Introduction and motivation

Chapter 1 introduces the topic and explains the relevance of, and need for studies like this. To this end, the preceding part of this chapter discussed the alarming SGBV statistics in South Africa, defined the concept of femicide and how it is linked to patriarchy, highlighted how civil society has mobilised in anti-SGBV protests, as well as explained the legacy of SGBV and patriarchy created by the apartheid regime. The rest of this chapter will detail the contents of each chapter going forward.

Chapter 2: Using a SGBV transitional justice strategy in an established democracy

In the second chapter, I will focus on justifying the implementation of TJ as part of a femicide-response strategy. To do so, I will acknowledge two points: TJ strategies are typically used by nascent democracies still transitioning from war or authoritarianism, and TJ strategies have often been gender-blind in the past. In Chapter 2, I will then focus on justifying the application of TJ strategies in established democracies such as South Africa, as well as the use of TJ strategies to specifically address gendered harms.

Chapter 3: Choosing the most effective transitional justice mechanism to balance prevention and justice goals

In Chapter 3, I will then focus on justifying why I have proposed a TC over other TJ strategies. In this third chapter, I will use TJ theory to show that a TC is the only TJ

[93] Sosa op cit note 31.
[94] Caputi op cit note 55.
[95] Daoud op cit note 61.
[96] Dlamini op cit note 57.

strategy that can effectively balance both pursuing restorative justice goals, and the prevention (or at least reduction) of future violence by creating more inclusive shared narratives on past and present violence, by promoting positive changes in inter-group attitudes and behaviours, as well as by making reform and reparations recommendations aimed at reducing future levels of violence.

Chapter 4: Justifying a second truth commission post-Truth and Reconciliation Commission

In the fourth chapter, I will focus my argument on addressing the elephant in the room, so-to-speak. More specifically, I will justify why I have proposed a second TC just 30 years or so after the TRC, whose success is now regarded rather pessimistically. Ultimately, I will argue that while the TRC is negatively perceived given the incoming government has not fully implemented the recommendations listed in the Commission's final report, given many South Africans do not subscribe to a shared understanding that apartheid's racial policy was bad and/or wrong, given cross-racial attitudes and behaviours continue to be bad or at least strained in many cases, and given many victims were indirectly misrecognised at the victim hearings and in the final report, these obstacles are largely irrelevant to my proposed SGBV TC.

Chapter 5: Conclusion

In this last chapter, I will tie up my arguments by applying the above points to the context of South Africa's ongoing pervasive femicide and SGBV rates. More specifically, in Chapter 5, I will outline the structure of my proposed SGBV TC, which will then be used to show exactly how a TC stands to pursue restorative justice for SGBV victims, promote patriarchy and gendered harms in a shared understanding of past and present violence, promote positive changes in patriarchal attitudes and behaviours, as well as to inform reform recommendations to prevent future gendered violence in South Africa.

CHAPTER 2 – USING A SGBV TRANSITIONAL JUSTICE STRATEGY IN AN ESTABLISHED DEMOCRACY

2.1 Introduction

In Chapter 1, I detailed South Africa's problem of femicide and introduced my proposed method to alleviate femicide and sexual violence, namely a SGBV TC. However, as mentioned in my chapter outline, I do acknowledge that the proposal is surprising for two reasons: TJ strategies are typically associated with nascent democracies navigating social upheaval, and TJ strategies have largely excluded gendered harms from their proceedings in the past. In this chapter, I will focus on justifying my proposal given the above two points.

To begin with, the term 'transitional justice' is relatively new, first used in the 1990s. For instance, Priscilla Hayner's 1994 *Fifteen Truth Commissions,* Neil Kritz's 1995 *Transitional Justice: How Emerging Democracies Reckon with Former Regimes,* Trudy Govier's 1999 *Forgiveness and the Unforgiveable,* Charles Villa-Vicencio's 1999 *The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet,* and later in Ruti Teitel's 2000 *Transitional Justice.* These publications largely explored post-Cold War societies in the late 1980s and early 1990s in Central/South America, Eastern Europe and Africa, particularly those that were undergoing political transitions from Soviet or military dictatorship to constitutional democracy, while also coming to terms with an extraordinarily violent past in which (typically state-led) mass human rights violations took place.[97] From the inception of TJ theory, therefore, 'transitional justice' was understood as a type of justice that simultaneously pursues dual goals, namely the backward-facing aim of justice for past human rights violations, and the forward-facing aim of peaceful democratisation. Over the course of the next few decades however, these dual goals have evolved slightly to adapt to post-civil war contexts and to be applicable in established democracies too. Regarding the former, TJ practices have since been used to pursue justice for victims of war crimes, crimes against humanity and genocide committed during ethno-

[97] Kritz op cit note 83 at xix; Villa-Vicencio op cit note 85 at 165; Hayner op cit note 82 at 599-600, 604; Govier op cit note 84 at 59.

nationalist civil wars, while also bringing an end to the cycles of violence associated with these civil wars. With regards to the latter, TJ practices have since been used to pursue restorative justice goals for victims of past patterns of institutional abuse, while also aiming to break ongoing patterns of harm and reducing future discrimination.

Notably, women were initially unable to participate meaningfully in these TJ practices, much as their participation and representation in political, judicial, and legal institutions had been largely limited and restricted for centuries prior, relegated rather to the household. This, first mentioned in Chapter 1, is known as the public-private divide, namely the absolute division between the productive economy in the public sphere and the reproductive economy (characterised by unpaid care labour, such as cooking, cleaning and child rearing) in the private sphere, typically a gendered division. More specifically, the public sphere has historically been populated only by male citizens, while their "non-citizen wives" have populated the private, non-political sphere.[98] This legacy has led to lower levels of women's representation in decision-making roles, the exclusion of women's lived experiences from consideration when drafting legislation, and ultimately to insufficient protections against gendered harms. However, the international community has recently taken significant strides to increase the visibility of gendered harms in the public sphere. Perhaps the most notable is the United Nations Security Council Resolution 1325. Passed in 2000, the resolution, known as the Women, Peace, and Security (WPS) resolution, aims to increase women's representation and security in peace-making and nation-building sectors worldwide,[99] thereby increasing the visibility of gendered harms.

2.2 Proposing a transitional justice strategy in an established democracy

In this section, I will use Ruti Teitel's three-phase genealogical framework published in 2003 to show why TJ practices were initially associated with navigating social upheavals, before being adapted for the context of established and/or consolidated democracies in later decades. To illustrate this, I will outline how TJ strategies were

[98] Arneil op cit note 46 at 29.
[99] SecurityWomen op cit note 10.

implemented in different contexts throughout the different phases posited by Teitel, first expanded to the post-civil war setting, followed by increasingly popular implementations in established and/or consolidated democracies to address patterns of historical abuse. In this way, I will argue that a TJ implementation strategy in contemporary South Africa would be effective, despite the association of TJ with democratisation efforts.

2.2.1 Traditional implementation of transitional justice strategies in nascent democracies

While it is true that TJ theory was first developed in the 1990s, some scholars argue that, in retrospect, the origins of TJ can be traced to either, in the case of interwar scholars, the post-World War I (WWI) Leipzig Trials,[100] or, in the case of postwar scholars, the post-World War II Nuremberg and Tokyo Trials.[101] An example of the latter is Teitel. In fact, Teitel's framework identifies three TJ phases in the development of TJ theory and practice, the first of which she labels the post-World War II (WWII) phase. She labels the second the post-Cold War phase, and the third and final phase the steady-state phase.[102]

Regarding what Teitel identifies as the first phase, one cannot understand the developments that took place in TJ theory and practices at this time without first understanding the interwar context. This is because the post-WWII approach to justice was designed to overcome the obstacles that the Allies were not able to overcome after the preceding world war. Initially, after WWI came to an end, the Allied governments tried to extradite 900 German soldiers and officials for criminal prosecution for 'war crimes'.[103] The request angered most of German society, resulting in significant

[100] This is a nuanced argument. Graf argues that the Leipzig Trials made the post-WWII Nuremberg and Tokyo Trials possible. While Leipzig is critiqued for achieving very few convictions, it failed to do so because Germany argued that prosecuting war criminals under international law would be a breach of its sovereignty. Graf argues that this prompted the Allied forces after WWII to overcome this obstacle, setting the precedent of favouring international law over national sovereignty. See Rüdiger Graf 'Transitional Injustice at Leipzig: Negotiating Sovereignty and International Humanitarian Law in Germany after the First World War' (2022) 55 *Central European History* 51-52.
[101] Ruti G Teitel 'The law and politics of contemporary transitional justice' (2005) 38 *Cornell Int'l LJ* 839. See also Simon Chesterman 'Never again... and again: Law, order, and the gender of war crimes in Bosnia and beyond' (1997) 22 *Yale J. Int'l L.* 305.
[102] Teitel op cit note 87 at 69.
[103] Graf op cit note 100 at 44.

domestic backlash; the 1920 Weimar Republic was also dependent on appeasing the military to maintain its authority and to avoid a coup.[104] As a result, the German government then rejected the Allied request for extradition on the grounds that a trial in front of Allied courts would not produce justice, but rather increase "turmoil and disorder" to the point of weakening the government's national sovereignty.[105] Ultimately, when balancing political stability and justice, the Weimar Republic favoured the former. As a result of the rejected extradition request, in the end, only 12 war criminals were put on trial in a domestic court in Leipzig, Germany.[106] Additionally, the Allied forces levied collective sanctions against the state, effectively punishing the entire German populace.[107] This would then foster resentment towards the rest of Europe in Germany during the build-up to WWII.[108] As a result, the Allied forces post-WWII sought a process that would overcome both these challenges to punishing perpetrators of crimes committed during war once the conflict has ended, and to ensuring the future absence of war.

To do so, the Nuremberg and Tokyo Trials (Nuremberg) set two important precedents that are now key tenants of international criminal law. The first precedent was the jurisdiction of international law over national law, [109] essentially preventing Germany from making a similar argument regarding national sovereignty to the one it made after WWI. This novel approach hoped to ensure widespread criminal prosecutions and achieve justice for past 'war crimes'.[110] The second precedent set was the application of law to individuals rather than to states,[111] essentially holding individuals accountable for past atrocities and preventing the animosity that came with the collective punishment of sanctions. Here, the hope was to re-establish rule of law principles and stability in Germany.[112] Ultimately, one can observe an early attempt to balance the dual TJ aims of backward-facing justice and forward-facing future peace and stability. It is worth noting, however, that the emphasis of Nuremberg remained

[104] Ibid. at 42-44.
[105] Ibid. at 45.
[106] Teitel op cit note 87 at 72-73.
[107] Ibid. at 72-73.
[108] Ibid. at 72-73.
[109] Ibid. at 70-72.
[110] Ibid. at 73.
[111] Ibid. at 70-72.
[112] Ibid. at 73.

on pursuing justice by punishing perpetrators, rather than on ensuring future peace.[113] This is keenly felt when considering that Nuremberg emphasised punishing the guilty over promoting better relations between the Allied and Axis forces. For instance, some academics maintain that the aggressive and exclusive prosecution of the Axis powers at Nuremberg represented victor's justice, a form of justice where victors are held to different standards than the defeated,[114] and which tends to be a deeply adversarial process.[115] As a result, Nuremberg was not as focused on improving inter-group relations in the name of future stability, as it was focused on punishing perpetrators of war crimes amongst the war's losers. Regardless, rather than unilaterally executing those German and Japanese soldiers presumed guilty of war crimes, rather than punishing the entire populace, or rather than accepting widespread impunity, Nuremberg represented a new approach to holding war criminals accountable retroactively, while also re-establishing domestic rule of law principles.

This approach, however, was thought unsuitable four decades later during the post-Cold War phase when the end of the Cold War brought on a period of accelerated democratisation across the globe by bringing an end to US and Soviet financial and military support for dictatorships in Central/South America,[116] an end to Soviet-backed governments in Eastern Europe,[117] as well as an end to Western support of apartheid-South Africa, no longer necessary as a stalwart against Communism in the region.[118] Unlike in the post-WWII context, democratisation did not come after years of inter-state war; clear military winners and losers were therefore hard to identify. This made things much harder for the incoming democratic governments in Central/South America, Eastern Europe, and Africa where peace and democracy were hard to

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[113] Ibid. at 73.
[114] James L Gibson 'On legitimacy theory and the effectiveness of truth commissions' (2009) 72 *Law & Contemp. Probs.* 138. See also Gary Bass 'Victor's justice, selfish justice' (2002) *Social Research* 1036.
[115] Kora Andrieu 'Transitional justice: A new discipline in Human Rights' (2010) 18 *Online Encyclopedia of Mass Violence* 8.
[116] For US-backing of military dictatorships in Central/South America, see Kevin Young 'Washing US Hands of the Dirty Wars: News Coverage Erases Washington's Role in State Terror' (2013) 46 *NACLA Report on the Americas* 1-4. For Soviet-backing, see Teitel op cit note 87 at 71.
[117] Teitel op cit note 87 at 71. For democratisation in Eastern Europe in the 1990s, see Licia Cianetti et al 'Rethinking "democratic backsliding" in Central and Eastern Europe–looking beyond Hungary and Poland' in *Rethinking'Democratic Backsliding'in Central and Eastern Europe* Routledge(2020) 224.
[118] Martha van Wyk 'Sunset over atomic apartheid: United States–South African nuclear relations, 1981–93' (2010) 10 *Cold War History* 53.

negotiate. In such cases, opposing dissidents are unlikely to concede and put an end to their counter-military efforts, and dictators are unlikely to hand over their power willingly to a new, democratic government.[119] As a result, peace is typically a result of power sharing agreements, negotiated compromises, and settlements in which political elites fight to maintain their positions of power or authority into the new dispensation.[120] For example, in some cases, political elites will insist on an amnesty agreement during negotiations to avoid criminal prosecution,[121]something they perceive to be a threat to themselves. As a result, this post-Cold War period was characterised by incoming governments trying to pursue justice for past crimes, while, at the same time, fearing destabilisation tactics by political elites (often complicit bystanders, beneficiaries or enforcers of the former regime) which maintained their power and access to resources through the transition from authoritarianism to democracy.

For instance, in Argentina alone, while it is estimated that between 10 000 and 30 000 people were killed by state forces during its 'war against subversion' or 'dirty war' from 1976 to 1983,[122] in the end, only the nine most high-ranking military *junta* generals and admirals were prosecuted.[123] They were tried for homicide, torture, false imprisonment, accessory after the fact, aggravated robbery, extortion, reduction to involuntary servitude, the falsification of public documents, and cover-ups.[124] Political elites then fought further prosecution through the 1986 Full Stop Law, the 1987 Law of Due Obedience, as well as a series of presidential decrees and pardons in 1989 and 1990.[125] Here, a weak judicial system and weak rule of law resulted in a high level of impunity, whereby the only courts capable of prosecuting human rights violators were domestic courts, plagued by rule of law obstacles and influenced by conservative elites

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[119] Louise Mallinder 'Can amnesties and international justice be reconciled?' (2007) 1 *The International Journal of Transitional Justice* 208-209.
[120] Andrew G Reiter et al 'Transitional justice and civil war: Exploring new pathways, challenging old guideposts' (2013) 1 *Transitional Justice Review* 150.
[121] Ibid. 150.
[122] United States Institute of Peace *Truth Commission: Argentina* (2010) Washington, available at *https://www.usip.org/publications/1983/12/truth-commission-argentina*, accessed on 29 May 2023.
[123] Mark Osiel 'The making of human rights policy in Argentina: The impact of ideas and interests on a legal conflict' (1986) 18 *Journal of Latin American Studies* 136.
[124] Ibid. at 148.
[125] Amnesty International. The outstanding debt: Amnesty International's continuing concerns on the fate of the "disappeared" 1992. London: Amnesty International at 3.

looking to derail prosecution attempts. In fact, these obstacles remained for decades after the *junta* handed over power, with Argentina being deemed a democracy without a developed rule of law for many years.[126] Moreover, amnesty laws were only repealed in Argentina in 2003 after President Nestor Kirchner was elected – notably, a key goal of Kirchner's administration was restoring Supreme Court independence and rule of law.[127] In Chile, impunity was even more overt. Despite the fact that estimates put the death toll at 3 200 during Augusto Pinochet Ugarte's 1973 to 1990 dictatorship,[128] criminal prosecutions were largely blocked by a 1978 Amnesty Law.[129] The law continued to be enforced after Pinochet had handed over power largely because his conservative, right-wing associates maintained positions of influence.[130] However, judges started reinterpreting the law in the late 1990s as Pinochet's associates began to retire from branches of power.[131] Towards the end of the 1990s, therefore, a couple hundred officials were prosecuted,[132] and Pinochet himself was arrested in London in 1998.[133] Criminal prosecutions then accelerated exponentially after a 2014 change in Supreme Court leadership,[134] and after President Gabriel Boric authorised a national search plan in August 2023 to uncover the remains of those that disappeared.[135] Again, the domestic legal system was only capable of holding perpetrators accountable once democracy was consolidated over a period of decades and the judicial system was transformed.

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[126] Christopher J Walker 'Judicial Independence and the Rule of Law: Lessons from the Post-Menem Argentina' (2007) 14 *Sw. JL & Trade Am.* 92.
[127] Ibid. at 92.
[128] Gram Slattery 'Chile doubles down on prosecutions for Pinochet-era crims' *Reuters* 2015 available at *https://www.reuters.com/article/uk-chile-dictatorship-trials-feature-idUKKCN0SQ2DB20151101*, accessed on 6 March 2023.
[129] AnnaJoy Gillis *When Support for Pinochet Has Not" Desaparecido"* (Masters thesis, Wellesley College, 2014) 23. at 11.
[130] Ibid. at 11.
[131] Ibid. at 11.
[132] Ibid. at 11.
[133] Cath Collins 'Human rights defense in and through the courts in (post) Pinochet Chile' (2016) 2016 *Radical History Review* 129.
[134] Slattery op cit note 128.
[135] Pascale Bonnefoy 'Decades After Dictatorship, Chile Mounts Search for Hundreds Who Vanished' *The New York Times* 2023 available at *https://www.nytimes.com/2023/08/30/world/americas/chile-military-coup-disappeared-search.html?campaign_id=60&emc=edit_na_20230830&instance_id=0&nl=breaking-news&ref=cta&regi_id=197846343&segment_id=143270&user_id=047a2b32df91a55442b36a35728c03c6*, accessed on 14 September 2023.

Furthermore, impunity was even more extreme in El Salvador and Guatemala. In the case of the former, an amnesty law was passed in 1993, resulting in impunity for all civil war related crimes, that is until the law was repealed in 2016.[136] This is despite the fact that estimates place the number of civilians killed by state forces during the countries 12-year civil war at 75 000.[137] Similarly, in Guatemala, it is estimated that 250 000 people died and one million were internally displaced during its 1960 to 1996 civil war.[138] Regardless, right-wing conservatives still occupying military positions, they continued to enforce an amnesty decree instituted back in 1986.[139] This was only revised in 2015 when the Supreme Court ruled that amnesty could not apply to international crimes, such as genocide and crimes against humanity.[140] Later, in 2019, there were legislative attempts to retroactively apply amnesty to all war-time criminals, such as the former head of state Efrain Rios Montt.[141]

Furthermore, in South Africa, between 1997 and 2005, only a handful of prosecutions were pursued, with even fewer perpetrators successfully sentenced,[142] despite the negotiated compromise that brought an end to apartheid making provisions for prosecuting perpetrators that did not meet conditions for amnesty.[143] Notably, the implementation of a conditional amnesty did not go unchallenged in the country. The land-mark case AZAPO *& Others v TRC & Others* saw a number of political parties in the country contest the TRC's powers and procedures, arguing that the TRC's amnesty process violated the constitutional rights of victims to seek justice through the courts. More specifically, they suggested that victims should have the right to

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[136] Elaine Freedman 'The repeal of the Amnesty Law: A bittersweet ruling' (2016) 423 *Revista Envío* 1.
[137] The Center for Justice & Accountability 'El Salvador' available at *https://cja.org/where-we-work/el-salvador/*, accessed on 8 September 2023.
[138] Deutsche Welle 'Guatemala civil war victims reject amnesty' *DW* 2019 available at *https://www.dw.com/en/guatemala-civil-war-victims-reject-amnesty-for-perpetrators-of-violence/a-47688265*, accessed on 6 March 2023.
[139] Sophie Beaudoin 'Guatemalan Court Rules out Amnesty for Genocide and Crimes Against Humanity' *International Justice Monitor* 2015 available at *https://www.ijmonitor.org/2015/10/guatemalan-court-rules-out-amnesty-for-genocide-and-crimes-against-humanity/*, accessed on 6 March 2023.
[140] Ibid.
[141] Deutsche Welle op cit note 138.
[142] David Backer 'Watching a bargain unravel? A panel study of victims' attitudes about transitional justice in Cape Town, South Africa' (2010) 4 *International Journal of Transitional Justice* 448.
[143] For the amnesty conditions, see Promotion of National Unity and Reconcilation Act 34 of 1995 ch 4, s 20(1)(c).

pursue criminal charges against perpetrators instead of seeing them granted amnesty without a trial.[144] Similarly, while inter-ethnic conflict between Burundi's Hutu and Tutsi groups fuelled coups, political assassinations, and regime changes in the decades after the country gained independence from Belgium in 1962,[145] as recently as 2016, the United Nations noted continued "pervasive impunity" for human rights violations largely committed by "State agents" during a visit by the then-Special Rapporteur.[146] Ultimately, the Central/South American and African states undergoing a process of democratisation during the post-Cold War era could not easily pursue justice in criminal courts. More specifically, in the case of Argentina, Chile, El Salvador, Guatemala, South Africa and Burundi, criminal prosecutions were hindered by political elites occupying positions of authority and influence, weakening the countries' judiciary and rule of law.

During this period, the countries in Eastern Europe saw even fewer prosecutions than those described above. While the collapse of the Union of Socialist Soviet States in 1991 brought an end to the Communist governments it had backed in the region, most of the human rights abuses had taken place in these countries when the Communist regimes first took over between the 1940s and 1950s.[147] More specifically, tens of thousands of people were killed, 'disappeared', tortured and imprisoned.[148] However, because the crimes had been committed in the distant past by the time the states underwent democratisation, criminal prosecutions were impossible given statues of limitations, and the degradation of evidence.[149] This was the case in Hungary, whereby the country's constitutional court ruled against suspending its statute of limitation on the crimes committed during its 1956 Uprising.[150] Therefore, in the absence of criminal

[144] AZAPO & Others v TRC & Others
[145] Yuhao Tan 'Comparative study of good governance on poverty reduction in Rwanda and Burundi' (2024) *Journal of Social and Economic Development* at 10.
[146] Forty-eighth session of the United Nations Human Rights Council 'Follow-up on the visits to Burundi, the United Kingdom of Great Britain and Northern Ireland and Sri Lanka. 2021. Geneva: United Nations Human Rights Council' para 7.
[147] Brianna Brown *Transitional Justice in Eastern Europe: Present Dilemmas of the Communist Past* (Masters thesis, published in E-International Relations, 2015) 18. at 4.
[148] Ibid. at 4.
[149] Ibid. at 4.
[150] See the Constitutional Court of Hungary (Magyarország Alkotmánybírósága) ruling on retroactive criminal legislation (1992). Or Brown op cit note 147 at 4 or Csilla Kiss 'The misuses of manipulation: The failure of transitional justice in post-communist Hungary' (2006) 58 *Europe-Asia Studies* 932.

prosecutions, the former satellite states opted to implement institutional reforms instead. The first to act was then-Czechoslovakia (now Czechia and Slovakia) in 1991, followed by Hungary, Albania, Estonia, Poland, Lithuania, Latvia and Romania in the mid- to late-1990s.[151] Macedonia, Bulgaria and Ukraine implemented similar reforms between 2006 and 2014.[152] Specific examples of institutional reforms included the dismantling of secret police, declassification of archives, and the vetting of public servants using abstract criteria to assess individual cultural dispositions and beliefs known as lustration.[153] Lustration in particular allowed states to remove public servants from their positions if vetting implicated them in past economic crimes that are notoriously difficult to prove in criminal courts (such as money laundering and personal enrichment) or if, after being assessed on abstract criteria such as integrity, it was determined that they were likely to discriminate against citizens in the future by leveraging their positions of authority and influence.[154] Through this example of lustration, one can observe the simultaneous pursuit of the dual TJ goals during the democratisation processes of post-Cold War Eastern Europe. More specifically, public servants guilty of committing economic crimes in the past were punished by being removed from their job posts, while the state also hoped to prevent future abuses by removing those public servants from office it deemed likely to commit future crimes or acts of discrimination. Critics of lustration, however, argue that the vetting process violates the individual rights and freedoms of public servants by filtering employment using abstract and subjective criteria, making it an undemocratic political process and therefore an unsuitable and ineffective TJ mechanism that undermines democratisation.[155] Lustration has therefore rarely been implemented outside of Eastern Europe,[156] known as a "postcommunist transitional justice" mechanism.[157]

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[151] Marko Krtolica *The Influence of the Lustration Processes on the Post-Communist Transitions in Europe* (PhD, Iustinanus Primus, 2019) 24. at 2-5.
[152] Ibid. at 2-5.
[153] Natalia Letki 'Lustration and democratisation in east-central europe' (2002) 54 *Europe-Asia Studies* 530-531, 542.
[154] Sixty-eighth session of the United Nations General Assembly 'Promotion of truth, justice, reparation and guarantees of nonrecurrence. 2013. New York: United Nations General Assembly' para 54.
[155] Cynthia M Horne 'The impact of lustration on democratization in postcommunist countries' (2014) 8 *International Journal of Transitional Justice* 502.
[156] Yan Vuks *Lustration legislation in eastern Europe and its meaning for the western world* (Masters thesis, The University of Texas at Arlington, 2014) 150. at 18.
[157] Horne op cit note 155 at 498.

In fact, Central/South American and African states undergoing democratisation processes during the post-Cold War phase opted for a very different approach, now known as truth-seeking. As already mentioned, criminal prosecutions were extremely limited and restricted by political elites in Argentina, Chile, El Salvador, Guatemala, and South Africa. This, in conjunction with the fact that the authoritarian regimes in Argentina,[158] Chile,[159] El Salvador,[160] Guatemala,[161] and South Africa kept extrajudicial killings and other abuses from the public,[162] many surviving family members had not even received confirmation that their loved ones were dead. Rather, they simply knew that they had 'disappeared', unsure if they had fallen victim to state-led extrajudicial killings. As a result, the victims of violent state-led campaigns, as well as the nature of the violence itself, were largely unknown to wider society. This caused many immense amounts of pain, unable to obtain closure for past atrocities. In Argentina for instance, domestic NGOs and organisations, such as the grass-roots women-led organisation known as the Mothers of Plaza de Mayo, held public protests as early as 1977 against the disappearances of dissidents and their children at the hands of the state, demanding to know the truth about what had happened to them.[163] In 1983, the first democratically elected president, Raul Alfonsin, obliged, unilaterally establishing a nonjudicial, official commission of inquiry in his first week in office.[164] The commission, known as the Argentine National Commission on the Disappeared (CONADEP), was tasked with investigating the military *junta*-led mass disappearances, and with publishing the results of their investigations in a document titled *Nunca Mas* (Never Again).[165] In the end, the six-month CONADEP proceedings identified roughly 9 000 missing persons as victims of military *junta* extrajudicial killings.[166] Chile then followed suite in 1991 with its own TC, dubbed the Rettig

[158] Osiel op cit note 123 at 145.
[159] Marivic Wyndham & Peter Read 'From state terrorism to state errorism: post-Pinochet Chile's long search for truth and justice' (2010) 32 *The Public Historian* 37.
[160] Andrew N Keller 'To Name or Not to Name-The Commission for Historical Clarification in Guatemala, Its Mandate, and the Decision Not to Identify Individual Perpetrators' (2000) 13 *Fla. J. Int'l L.* 292.
[161] Anne Manuel & Eric Stover *Guatemala: Getting Away with Murder* New York, Human Rights Watch (1991) 1.
[162] Audrey R Chapman & Patrick Ball 'The truth of truth commissions: Comparative lessons from Haiti, South Africa, and Guatemala' (2001) 23 *Hum. Rts. Q.* 5.
[163] Valeria Fabj 'Motherhood as political voice: The rhetoric of the mothers of Plaza de Mayo' (1993) 44 *Communication Studies* 4.
[164] Hayner op cit note 82 at 615. See also Osiel op cit note 123 at 136.
[165] United States Institute of Peace op cit note 122.
[166] Ibid.

Report, to investigate the political disappearances, extrajudicial killings and unlawful detentions committed under Augusto Pinochet Ugarte's dictatorship from 1973 to 1990.[167] The Rettig Report identified 979 detained-disappeared persons, 1 319 politically executed, as well as uncovered state-run mass grave sites.[168] El Salvador and Guatemala then followed later with their UN-sponsored commissions, the 1992 Commission on the Truth for El Salvador and the 1994 Commission for Historical Clarification (CEH), respectively.[169] In El Salvador, the commission received 22 000 cases of civil war-related human rights violations, 60 per cent of which related to extrajudicial killings, 25 per cent to forced disappearances, and another 20 per cent relating to torture.[170] Guatemala's CEH identified 626 state-led massacres, alongside mass disappearances, extrajudicial killings, forced displacements, and mass rape.[171] Similarly, South Africa set up its own TC in 1995, mandated with investigating extrajudicial killings, torture, political disappearances, unlawful detentions, and guerrilla-style attacks committed during the apartheid regime between 1960 and 1994.[172] By the end of its proceedings, South Africa's TRC identified around 21 000 official victims of apartheid.[173]

Therefore, unable to prosecute all perpetrators of past crimes, these countries implemented *truth-seeking* mechanisms instead. The thinking was that truth-seeking would contribute to victim healing by providing victims with closure and allowing them to move on from past suffering.[174] More than that, by publicly acknowledging victims and their suffering, truth-seeking was thought to help victims heal by restoring a sense of dignity and empowerment to them.[175] During the post-Cold War period, this pursuit of victim healing was conceptualised as a new form of justice, known as

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[167] Wyndham & Read op cit note 159 at 32.
[168] Ibid. at 37.
[169] For Guatemala see Keller op cit 160 at 291. For El Salvador see Bishnu Pathak 'World's Disappearance Commissions: An Inhumanious Quest for' (2016) 3 *World* 280-281.
[170] Pathak op cit note 169 at 281.
[171] Keller op cit 160 at 290-292.
[172] Lyn S Graybill *Truth and reconciliation in South Africa: Miracle or model?* Lynne Rienner Publishers (2002) 59.
[173] United States Institute of Peace 'Truth Commission: South Africa' available at *https://www.usip.org/publications/1995/12/truth-commission-south-africa#:~:text=The%20TRC%20took%20the%20testimony,them%20appeared%20at%20public%20hearings.*, accessed on 30 June.2023.
[174] David Mendeloff 'Truth-seeking, truth-telling, and postconflict peacebuilding: Curb the enthusiasm?' (2004) 6 *International studies review* 359.
[175] Ibid. at 359.

restorative justice – a form of justice that sought to compensate victims for their suffering using inclusion, encounter, repair, cohesion, and healing.[176] Ultimately, unable to pursue widespread *retributive justice* by punishing all perpetrators in criminal courts, these post-Cold War nascent democracies opted for truth-seeking mechanisms to help victims heal instead. This development is still reflected in current definitions of TJ. For example, the International Centre for Transitional Justice (ICTJ) defines TJ as a response to systematic or widespread human rights violations that seeks recognition for victims, and promotes peace, reconciliation and democracy, either through criminal prosecutions, TCs, reparations (including memorialisation efforts), security system reform, or any combination thereof.[177] Here, in this definition, both retributive justice via criminal prosecution and restorative justice via TCs are included as core TJ practices to this day.

Additionally, the above ICTJ definition reveals a second important development in TJ practices and theories that took place during this second phase, ie, the promotion of democracy as a TJ aim. This development came about because, during the post-Cold War era, a transition from a period in which systematic human rights violations took place to a period of relative peace typically coincided with a transition from authoritarianism to democracy. What this means is that mass human rights violations were associated with authoritarian regimes, and periods of relative peace were associated with democratic systems of governance. The result was therefore the association of the 'transition' in TJ with democratisation.[178] As a result, TJ has been associated with nascent democracies, and understood as a political process (typically implemented after mass human rights violations have been committed) predominantly concerned with navigating transitions from an authoritarian system of governance to constitutional democracy by promoting rule of law, legitimacy, liberalisation, nation-building, reconciliation, and conflict resolution.[179] If this association holds true, then

[176] Government of Canada 'Restorative Justice' available at *https://www.justice.gc.ca/eng/cj-jp/rj-jr/index.html*, accessed on 2 October 2023.
[177] International Centre for Transitional Justice 'What is Transitional Justice?' available at *https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf*, accessed on 30 March 2022.
[178] Teitel op cit note 101 at 838.
[179] Ibid. at 838.

any TJ practice would be inappropriate for the context of present-day South Africa, an established democracy. Below, however, I will argue that this is simply not the case.

2.2.2 Implementation of transitional justice strategies to pursue increasingly diverse goals

In this section I discuss the third TJ phase during which TJ strategies have increasingly been used to pursue a range of diverse goals. Teitel labels this third phase the steady-state phase.[180] As the name suggests, this phase was characterised by the "expansion" and "normalisation" of TJ theory and practices globally.[181] Examples of TJ mechanisms implemented at this time include the UN war tribunal set up in Rwanda in 1994 to investigate crimes committed during the genocide in April of that year, and the tribunal set up in the former Yugoslavia in 1993 to investigate the war crimes, crimes against humanity and acts of genocide committed during the Yugoslav Wars.[182] Temporary (or *ad hoc*) courts such as these are typically set up to investigate and prosecute genocide, war crimes and crimes against humanity committed within a particular timeframe and in a particular country.[183] Most often, they are comprised of both international and national judges and staff, facilitated by the UN to ensure independent and fair trials in countries with weak or unstable judiciaries.[184] However, some TJ scholars and practitioners found these tribunals to be costly and ineffective.[185] Therefore, after the permanent International Criminal Court (ICC) was established by the Rome Statute in 2002, which was mandated with investigating and prosecuting individuals responsible for war crimes, genocide, and crimes against humanity under international criminal law when countries are either unwilling or unable to prosecute the alleged perpetrators themselves,[186] many scholars expected these hybrid courts to

[180] Teitel op cit note 87 at 89.
[181] Ibid. at 89.
[182] Ellen Emilie Stensrud 'New dilemmas in transitional justice: Lessons from the mixed courts in Sierra Leone and Cambodia' (2009) 46 *Journal of peace research* 6.
[183] Ibid. at 7. It is worth noting, however, that the focus of Stensrud's paper is the legitimacy of international courts.
[184] Ibid. at 7.
[185] Ibid. at 5-7.
[186] ICTJ 'Criminal Justice' available at *https://www.ictj.org/criminal-justice*, accessed on 20 January 2023.

be made redundant.[187] Notably, this appeared to be the case between 2007 and 2012 when the hybrid model almost disappeared entirely.[188] However, since then, an increasing number of states have opted for hybrid courts instead of the ICC out of concerns that the latter is too politicised.[189] Regardless of whether an *ad hoc* or a permanent court, however, some argue that such international justice mechanisms, while effective ways to pursue retributive justice, cannot successfully pursue forward-facing TJ aims. For instance, according to the 2004 report of the UN-Secretary General on rule of law and TJ, "no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable".[190] This therefore suggests that in order to successfully achieve forward-facing TJ goals such as reconciliation and national unity, TJ practices should be implemented domestically.

It is unsurprising therefore that, in the 21st century, TJ practices were increasingly implemented domestically without international oversight. This trend can most obviously be observed in applications of TJ practices to post-civil war contexts. By the time the third and fourth waves of democratisation came to an end and most post-authoritarian countries had already implemented TJ practices,[191] civil wars had become extremely common. In fact, in 2001, all active wars globally, barring one, were civil wars.[192] Notably, many of the state leaders and politicians trying to both resolve these civil wars and recover from them then began turning to TJ practices.[193] Some scholars even identify the popularisation of TJ practices in post-civil war settings in the 21st century as a fourth phase in and of itself, characterising it to be a type of "post-conflict justice".[194] First, TCs were increasingly implemented to acknowledge and reconcile victims of war atrocities.[195] For instance, in the wake of Liberia's first

[187] Kirsten Ainley & Mark Kersten 'Resilience and the impacts of hybrid courts' (2020) 33 *Leiden Journal of International Law* 970. Note, Ainley and Kersten's argument focuses on the resilience of hybrid courts.
[188] Ibid. at 970.
[189] Ibid. at 970.
[190] Stensrud op cit note 182 at 7, citing United Nations Security Council. Report of the Secretary General 2004: The rule of law and transitional justice in conflict and post-conflict societies para 17.
[191] Reiter et al op cit note 120 at 138.
[192] Paul Collier et al *Breaking the conflict trap: Civil war and development policy* Washington, The World Bank (2003) 93.
[193] Reiter et al op cit note 120 at 139.
[194] Ibid. at 141.
[195] Ibid. at 140.

(1989 to 1996) and second (1999 to 2003) civil wars, the country signed a final peace agreement in Accra in 2003 which called for a TC.[196] Similarly, in the wake of the 1993-2005 Burundian Civil War, the 2000 Arusha Peace and Reconciliation Agreement for Burundi included provisions to establish its National Truth and Reconciliation Commission, a provision later endorsed by the United Nations Security Council Resolution 1606 in 2006.[197] As a result, in 2014, Burundi established its National Truth and Reconciliation Commission by presidential decree, which, after significant delays caused (at least in part) by government and former rebels being "unenthusiastic" and resistant to support the transitional process,[198] remains ongoing.[199] On the other hand, the resulting Truth and Reconciliation Commission of Liberia ran from 2006 to 2009, and was mandated with promoting national peace, security, unity, and reconciliation by investigating past gross human rights violations,[200] all as part of a "plan to end" years of intrastate violence.[201] Here, as was the case for the post-Cold War TCs described in section 2.2.1, one can observe attempts to simultaneously achieve both forward-facing peace goals and backward-facing justice goals. With regards to the former, truth-telling in Liberia aimed to redefine group identities and inter-group relationships in society to restore a stable social order and reduce future violence,[202] with the final report concluding that a root cause of the civil war was "identity conflict".[203] Regarding the latter, the commission found that all factions of the Liberian conflict were responsible for war crimes, crimes against humanity, SGBV, and forced child conscription in rebel groups,[204] publicly acknowledging these victims' suffering. Notably, this scale of abuse is common for

[196] United States Insititute of Peace 'Truth Commission: Liberia' available at *https://www.usip.org/publications/2006/02/truth-commission-liberia*, accessed on 11 September 2023.
[197] Damian Etone et al *Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion* Taylor & Francis (2024) at 155.
[198] Mirjam Ellemars 'Burundi Truth and Reconciliation Commission (2014-present)' *African Transitional Justice Hub* 2023 available at *https://atjhub.csvr.org.za/burundi-truth-and-reconciliation-commission-2014-present/*, accessed on 2 July 2024.
[199] Accord 'Pursuing peace and reconciliation in a post-atrocity society: A case study of transitional justice in Burundi' available at *https://www.accord.org.za/conflict-trends/pursuing-peace-and-reconciliation-in-a-post-atrocity-society-a-case-study-of-transitional-justice-in-burundi/*, accessed on 2 July.2024.
[200] United States Insititute of Peace op cit note 196.
[201] William J Long 'Liberia's truth and reconciliation commission: An interim assessment' (2008) *International journal of peace studies* 1.
[202] Ibid. at 2-3.
[203] United States Insititute of Peace op cit note 196.
[204] Ibid.

ethnic and nationalist civil wars,[205] and can be difficult to pursue retributive justice for because victims may be too scared to testify in trials due to fear of further violence and reprisals or because the sheer scale of violence can overwhelm the capacity of a single legal system.[206] Therefore, in the case of Liberia, the state resorted to pursuing restorative justice goals (victim acknowledgment through truth-seeking) instead.[207]

Secondly, special tribunals have also increasingly been used to punish perpetrators for atrocities committed during past civil wars (and to deter future violence).[208] While the Liberian commission only *recommended* the establishment of an Extraordinary Criminal Tribunal,[209] Columbia implemented both a TC (known as the Commission for the Clarification of Truth, Coexistence and Non-Repetition),[210] as well as a special civil war tribunal known as the Special Jurisdiction for Peace.[211] The tribunal was tasked with prosecuting those guilty of human rights violations committed during the more than fifty-year long civil war in which it is estimated that nine million civilians were killed.[212] Thirdly, amnesty agreements (used in the post-Cold War phase to incentivise dictators and their associates to agree to democratisation) have also been increasingly used to promote disarmament in civil war contexts.[213] For instance, the peace agreement signed in 2006 that led to the end of the Second Sudanese Civil War (known as the Juba Deceleration) included amnesty provisions extending to all criminal acts committed in past clashes between the Sudan People's Liberation Army and the South Sudan Defence Forces.[214] Here, an amnesty agreement was used to help bring an end to hostilities and contribute to resolving the civil war. Ultimately, at this time, states coming out of ethnic and nationalist civil wars began implementing TJ

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[205] Reiter et al op cit note 120 at 139.
[206] Colleen Murphy 'Truth Commissions' (2013) *International Encyclopedia of Ethics* 1. Note, Murphy makes this argument in reference to both post-authoritarian and post-civil war states.
[207] Long op cit note 201 at 3.
[208] Reiter et al op cit note 120 at 140.
[209] United States Insititute of Peace op cit note 196.
[210] International Catalan Institute for Peace 'The mandate of the Colombia Truth Commission concludes with a presentation of the final report' available at *https://www.icip.cat/en/the-mandate-of-the-colombia-truth-commission-concludes-with-a-presentation-of-the-final-report/*, accessed on 11 September 2023.
[211] Gwen Burnyeat et al 'Justice after war: innovations and challenges of Colombia's Special Jurisdiction for Peace' (2020) *LSE Latin America and Caribbean Blog* 2.
[212] Ibid. at 2.
[213] Reiter et al op cit note 120 at 140.
[214] The Juba Declaration on Unity and Integration between the Sudan People's Liberation Army (SPLA) and the South Sudan Defence Forces (SSDF) of 8 January 2006.

practices to both pursue justice for victims of war crimes, crimes against humanity and genocide, as well as bring an end to the cycles of violence associated with civil wars.[215]

Notably, the TJ field has developed even further since to pursue ever more diverse goals. More specifically, in the past fifteen years or so, TJ practices have become popular in established and consolidated democracies looking to pursue restorative justice goals for victims of colonial and institutional violence, while also aiming to reduce ongoing and future harms. For instance, in 2008, Canada set up its Truth and Reconciliation Commission, mandated with investigating the long-term patterns of harm inflicted on the indigenous community by the Indian Residential School (IRS) system.[216] More recently, in 2020, Belgium established its own commission, the Truth and Reconciliation Commission on Belgium's Colonial Past, tasked with investigating the mass human rights violations committed in colonial Congo, Rwanda and Burundi from 1885 to 1962.[217] Currently, Australia's Yoorrook Justice Commission is underway, investigating the historical and ongoing injustices and atrocities committed against Aboriginal Victorians since colonialism.[218] The final report is expected in June 2024.[219] Similarly, Ireland implemented its Commission of Investigation into the Catholic Archdiocese of Dublin in 2009 – tasked with investigating the widespread sexual abuse of children by the clergy, as well as the cover-ups thereof by clergy members.[220] Australia implemented a similar commission, the Royal Commission into Institutional Responses to Child Sexual Abuse in 2013, tasked with investigating institutional responses to child sexual abuse by the clergy.[221] Lastly, in 2018, New Zealand set up its Royal Commission of Inquiry into Care Abuse, mandated with

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[215] Reiter et al op cit 120 at 138.
[216] Naomi Angel 'Before truth: The labors of testimony and the Canadian truth and reconciliation commission' (2012) 53 *Culture, Theory and Critique* 199.
[217] Commission speciale "Passe colonial". Recommandations de la Commission speciale "Passe colonial". Brussels: Belgian Parliament at 13.
[218] State Government of Victoria 'Truth and Justice in Victoria' available at *https://www.firstpeoplesrelations.vic.gov.au/truth-and-justice*, accessed on 31 May 2023.
[219] Ibid.
[220] Pádraig McAuliffe 'Comprehending Ireland's post-catholic redress practice as a form of transitional justice' (2017) 6 *Oxford Journal of Law and Religion* 451. See also James Gallen 'Transitional Justice and Ireland's Legacy of Historical Abuse' (2020) 55 *Éire-Ireland* 1.
[221] Fiona Davis 'The royal commission into institutional responses to child sexual abuse: Learning from the past' (2015) 41 *Australian Feminist Law Journal* 213-215.

investigating the widespread abuse of individuals between 1950 and 1999 in state facilities, such as children's homes, government hospitals, and religious institutions.[222] As these examples show, when patterns of historical abuse relate to the distant past and/or occurred on a massive scale, it is extremely difficult to prosecute and convict the perpetrators (especially perpetrators of SGBV).[223] For one, the scale of abuses means that the number of potential defendants is often too great for the human and financial capacity of ordinary criminal courts and police forces to investigate and prosecute.[224] Another problem is the number of legal obstacles, such as jurisdiction issues, a statue on limitations, or a lack of evidence due to the passing of time.[225] In other words, it is not possible to pursue retributive justice goals for so many crimes and after so much time has passed. Therefore, in recent years, these established democracies have resorted to truth-seeking practices to pursue restorative justice goals instead. In the case of Canada, for instance, the TC was able to identify victims of the state's IRS system through the Missing Children Project, which ultimately identified the children that never came home after being sent to a residential school and reunited them with their families (now adults).[226] Similarly, Australia's Yoorrook Justice Commission has been tasked with making reparations recommendations to advise on how best the government should assist victim healing by compensating them for their suffering.[227] Therefore, where criminal prosecutions were not feasible, the state opted to pursue victim healing instead.

The likes of Australia and Ireland did, however, have a secondary aim, namely reducing future discrimination and harm. In the case of Ireland for instance, the commission and its final report, the Murphy report, prompted four bishops to resign and subjected many others to widespread public criticism and shame in the media.[228]

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[222] Abuse in Care - Royal Commission of Inquiry 'Tell Me About You' available at *https://www.abuseincare.org.nz/our-progress/reports/tell-me-about-you/*, accessed on 31 May.2023.
[223] Gallen op cit note 220 at 22.
[224] Ibid. at 22.
[225] James Gallen makes a similar argument in the context of Ireland. See James Gallen 'Jesus Wept: The Roman Catholic Church, child sexual abuse and transitional justice' (2016) 10 *International Journal of Transitional Justice* 17.
[226] Konstantin S Petoukhov 'Locating a Theoretical Framework for the Canadian Truth and Reconciliation Commission: Charles Taylor or Nancy Fraser?' (2012) 3 *The International Indigenous Policy Journal* 11.
[227] State Government of Victoria op cit note 218.
[228] Pádraig McCarthy 'The Murphy Report Revisited' (2013) 102 *Studies: An Irish Quarterly Review* 388.

The TC therefore led to the removal of some confirmed abusers from positions of authority and power in which they could reoffend, as well as informed the public of other offenders to be aware of. Additionally, in Australia, the Yoorrook Justice Commission is tasked with investigating both historical and *ongoing* injustices committed against the indigenous population (or rather the First Peoples) with the intention of better understanding the nature of the injustices and making informed recommendations on how to reform systems, laws, policy, and education to reduce future harms.[229] Therefore, in this way, these TCs implemented by established democracies are also aimed at breaking ongoing patterns of harm and reducing future discrimination.

Ultimately, over the course of the past twenty years or so, TJ practices have been implemented to pursue increasingly diverse goals. First, TJ practices and theory developed for implementation in post-civil war contexts, and later for the context of established and/or consolidated democracies. As a result, I argue that TJ practices should no longer be understood as exclusively suited for nascent democracies undergoing a process of democratisation, appropriate rather for established democracies such as South Africa.

2.3 Proposing a transitional justice strategy to pursue justice for SGBV victims and reduce future SGBV and femicide rates

In this section, I will first discuss how SGBV has traditionally been treated under international criminal law and illustrate why this type of violence has largely been excluded from political processes and legal proceedings in the public sphere. From there, I will argue that in recent years gender-sensitive policies have increasingly been used to prevent TJ strategies from excluding women, and to increase the visibility of gendered harms during TJ proceedings. To do so, I will refer to GTJ authors such as Fionnuala Ni Aolain and Catherine O'Rourke. In this way, I argue that implementing a TJ strategy in South Africa to address SGBV and femicide stands to be an effective

[229] State Government of Victoria op cit note 218. See also Yoorrook Justice Commission 'About Yoorrook' available at *https://yoorrookjusticecommission.org.au/overview/*, accessed on 11 September 2023.

way to both pursue justice for past violence and reduce future violence, regardless of the field's reputation for being gender-blind and for excluding women.

2.3.1 Traditional implementation of transitional justice practices and the exclusion of SGBV

There is no doubt that SGBV has often been excluded from TJ processes in the past. For starters, there is a long legacy of the ambiguous treatment of SGBV under international criminal law and the legislation that came before it. In fact, before the 1300s, women who experienced war-time rape and sexual violence in Europe had no legal protections. In fact, the rape of women was considered an injury to the men in their lives, treated much the same way as property vandalism.[230] Here, this legal definition of SGBV was defined only in relation to how men experienced the sexual assault of women. In fact, it was only between the 1870s and 1900s that war-time rape was recognised as a violent crime across Europe and the United States.[231] Moreover, it was only with the onset of WWI and modern warfare that war-time rape in Europe became less acceptable and normalised.[232] Later, at Nuremberg, war-time rape committed during WWII was condemned, but dealt with ambiguously as the "ill treatment" of civilians.[233] As a result, while Nuremberg treated rape as "ill treatment", and thereby refuting the normalisation of war-time rape and SGBV as acceptable costs of war, SGBV was not yet characterised as a political form of violence.[234] This is despite documented incidents of Nazi soldiers employing sexual violence as part of a larger strategy of genocide – more specifically, using SGBV to feminise and therefore subordinate the Jewish population as a way to enforce Aryan superiority.[235] Ultimately, regardless of political motives, SGBV was therefore perceived as a low priority crime in the political sphere.[236]

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[230] Chesterman op cit note 101 at 329.
[231] Ibid. at 330.
[232] Ibid. at 326.
[233] Ibid. at 330.
[234] Ibid. at 300-305, 326-330.
[235] Ibid. at 326.
[236] Andrea Durbach makes a similar argument regarding how SGBV was perceived at South Africa's TRC. See Andrea Durbach 'Towards reparative transformation: Revisiting the impact of violence against women in a post-TRC South Africa' (2016) 10 *International Journal of Transitional Justice* 385.

Up until this point, an international jurisdiction for war crimes under an international criminal law had not yet been established. Unfortunately, the above ambiguous legal treatment of war-time SGBV at Nuremberg was inherited by the 1949 Geneva Conventions, which established international standards for the treatment of individuals during armed conflict and ultimately shaped contemporary international criminal law.[237] More specifically, there was no mention of rape nor sexual violence in the Geneva Conventions; that is, unless "torture or inhumane treatment" is read to include SGBV.[238] In this way, the ambiguous application of law to sexual violence at Nuremberg filtered through to the international jurisdiction of war-time crimes enforced by the legal framework of the Geneva Conventions and later under international criminal law. The by-product was then the exclusion of sexual violence as a violent, political crime from the public sphere.

Later, in 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR), recognising the international legal rights to truth-seeking ("freedom to seek, receive and impart information and ideas of all kinds") and reparations ("effective remedy") for all those whose human rights have been violated.[239] As truth-seeking and reparations were increasingly put into practice using TJ strategies, the male-dominated views that informed the ambiguous legal treatment of SGBV at war tribunals above also informed the treatment of SGBV at TCs and in reparations programmes. For example, in the case of Rwanda, women were urged to stay quiet and forget the sexual violence and rape committed against them during the genocide in the name of peace and reconciliation.[240] In the case of populist movements in Central/South America, they typically adopted very masculine language and perspectives that reaffirmed gender norms and roles in both societal and familial structures in the 1980s and 1990s.[241] This therefore led to the exclusion of women from traditionally masculine political spaces in favour of their occupying cultural and

[237] Chesterman op cit note 101 at 331.
[238] Ibid. at 331.
[239] International Covenant on Civil and Political Rights supra note 29 art 19(2) and art 2(3)(a).
[240] Susan McKay 'Gender justice and reconciliation' (2000) 23 *Women's Studies International Forum* 565.
[241] Katherine E Bliss 'Gender and Populism in Latin America: Passionate Politics' (2012) 117 *The American Historical Review* 1267.

biological roles, ie motherhood and reproduction.[242] In fact, across the region, women activists faced resistance from incoming politicians and civil society groups when taking up increasingly public and political roles.[243] Ultimately, with minimal women's representation in the public sphere, when TC frameworks and mandates were created, they were done so largely based on men's lived experiences, defining political categories of human rights violations according to how men's rights were violated. For instance, South Africa's TRC failed to recognise sexual violence as a category of human rights violations, and its women's committee served a largely auxiliary function to provide testimonies about the disappearances of women's sons, brothers, and husbands, thereby failing to recognise unique, gendered harms under apartheid.[244] I will expand further on this topic in Chapter 4.

The offshoot of the above gender-blind approaches is the creation of a "hierarchies of harm".[245] What this means is that crimes committed as part of a plan or pattern across political groups are prioritised over equally serious opportunistic harms (that are enabled by armed conflict) committed within political groups.[246] This is because the latter is generally understood to fall under the category of ordinary violence, rather than extraordinary violence – in other words, these harms also take place in peaceful and democratic states, just less frequently. The problem is that these private and opportunistic harms disproportionately effect women.[247] This is because women make up the majority of SGBV victims (targeted because of their femininity and sexuality),[248] as well as the majority of victims of social and economic rights violations

[242] Ibid. at 1267.
[243] Emily Rosser 'Depoliticised speech and sexed visibility: Women, gender and sexual violence in the 1999 Guatemalan Comisión para el Esclarecimiento Histórico Report' (2007) 1 *The International Journal of Transitional Justice* 393. Additionally, Fionnuala Ní Aoláin states that, while TCs have addressed gendered harms more than criminal prosecutions have, feminist activists have still had to fight for their perspectives to be included in TC proceedings, particularly in South Africa and Northern Ireland. See also Fionnuala Ní Aoláin 'The Inner and Outer Limits of Gendered Transitional Justice' (2020) 55 *Éire-Ireland* 290.
[244] Ayumi Kusafuka 'Truth commissions and gender: A South African case study' (2009) 9 *African journal on conflict resolution* 45.
[245] Jaya Ramji-Nogales 'Questioning hierarchies of harm: Women, forced migration, and international criminal law' (2011) 11 *International Criminal Law Review* 1. Ramji-Nogales's argument is centred on migrant women.
[246] Ibid. at 1.
[247] Ibid. at 1. See also Aoláin op cit note 243 at 286-287.
[248] Aoláin op cit note 243 at 286-287.

(75 per cent of women in developing regions are in the informal economy).[249] Therefore, when political processes focus on political and civil rights violations at the expense of social and economic rights, they deprioritise the latter, creating a "hierarchies of harm".[250] The concern here is that, in the case of TJ practices, they risk reenforcing the patriarchal attitudes and beliefs described in Chapter 1, which both normalise and justify SGBV and femicide. More specifically, in this way, TJ strategies have historically excluded women and their lived experiences from justice-seeking processes, shared historical narratives, and even reform recommendations. As a result, TJ strategies have largely failed to mainstream women's voices in public spaces, relegating them to private spheres of society instead.[251] The result is then that these TJ strategies set the tone going forward that SGBV and femicide are natural, ordinary crimes in stable democracies.[252] I, however, argue that TJ strategies can adopt gender-sensitive policies to overcome the privatisation of women's harms described above, and can therefore be used to address harms under institutionalised patriarchy.

2.3.2 Gender-sensitive policies and the increasing visibility of gendered harms during transitional justice proceedings

Notably, the term 'gendered transitional justice' is very new, first emerging around 2010; for instance, used in Fionnuala Ni Aolain and Catherine O'Rourke's *Gendered Transitional Justice and the Non-state Actor*. That being said, the concept of 'gender justice', defined as the protection and promotion of citizenship, as well as of political, social and economic rights, on the basis of gender equality, started to develop in TJ theory towards the end of the 20th century.[253]

In response to the privatisation of women's lived experiences described in section 2.3.1, gender justice scholars have focused on increasing the visibility of women's vulnerabilities and victimisation in times of war, conflict, or oppressive regimes. To

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[249] Oxfam 'Why the majority of the world's poor are women' available at *https://www.oxfam.org/en/why-majority-worlds-poor-are-women*, accessed on 11 September 2023.
[250] Ramji-Nogales op cit note 245 at 1.
[251] Aoláin op cit note 243 at 290.290.
[252] Louise du Toit 'Shifting meanings of postconflict sexual violence in South Africa' (2014) 40 *Signs: Journal of Women in Culture and Society* 103.
[253] Aoláin op cit note 243 at 282. For the definition of gender justice, see Dragana Dulić 'Feminist Security Research' (1989) 18 *Women in the Security Sector – A Regional Perspective* 17.

do so, some feminist authors have advocated for increasing international accountability for and deepening domestic criminalisation of sexual violence.[254] To this end, in 2001, in the first international tribunal that recognised rape as an act of genocide, Jean-Paul Akayesu was prosecuted for his role in perpetrating crimes against humanity, genocide and war crimes in the Rwandan genocide.[255] In that same period, the International Criminal Tribunal for the former Yugoslavia charged over 70 people for sexual violence committed during the Yugoslav Wars.[256] Later, in 2016, the ICC included sexual violence in the confirmation of charges decision for the first time with the prosecution of the Congo's former vice president Jean-Pierre Bemba.[257] Furthermore, in 2021, the ICC also prosecuted former child-soldier-turned-commander Dominic Ongwen for SGBV.[258]

Other gender justice scholars have focused on increasing the visibility of gendered harms in TJ practices by advocating for the implementation of gender-sensitive policies when designing TC frameworks. For example, some gender-sensitive policies encourage women to participate in truth-seeking processes at a greater rate. These include the creation of stigma-free spaces, robust witness protection programmes, making provisions for transport, childcare, or other obstacles to women's participation in TJ practices, as well as gender-sensitivity training for TJ personnel.[259] Other gender-sensitive policies aim to increase the visibility of gendered harms by expanding the scope of atrocities typically focused on at TC victim hearings to include those that disproportionately effect women. For example, in 2014, Tunisia's Truth and Dignity Commission was able to broaden the visibility of women by recognising the unique harms of indirect female victims, alongside direct victims.[260] The recognition of indirect female victims led to increasing the visibility of non-sexual gendered harms, such as police harassment, a breakdown in family ties, and denied work and

[254] Aoláin op cit note 243 at 282-283.
[255] *The Prosecutor v. Jean-Paul Akayesu* 2013 (International Criminal Tribunal of Rwanda).
[256] ICTY 'International Criminal Tribunal for the former Yugoslavia: Landmark Cases' available at *https://www.icty.org/en/features/crimes-sexual-violence/landmark-cases*, accessed on 15 March 2023.
[257] *The Prosecutor v. Jean-Pierre Bemba Gombo* 2016 (International Criminal Court).
[258] *The Prosecutor v. Dominic Ongwen* 2021 (International Criminal Court).
[259] Scanlon & Muddell op cit note 91 at 17-18. It is worth noting that Scanlon and Muddell discuss TJ broadly, not focusing on truth-seeking.
[260] Doris H Gray 'Who Hears My Voice?' available at *https://www.ictj.org/publication/"who-hears-my-voice-today"-tunisia's-forgotten-women-victims*, accessed on 16 November 2022.

schooling opportunities, ultimately contextualising human rights violations in the realities of social oppression institutionalised by patriarchal systems.[261] Similarly, Morocco's Equity and Reconciliation Commission (ERC) was also able to recognise women's lived experiences more broadly, with a third of all testimonials coming from women, both direct and indirect victims.[262] Some gender-sensitive policies aim to rather increase the visibility of gendered harms when TCs make recommendations. For instance, in 2004, Morocco's ERC made sure to bypass its "gender-biased" inheritance law when recommending a reparations programme, later implemented.[263] Similarly, in 2008, Kenya's Truth Justice and Reconciliation Commission employed gender quotas,[264] presenting women with the opportunity to inform policy recommendations, ultimately leading to broad-based gender equity "principles" governing their subsequent reparations programme.[265]

Therefore, here, I have argued that while traditional TJ practices historically excluded SGBV from consideration, gendered harms have become increasingly visible in criminal prosecutions, TCs and reparations programmes over the course of the past two decades or so. With this in mind, I propose a SGBV TC be implemented in South Africa to help pursue justice for victims of SGBV and femicide, as well as to reduce future levels of gendered violence and patriarchal harms in the country.

2.4 Conclusion

In this chapter, I set out to show why implementing a TJ strategy would be effective at addressing femicide and SGBV in South Africa, despite TJ practices being associated with nascent democracies and having a reputation of excluding gendered harms. Essentially, I argued that TJ strategies have been implemented to pursue

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[261] Ibid.
[262] Bettina Dennerlein 'Remembering violence, negotiating change: The Moroccan equity and reconciliation commission and the politics of gender' (2012) 8 *Journal of Middle East Women's Studies* 19.
[263] Margaret Urban Walker 'Transformative reparations? A critical look at a current trend in thinking about gender-just reparations' (2016) 10 *International Journal of Transitional Justice* 112.
[264] Tiina Pajuste 'Women and Peace Agreements' (2016) 7 *East-West Studies* 40-41.
[265] Andrew Songa 'Chapter 2: Locating civil society in Kenya's transitional justice agenda: A reflection on the experience of the Kenya Transitional Justice Network with the Truth, Justice and Reconciliation Commission' in *Advocating Transitional Justice in Africa* New York, Springer(2018) 30.

increasingly diverse aims, including to pursue restorative justice goals for victims of past patterns of abuse, while also aiming to break ongoing patterns of harm and reducing future discrimination in established and/or consolidated democracies. I have also shown that gendered harms and women's lived experiences have become increasingly visible in the public sphere, with the implementation of gender-sensitive policies when creating TC frameworks promoting the increased representation and participation of women during TJ proceedings. Therefore, I have shown that a TJ implementation strategy is appropriate both for the context of an established democracy like contemporary South Africa, and to address harms under institutionalised patriarchy like femicide. In the next chapter, I will focus on justifying why I have opted for a TC strategy over other TJ strategies.

CHAPTER 3 – CHOOSING THE MOST EFFECTIVE TRANSITIONAL JUSTICE MECHANISM TO BALANCE PREVENTION AND JUSTICE GOALS

3.1 Introduction

In Chapter 2, I explained why I am proposing a TJ strategy in contemporary South Africa (an established democracy with extremely high rates of SGBV and femicide) despite TJ being associated with navigating social upheaval and having a reputation for excluding gendered harms from proceedings. In this chapter, I will detail and justify the specific TJ implementation strategy that I argue would be the most effective at pursuing justice and prevention goals regarding femicide in South Africa, namely a TC.

Essentially, when designing a TJ implementation strategy, there are four main mechanisms with which to achieve the dual goals of justice for victims and reducing future violence: criminal prosecutions, TCs, reparations – this ranges from lumpsum individual and community payments, increased access to public goods, public apologies, and memorialisation efforts –,[266] and institutional reforms. It is worth noting, however, that some scholars categorise memorialisation efforts – ie, building statues, memorials and museums, or the renaming of streets and public buildings – separately from reparations.[267] Others view this traditional four-pillar (truth, justice, reparations and guarantees of nonrecurrence) framework as outdated, calling it rigid and restrictive.[268] For the sake of simplicity, however, in this thesis, I will be adopting this traditional, four-pillar framework, treating memorialisation efforts as a form of nonmaterial, group-oriented reparations. Regardless, a TJ strategy can constitute any combination of the above mechanisms,[269] either used in isolation, or in conjunction

[266] International Center for Transitional Justice 'Reparations' available at *https://www.ictj.org/reparations*, accessed on 13 September 2023.
[267] United Nations 'What is Transitional Justice? A Backgrounder' available at *https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/26_02_2008_background_note.pdf*, accessed on 17 January.2023.
[268] Sherin Shefik 'Reimagining transitional justice through participatory art' (2018) 12 *International Journal of Transitional Justice* 319.
[269] Evelyn Schmid points out that all post-conflict situations are unique and require different measures to address past wrongdoings depending on whether crimes were widespread or targeting a specific group, how large the perpetrator group is, whether the crimes were state-sanctioned, whether the perpetrators still hold positions of power, the number of resources available to the incoming

with all of, or some of, one another. To decide on the best combination of mechanisms to implement, states have to tailor their implementation strategies to their specific cultural, historical and social contexts by assessing the aims of each TJ mechanism against the government's goals for implementing TJ.[270] This can, however, become complicated because the backward-facing goal of justice is often in tension with the forward-facing goal of reducing future violence,[271] which then leads to TJ mechanisms not always complementing one another, but rather existing in tension with one another, sometimes even constraining the aims of other mechanisms.[272] With regards to SGBV and femicide, the backward-facing aim of justice is also often in tension with what is achievable, both politically and legally. This is because justice for such crimes is hard to come by globally given that these crimes tend to be deprioritised by some prosecutors for more 'serious' crimes such as murder,[273] are difficult to prove in court,[274] and victims are often stigmatised when coming forward.[275] Essentially, each TJ mechanism has a slightly different purpose and therefore has different risks and rewards associated with it; [276] each TJ implementation strategy comes with trade-offs. In this chapter, I argue that a SGBV TC is the TJ mechanism that would be able to best balance these dual backward-facing and forward-facing aims of the four. More specifically, a TC not only mandated with truth-seeking, but also with making institutional reform and reparations recommendations aimed at reducing future femicide and SGBV rates, as well as for recommending cases and forwarding any evidence collected to the National Prosecuting Authority (NPA).

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government, and the credibility of the courts. See Evelyne Schmid *Transitional justice information handbook* Washington, United States Institute of Peace (2008) 1-2.

[270] Ibid. at 1-2.

[271] Sandra Penić et al 'Reconciliation versus justice? It depends on the context: The role of symmetric and asymmetric violence in predicting postconflict attitudes' (2021) 12 *Social Psychological and Personality Science* 202. Note Penić et al argue more broadly that wether justice and reconciliation complement or contsrain one another is context-dependent.

[272] Alexander Dukalskis 'Interactions in transition: How truth commissions and trials complement or constrain each other' (2011) 13 *International studies review* 433. Note, Dukalskis focuses on how TCs and trials interact with one another (either complement or constrain).

[273] Margaret M DeGuzman 'An expressive rationale for the thematic prosecution of sex crimes' in Bergsmo Morten (ed) *Thematic Prosecution of International Sex Crimes, Morten Bergsmo, ed., Torkel Opsahl Academic EPublisher* 2 ed Brussels, Torkel Opsahl Academic EPublisher(2018) 37-38.

[274] Ibid. at 16.

[275] Ibid. at 24.

[276] Schmid op cit note 269 at 2.

3.2 The most effective transitional justice mechanism to both reduce SGBV and pursue justice for victims: A SGBV truth commission

A 'truth commission', the first of the four mechanisms I will be evaluating, refers to temporary, non-judicial and state-sanctioned bodies established to investigate what happened during a specific period of widespread violence by holding public hearings, recording victim and witness statements, as well as by conducting independent research.[277] They tend to focus on periods of human rights abuses and/or violations of international humanitarian law.[278] Typically, TCs publish their findings in a final report, alongside recommendations,[279] such as reparations and institutional reforms. Some TCs (although rare) also recommend prosecutions or forward their materials/evidence collected to the courts,[280] while others have the authority to grant amnesty to perpetrators for past abuses.[281]

Within TJ theory there are three main philosophical arguments used in the field to morally justify implementing a TC.[282] First, some scholars, such as Gutmann and Thompson, argue that while a TC sacrifices justice, the sacrifice is necessary and justified because a TC advances important moral values, such as democracy and respect for human rights by acknowledging and condemning past abuses.[283] However, this argument assumes that the pursuit of restorative justice goals via victim healing and acknowledgement does not constitute justice. Secondly, other scholars contend that a TC is the best way to compromise between the backward-facing (justice) and forward-facing (prevention) goals of TJ theory. More specifically, TCs do not punish perpetrators, but they do hold them accountable by getting them to acknowledge their responsibility for past abuses, and they promote justice by recognising victims and

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[277] United States Holocaust Memorial Museum 'Transitional Justice Tools: Truth Seeking' available at *https://www.ushmm.org/genocide-prevention/simon-skjodt-center/work/ferencz-international-justice-initiative/transitional-justice/truth-seeking*, accessed on 13 September 2023.
[278] Hayner op cit note 82 at 598.
[279] United States Holocaust Memorial Museum op cit note 277.
[280] Hayner op cit note 82 at 597.
[281] For example, South Africa's TRC. See United States Institute of Peace op cit note 173.
[282] Murphy op cit note 206 at 2.
[283] Murphy citing Amy Gutmann and Dennis Thompson in 'The Moral Foundations of Truth Commissions' in Rothberg Robert and Thompson Dennis (eds), *Truth v. justice: The morality of truth commissions* Princeton, Princeton University Press(2000) 22.

their lived experiences publicly, all while promoting respect for human rights.[284] In this way, according to Allen, a TC can be understood as a "complex and principled compromise between justice and unity".[285] Thirdly, as presented by Llewellyn and Howse, TCs do not sacrifice justice at all, they simply pursue goals and satisfy demands of restorative justice rather than those of retributive justice.[286] This argument, however, is only appropriate in transitional contexts, where calls for restorative justice may be more pressing to respond to than those for retributive justice – with many surviving loved ones simply wanting to know what has happened to those that have 'disappeared' during violent, state-led campaigns against dissidents. In this section, I will therefore be arguing for my proposed SGBV TC using the second philosophical justification, essentially that a TC is the best way to compromise between pursuing the competing values of justice and prevention (for the sake of this thesis, prevention can be understood as reducing future SGBV and femicide rates). This is particularly important in the context of South Africa because, as mentioned in Chapter 1, there is a long legacy of both rampant SGBV and impunity for such gendered violence in the country, leading to a deep need for both improved justice and prevention in the country. Below, I will first detail how a TC has the potential to pursue forward-facing TJ aims in sections 3.2.1 to 3.2.3, before detailing how a TC may pursue backward-facing aims in section 3.2.4.

3.2.1 Promoting shared narratives of femicide and SGBV

In this section, I am primarily concerned with showing why TCs have the potential to promote more inclusive, shared historical narratives of femicide and SGBV, and in so doing, by this logic, contribute to reducing future violence. As alluded to above, this is one of three keyways a TC has the potential to pursue forward-facing prevention goals. This is so, first, because a TC featuring emotive victim testimonies is more likely to draw mass media attention than less comprehensive and dramatic legal or political interventions. For instance, the victims' hearings organised by South Africa's

[284] Murphy op cit note 206 at 2-3.
[285] Murphy citing Jonathan Allen in 'Balancing justice and social unity: political theory and the idea of a truth and reconciliation commission' (1999) 49 *U. Toronto LJ* 352.
[286] Murphy citing Jennifer J Llewellyn and Robert Howse in 'Institutions for restorative justice: The South African truth and reconciliation commission' (1999) 49 *The University of Toronto Law Journal* 357.

TRC were covered by both national and international media outlets (of course, not every single hearing was covered nationally and especially internationally).[287] It is worth noting, however, that this is not always the case. An example is Guatemala's CEH which did not hold public hearings and thus only received media attention after the release of its final report.[288] Even in this case however, when the CEH did publish its final report, media coverage was extensive and public reception thereof "profound".[289] Ultimately, therefore, TCs have the potential to reach a wide audience when victims' hearings and the commission's findings are published and disseminated on television, radio, newspapers, and social media. In the case of South Africa, Van der Merwe and Chapman refer to media coverage of the special report on South Africa's TRC as "one of the most successful nonentertainment programmes ever screened" in the country.[290] They do, however, note that television reporting on the TRC drew a particular following from black South Africans,[291] thereby indicating that, unsurprisingly, victims of the past regime were more interested in the coverage of the victims' hearings than beneficiaries of the former regime. In the case of a SGBV TC in contemporary South Africa, this could mean that beneficiaries of patriarchy and perpetrators of SGBV and femicide are likely to follow the media coverage of victims' hearings less attentively than the victims themselves. Regardless of how engaged the audience is, however, with extensive media coverage, a TC has the capacity to reach a wide and diverse audience even if many South Africans do not intentionally seek it out. This would be even more likely were coverage of the proceedings to be translated into as many national languages as possible.

In this way, oral history stands to give a voice to the marginalised;[292] in this case oral history would be presented at the hearings organised by the TC and covered in the media. In other words, the media attention of victims' hearings and the publishing of

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[287] Hugo Van der Merwe & Audrey R Chapman *Truth and reconciliation in South Africa: Did the TRC deliver?* University of Pennsylvania Press (2008) 9.
[288] Joanna R Quinn & Mark Freeman 'Lesson Learned: Practical Lessons Gleaned from inside the Truth Commissions of Guatemala and South Africa' (2003) 25 *Hum. Rts. Q.* 1123.
[289] Ibid. at 1146.
[290] Van der Merwe & Chapman op cit note 287 at 202.
[291] Ibid. at 202.
[292] Marie Magdaleen Oelofse *Remembering the truth: An oral history perspective on the victim hearings of the Truth and Reconciliation Commission of South Africa, 1996-1998* (PhD, University of the Free State, 2007) 474. at 28.

a final report has the potential to expose the general public to victims' oral history and how victims remember and interpret past events. This is necessary because the beneficiaries of oppressive systems will remember events differently to the systems' victims. More specifically, because different group's experiences are influenced by their identity and how society treats them, each group will remember events differently.[293] These memories may contradict one another,[294] with victims perceiving past abuses as persecution or discrimination, and perpetrators as self-defence or as justified behaviour. This does not, however, mean that one truth or memory of the past is entirely correct, and the other wrong. In fact, personal, individual truths may differ from community truths or national truths, which may differ from factual truths.[295] Therefore, the objective truth typically contains elements of truth from all groups in society. This is known as a multiplicity of truth.[296] However, in oppressive systems, victims' experiences of violence and interpretations of events are often inadequately reflected in public discourse. For instance, Guriev and Treisman point out that dictators are able to stay in power for so long by using censorship and indoctrination tactics that silence dissidents, alongside terror campaigns.[297] Very often, therefore, TC hearings are the first time that victims' lived experiences are so readily shared publicly; in fact, both Oelofse and Fleckstein make similar arguments (in separate papers) in reference to South Africa's TRC.[298] In the case of femicide and SGBV, victims' lived experiences tend to be largely excluded from public discourse when victims fear stigmatisation,[299] or even further retaliatory violence,[300] and as a result do not come

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[293] Stiina Löytömäki 'The Law and Collective Memory of Colonialism: France and the Case of 'Belated' Transitional Justice' (2013) 7 *International Journal of Transitional Justice* 206. Note, Stiina Löytömäki makes this argument while focusing on memories of French colonialism in France and Algeria.
[294] Ibid. 206.
[295] Kevin Avruch & Beatriz Vejarano 'Truth and reconciliation commissions: A review essay and annotated bibliography' (2001) 2 *Social Justice: Anthropology, peace, and human rights* 39.
[296] Ibid. at 39.
[297] Sergei Guriev & Daniel Treisman 'How modern dictators survive: Cooptation, censorship, propaganda, and repression' (2015) 2.
[298] Anne Fleckstein 'Writing for Others in South Africa's Truth and Reconciliation Commission' (2020) 32 *Law & Literature* 280-282. Oelofse makes a similar argument, suggesting that the TRC brought an end to the silencing of victims lived experiences under apartheid. See Oelofse op cit note 292 at ii.
[299] DeGuzman op cit note 273 at 24.
[300] Karen Brouneus suggests this was the case in Rwanda after the 1994 genocide. See Karen Brounéus 'Truth-telling as talking cure? Insecurity and retraumatization in the Rwandan Gacaca courts' (2008) 39 *Security dialogue* 71-72. Thomas Buergenthal makes a similar argument, referencing El Salvador's TC. See Thomas Buergenthal 'The United Nations Truth Commission for El Salvador' (1994) 27 *Vand. J. Transnat'l L.* 311.

forward and discuss/report crimes committed against them, as well as when dominant patriarchal narratives deprioritise SGBV and femicide in relation to other forms of violence.[301] TCs therefore aim to promote a more inclusive shared narrative that more accurately reflects this multiplicity of truth by exposing perpetrators, supporters, and beneficiaries of the former regime to an alternative memory of past human rights abuses for the first time, at least on such a large scale. In the case of femicide and SGBV, victim testimonies have the potential to expose the beneficiaries of patriarchy to alternative perspectives on gendered harms.

In the context of South Africa, this is particularly relevant. First, one in three South African men admitted to rape, three in four to GBV acts, and nine in ten admitted to believing women should obey their husbands in a 2010 survey.[302] Similarly, according to a 2001 Human Rights Watch report, eight out of ten men in the Gauteng region believed that women and girls caused sexual violence.[303] Furthermore, a 2013 study commissioned by the South African Department of Women, Children and People with Disabilities suggests that male sexual entitlement is rather socially acceptable in the country, as are ideas that women and girls are responsible for their own rape. [304] While a bit outdated (in the absence of more recent data), these findings shed important light on the prevalence and normalisation of gendered violence in South Africa, as well as highlight that the normalisation of alternative perspectives on gendered harms are sorely needed in the country.

Essentially, truth-seeking therefore has the potential to promote the broad acceptance of different (previously marginalised) and more inclusive narratives of past patterns of violence by promoting debate in society,[305] for instance around how best to remember the past, around the responsibility and complicity of those that committed or supported

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[301] DeGuzman makes a similar argument, suggesting some prosecutors tend to be deprioritise SGBV for more 'serious' crimes such as murder. See DeGuzman op cit note 273 at 37-38.
[302] David Smith 'One in three South African men admit to rape, survey finds' *The Guardian* 2010 available at *https://www.theguardian.com/world/2010/nov/25/south-african-rape-survey*, accessed on 17 March 2023.
[303] Human Rights Watch 'Scared at School: Sexual Violence Against Girls in South Africa' available at *https://www.hrw.org/reports/2001/safrica/ZA-FINAL-03.htm*, accessed on 4 April 2022.
[304] The Department of Women, Children & People with Disabilities. Stop violence against women: Know your epidemic- Know your response 2013. Pretoria: The Department of Women, Children & People with Disabilities at 50.
[305] Van der Merwe & Chapman op cit note 287 at 215.

abuses in the past, as well as around obligations to fellow citizens.[306] Van der Merwe and Chapman argue that, in the case of South Africa's TRC, the extensive media coverage of the victim hearings organised by the Commission contributed greatly to the broad acceptance of the narrative that the abuses committed under apartheid constituted crimes against humanity.[307] Similarly, Löytömäki (citing Charles Forsdick) argues that in postcolonial France, the increasingly diverse and sometimes conflicting narratives of colonialism in the public sphere of society indicates a move towards a more inclusive memory of the past that recognises the multiplicty of truth.[308] More specifcally, Löytömäki argues that the increasing number of trials and other legal interventions on the topic of colonialism "constitute contests over memory that represent an important challenge to self-serving versions of national history by acknowledging past breaches of human rights and by pointing out where the state has violated its own ideals". [309] That being said, Avruch and Vejarano point out that it is much easier to establish historical facts (ie, so many people were discriminated against, detained, tortured, or even killed), than establishing a "society-wide consensus" regarding what these facts mean (ie, engaging with oppressive structures, bystander complicity, future responsibility for reparations, and even ongoing and future discrimination).[310] If done correctly, however, TCs have the potential to reframe how broader society remembers and interprets past events and patterns of violence by popularising more inclusive narratives of past abuses in political/societal discourses. This is because broad acceptance of new and inclusive historical narratives could then, according to truth-seeking theory, counterbalance dominant and permissible contested or unacknowledged truths in society. By contested truths, I am referring to narratives which either deny that human rights violations took place, or justify past violence with cultural and ethnic myths.[311] Here, by introducing alternative narratives to these "permissible lies" that either deny or justify past atrocities, the hope is that the TC can promote the broad based acceptance of more inclusive narratives instead, minimising

[306] Löytömäki op cit note 293 at 206. See also Ernesto Verdeja *Unchopping a tree: Reconciliation in the aftermath of political violence* Temple University Press (2009) 114.
[307] Van der Merwe & Chapman op cit note 287 at 279.
[308] Löytömäki op cit note 293 at 222.
[309] Ibid. at 222.
[310] Avruch & Vejarano op cit note 295 at 40.
[311] Janine Natalya Clark 'Transitional justice, truth and reconciliation: An under-explored relationship' (2011) 11 *International Criminal Law Review* 259.

the scope of these lies in society.[312] This is particularly important because contested truths, if left unaddressed, can destabilise society by increasing inter-group tensions, even leading to mass reprisals.[313] In the case of femicide and SGBV, a TC has the potential to popularise more inclusive perspectives on gendered harms in political/societal discourses and minimise the permissibility of rape myths that justify and promote impunity for SGBV and femicide.

By rape myths, I am referring to lies that typically defame women and blame them for being victims of SGBV, rather than blaming their perpetrators. For example, these include myths that women wearing provocative clothing or that go out alone at night 'are asking for it', only promiscuous women or women with a bad reputation are raped, women who 'tease' men deserve to be raped, women mean 'yes' when they say 'no', once women have said 'yes' once there is no reason to believe their 'no' in future, women "cry rape" to hide pregnancies, a man is entitled to sex if he buys a woman dinner, women find victimisation pleasurable, and a man is justified in forcing himself on a woman that makes him sexually excited.[314] In fact, one of the most prominent barriers to the prosecution of rape is the "law's adoption of, or at least willingness to tolerate…myths about rape".[315] This therefore highlights how pervasive these rape myths are, used to blame the vicitms for their own sexual assault rather than the perpetrator. Ultimately, in the case of a SGBV TC, as different actors contest and present different experiences and memories, the TC stands to build a more inclusive collective memory of past and ongoing violence.

That being said, the media covering (even extensively) past abuses is not enough to increase sensitivity to ongoing human rights violations. In fact, as Van der Merwe and Chapman point out in relation to South Africa's TRC, a TC should be seen as a "helpful starting point" that should be followed by educational campaigns in the future, aimed at raising awareness in the field of human rights.[316] Therefore, in the context of my thesis, a SGBV TC would need to be followed up with educational campaigns

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[312] Michael Ignatieff 'Articles of faith' in *Wounded Nations: Overview* London, Index on Censorship(1996) 113.
[313] Clark op cit note 311 at 259.
[314] Morrison Torrey 'When will we be believed-rape myths and the idea of a fair trial in rape prosecutions' (1990) 24 *Uc DaViS l. reV.* op cit note 577 at 1015-1016.
[315] Ibid. 1014.
[316] Van der Merwe & Chapman op cit note 287 at 215.

regarding the nature of violence against women, how patriarchal values and attitudes exacerbate and drive this type of violence, and regarding how women are often financially dependent on men and are therefore more vulnerable to femicide as a result of patriarchal structures and institutions in wider society and the household. Moreover, this dependence on media coverage to promote broad acceptance of a more inclusive narrative on violence requires the commission to have a robust media management department. Quinn and Freeman, for instance, point out that, when comparing South Africa's TRC with Guatemala's CEH, a TC's capacity to harness the media for their own purposes depends on whether victims' hearings are public, on whether TC employees have regular and open lines of communication with media outlets, on whether the TC has an extensive media strategy, as well as on whether the TC is able to monitor media coverage and prevent the leaking of sensitive information or premature publishing of information.[317] Therefore, much like South Africa's TRC had an extensive media liaison department,[318] so would my proposed SGBV TC to ensure that it is able to harness the media to really promote the broad acceptance of an inclusive narrative of SGBV and femicide, as well as how this violence is linked to patriarchy, to counterbalance existing patriarchal narratives that justify and therefore perpetuate SGBV.

3.2.2 Encouraging changes in patriarchal attitudes and behaviours

Secondly, a SGBV TC also stands to pursue prevention goals, ie reduce future levels of gendered violence, by pursuing societal transformation. More specifically, TCs have the potential to do so by promoting positive changes in inter-group perceptions and behaviours, largely by enhancing inter-group understanding and empathy. According to truth-seeking theory, TCs do so primarily by presenting wider society with new information regarding past (and in the case of femicide and SGBV, ongoing) abuses. By new information, I am referring to historical facts and interpretations of past violence, as well as new perspectives on perpetrator and bystander wrongdoing for past abuses previously not widely known or acknowledged by the broader public.

[317] Quinn & Freeman op cit note 288 at 1144.
[318] Ibid. at 1144.

When these are presented by a TC, this new information then has the potential to individualise both victims and perpetrators, thereby encouraging inter-group empathy.

First, TCs can individualise victims in the eyes of the perpetrator group by associating atrocities with individual victims whose lives have been destroyed by the violent campaigns carried out against them.[319] By this logic, in the case of contemporary South Africa, a TC has the potential to associate SGBV and femicide statistics with individual victims in the eyes of men. If this is correct, perpetrators (and more broadly men) would then be more likely to confront the suffering that they have caused.[320] The thinking here is that a TC presents perpetrators with the opportunity to self-reflect and re-examine their own complicity (whether direct or indirect) in past violence and abuse.[321] In so doing, TCs have the potential to re-humanise victims and restore them as rights-holders in the eyes of the perpetrator group, or at the very least, encourage more inter-group understanding and empathy.[322] Increasing empathy levels towards women is particularly relevant to the South African context given a 2012 study by Jewkes *et al.* found that men who only had a relationship or sex with women predicated on their fulfilling a provider role, or who only had sex with prostitutes, showed the highest levels of psychopathic traits.[323] TCs could also individualise perpetrators to improve the victim group's perception of them. More specifically, TCs have the potential to do so by identifying the individuals guilty of human rights violations, and thus, so the argument goes, help to undermine the collective guilt placed on the perpetrator group for all the atrocities that took place in the past.[324] This is because individualising criminal responsibility and therefore guilt has the capacity to

[319] Pumla Gobodo-Madikizela 'Chapter Eight Working Through the Past: Some Thoughts on Forgiveness in Cultural Context' in Pumla Gobodo-Madikizela and Merwe Chris N Van der (eds), *Memory, Narrative and Forgiveness: Perspectives on the Unfinished Journeys of the Past* Cambridge, Cambridge Scholars Publishing(2009) 162.
[320] Ibid. at 162.
[321] Nevin Aiken makes a similar argument in reference to South Africa's TRC in 'Post-conflict peacebuilding and the politics of identity: Insights for restoration and reconciliation in transitional justice' (2008) *Peace Research* 25.
[322] Gobodo-Madikizela op cit note 319 at 162.
[323] Rachel Jewkes et al 'Prospective study of rape perpetration by young South African men: incidence & risk factors' (2012) 7 *PloS one* 6.
[324] Phenyo Keiseng Rakate *Transitional Justice in South Africa and the Former Yugoslavia: a Critique* University of the Witwatersrand (1999) 33. Note, Rakate makes this argument in reference to South Africa's TRC.

undermine narratives that all members of the perpetrator group are guilty.[325] Gobodo-Madikizela points out that this is more likely when perpetrators show remorse. More specifically, she argues that when a perpetrator expresses remorse while testifying at a TC, victims are presented with a new, alternative narrative of the perpetrator group, namely that they have humanity and feel remorse, rather than that they are simply "monsters".[326] This therefore has the potential to minimise hate and resentment for the perpetrator group as a whole in the victim group. In the case of femicide and SGBV, individualising men guilty of this form of violence is particularly important to subvert patriarchal narratives that tend to portray feminist activists as hating all men, which then deflects from the core problem at hand (ie, how patriarchal structures fail to protect women from SGBV, how patriarchal attitudes exacerbate SGBV rates, and how men can be indirectly and perhaps unknowingly complicit in gendered harms) and is then used to further justify misogynistic attitudes and behaviours.[327] Therefore, by minimising collective guilt, a SGBV TC has the potential to encourage greater engagement with how SGBV and patriarchy is linked than is currently possible. Essentially, here I argue that TCs have the potential to improve victim-perpetrator perceptions of one another by humanising victims in the eyes of the perpetrator group and individualising guilt to reduce resentment of the perpetrator group in the eyes of the victim group, with the overall aim being improving inter-group understanding and empathy.

To achieve the above, however, the commission must both attract widespread attention, as well as be perceived as credible by wider society. On the first point, people will not be encouraged to self-reflect and re-examine their past behaviour if they have not sufficiently engaged with the new information presented by the TC.[328] To optimise engagement, TCs limit legalistic and technical language, minimise the costs of acquiring the information, and restrict public trials to emotive "human interest" stories that avoid inserting cognitive and ideological arguments that may dissuade civil

[325] Ibid. at 33. Again, Rakate makes this argument in reference to South Africa's TRC.
[326] Gobodo-Madikizela op cit note 319 at 162.
[327] Maxime Dafaure 'The "great meme war:" The alt-right and its multifarious enemies' (2020) *Angles. New Perspectives on the Anglophone World* 10. Note, Dafaure's research focuses on the role of the alt-right movement in online spaces.
[328] Gibson op cit note 114 at 125.

society from engaging further or trigger denials.[329] On the second point, broader society will not be encouraged to self-reflect if TCs are not perceived as a credible source of information on past events and atrocities, as well as a credible source of guidance for future political activity,[330] which typically hinges on procedural fairness and even-handedness.[331] An example of how TC officials can communicate procedural fairness to the general public is including civil society members when creating the initial legal framework for the TC; an example of communicating even-handedness is the consistent and impartial application of general principles to all sides of the conflict/violence to assure the general public that the TC is not a form of victor's justice,[332] or in the case of femicide and SGBV, a witch hunt. As a result, it is crucial that the SGBV TC is perceived as fair to stand a chance of encouraging men and supporters/beneficiaries of patriarchy to self-reflect and re-examine their past and present behaviours towards women.

3.2.3 Guiding reparations and institutional reforms

Thirdly, in this section I contend that TCs have the potential to identify the root causes and patterns of violence that can then be used to make recommendations for institutional reforms and reparations aimed at reducing future femicide and SGBV rates. This is particularly important because SGBV is systemic in nature, and therefore cannot be rooted out merely by addressing individual attitudes and behaviours. For one, TCs are typically mandated with creating a comprehensive report of all human rights violations that took place during the given period.[333] In the case of femicide and SGBV in South Africa, establishing a comprehensive record that reflects the true number of SGBV cases in the country would be impossible given the sheer extent of the violence. However, as it stands, there is a massive gap in knowledge regarding exactly how many women are sexually assaulted and raped in the country. While there seems to be a consensus that many more women are raped than report it, estimates of exactly how many rapes go unreported vary greatly. In fact, concerns regarding rape statistics and estimates have been raised for the past 25 years or so, even in

[329] Ibid. at 125, 132-135.
[330] Ibid. at 125.
[331] Ibid. at 137.
[332] Ibid. at 137-138.
[333] Chapman & Ball op cit note 162 at 7.

parliament.[334] For instance, SAPS estimated that one in 36 rapes go unreported in 1999 (a figure many still refer to decades later),[335] while the NGO Women For Change estimate 90 per cent of rapes go unreported,[336] and statistics published by The Economist in 2017 suggest that only one in nine rapes go unreported.[337] As a result, there is a significant need for more accurate records regarding femicide and SGBV in South Africa, not to mention for race- and class-disaggregated data, which, if done well, a TC has the potential to do.

I thus argue that this record of individual human rights violations could then help to identify generalised patterns and trends in the data.[338] These patterns, I contend, could then be used to understand the root causes of violence by identifying the political, ideological and personal motives common to most of the individual cases recorded, as well as to understand which institutional failings facilitated the crimes.[339] Of course, analysing and interpreting this data requires extensive research, advanced methods for data collection and processing, as well as a complex information management system.[340] In the case of femicide and SGBV, this would also require the commissioners to have some base knowledge regarding how patriarchy works, and the causes of violence against women. From there, this information could then be aggregated to understand the common beliefs in society which justify and motivate violence,[341] as well as the institutions and structures that fail to protect victims and even those that perpetuate violence. In the case of SGBV and femicide, these patterns and ideological motives can be contextualised in the broader context of patriarchy in South Africa to best understand how the country's structures and institutions

[334] Parliamentary Monitoring Group 'Violence Against Women and Access to Justice: hearings' available at *https://pmg.org.za/committee-meeting/5075/*, accessed on 14 September 2023. This figure continues to be cited, as recently as 2020. See Lacey George 'Gender-Based Violence Against Women in South Africa' *Ballard Brief* 2020 available at *https://ballardbrief.byu.edu/issue-briefs/gender-based-violence-against-women-in-south-africa*, accessed on 16 August 2023.
[335] Parliamentary Monitoring Group op cit note 334.
[336] WomenForChange 'Let's talk about rape' available at *https://womenforchange.co.za/lets-talk-about-rape/*, accessed on 14 September 2023.
[337] The Economist 'South Africa's rape epidemic' 2017 available at *https://www.economist.com/middle-east-and-africa/2017/03/09/south-africas-rape-epidemic*, accessed on 14 September 2023.
[338] Chapman & Ball op cit note 162 at 7.
[339] Eric Brahm 'Uncovering the truth: Examining truth commission success and impact' (2007) 8 *International Studies Perspectives* 21. See also Chapman & Ball op cit 162 at 7.
[340] Chapman & Ball op cit 162 at 7.
[341] Ibid. at 7.

perpetuate the unequal power dynamic between men and women, as well as how they consolidate patriarchal attitudes and beliefs in society. This then presents a good starting point to research how best to dismantle the country's patriarchal structures and institutions, as well as identify what the state can do to promote less patriarchal attitudes and beliefs in South Africa, all with the hope of reducing future SGBV and femicide rates. Furthermore, these patterns can also be used to understand how race, sexual orientation and class intersect with gender to shape women's vulnerability to femicide and SGBV. Understanding how, for instance, poorer women are more financially dependent on men in patriarchal societies could help inform better welfare programmes and government protections to reduce their future vulnerability to femicide and SGBV. Therefore, by using the social context of past abuses, TCs have the potential to ultimately make well-informed and well-crafted reform recommendations (both institutional reforms and reparations programmes) aiming to end, or at the very least slow, the cycle of violence.

However, it is important to note that TCs do not have the authority to implement their recommendations.[342] Rather, they forward their recommendations to the government in a final report.[343] As a result, it is entirely up to the administration at the time whether reparations and institutional reforms are implemented at all, let alone whether they will be implemented the way the TC recommended.[344] Ultimately, while TCs are well-placed to make informed recommendations on these reforms to address the root causes of violence, there is no guarantee that they will be enforced.[345] As a result, no tangible benefit may result from even the most insightful and well-crafted TC recommendations. That being said, civil society can play an important role in holding the government accountable to implementing the TC's proposed reform measures. Melish, for instance, argues that perhaps the most significant contributing factor to a TCs success is the level of civil society engagement in the process of implementing the TCs final recommendations.[346] This is because civil society is the "backbone" of a

[342] Eric K Yamamoto et al 'Bridging the chasm: reconciliation's needed implementation fourth step' (2016) 15 *Seattle J. Soc. Just.* 113. Note, Yamamoto et al focus their argument on reparations.
[343] United States Holocaust Memorial Museum op cit note 277.
[344] Yamamoto et al op cit note 342 at 113.
[345] Ibid. at 113.
[346] Tara J Melish 'Implementing Truth and Reconciliation: Comparative Lessons for the Republic of Korea' (2012) 19 *Buff. Hum. Rts. L. Rev.* 7.

successful democracy, able to counterbalance the government by mobilising opinion, by encouraging the government to impose better rules and by monitoring state behaviour.[347] Given that South Africa has a relatively strong civil society,[348] unlike many developing countries, it has been able to monitor public expenditure trends, government delivery of social development, as well as play an advocacy role to promote accountability of the government.[349] Therefore, I argue that South African civil society can help hold the government accountable to any recommendations put forward by a TC. While it is impossible to say that civil society can completely insulate the country from this problem, civil society can at least minimise government apathy towards implementing recommendations.

3.2.4 Pursuing restorative justice for SGBV victims

While a SGBV TC has the potential (if done well) to reduce future femicide and SGBV rates as described in sections 3.2.1 to 3.2.3, I argue in this section that it also has the potential to pursue widespread restorative justice by acknowledging victims and restoring their dignity, ie the pursuit of backward-facing justice goals. More specifically, when individual victims testify at a TC, they detail the atrocities committed against them in their own words and at their own pace.[350] In this way, skilfully managed TC hearings can afford victims the opportunity to curate the information that they think is relevant and appropriate for their testimony themselves without having to face cross-examination or restrict their testimony to the rules of evidence that are associated with testimonies during legal court proceedings.[351] As a result, the hearings organised by the TC may help to empower victims to interpret the meaning of their own stories and experiences by promoting their agency when testifying.[352] Essentially, victim hearings at a TC can provide victims with a cathartic moment in which they can process their trauma. In this way, these hearings can fulfil a therapeutic function.

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[347] Natasha Shawarib 'The role of civil society in democratic transition: the case of Jordan' (2014) 82.
[348] Lincoln Allison 'Sport and civil society' (1998) 46 *Political studies* 716, 721.
[349] Leila Patel 'Social development in a society in transition' (2003) 3(18) *Center for Social Development* 9.
[350] Murphy op cit note 206 at 2.
[351] Ibid. at 2.
[352] Carrie Booth Walling 'Insights on victim testimony and transitional justice: A response to Angelina Snodgrass Godoy' (2018) 17 *Journal of Human Rights* 388.

This argument is not uncontroversial. Some authors question whether testifying at TC victim hearings can fulfil this therapeutic function. Ignatieff, for example, sheds some doubt as to whether the theory that self-knowledge is a condition of psychic health can be scaled on a national level.[353] Avruch and Vejarano also cast doubt on whether this process of acknowledging victims can be therapeutically effective at the collective level, particularly with regards to national healing in the form of forgiveness and reconciliation.[354] That being said, given South Africa is an established democracy, my proposed SGBV TC would not be mandated with reconciliation and national unity goals relating to nation-building initiatives. However, Hamber, De Ridder and Brouneus, argue (in their separate works) that inviting victims to testify at commission hearings is more likely to retraumatise them than help them heal, largely because testifying at the hearings organised by the TC requires victims to relive the suffering they have experienced.[355] Retraumatisation is a particular risk when the TC environment is not perceived by victims to be safe and secure.[356] For instance in Rwanda, some of the women that testified about SGBV incidents at the informal, community-based *gacaca* trials were stigmatised and were targets of threats, harassment, and even feared further violence.[357] Therefore, to overcome this obstacle, special measures must be put in place to protect those testifying. Examples include the creation of stigma-free spaces, robust witness protection programmes, making provisions for transport, childcare, or other high-risk spaces, and gender-sensitivity training for commission personnel.[358] In the case of my proposed SGBV TC, extra provisions for anonymity could also be made to encourage women to come forward despite their fears of stigmatisation and further violence. Examples include written testimonies read out on behalf of victims that feel too uncomfortable to testify

[353] Ignatieff op cit note 312 at 118.
[354] Avruch & Vejarano op cit 295 at 41.
[355] Brandon Hamber *Transforming societies after political violence: Truth, reconciliation, and mental health* Springer Science & Business Media (2009) 90. Note, Hamber's argument is in reference to South Africa's TRC. See also (again in reference to South Africa's TRC) Trudy De Ridder 'The trauma of testifying: deponents' difficult healing process' (1997) 6 *Track Two: Constructive Approaches to Community and Political Conflict* 3-4. See also Brounéus op cit 300 at 71. Note, Brouneus's argument is in reference to SGBV victims testifying at Rwanda's gacaca courts after the 1994 genocide.
[356] Brounéus op cit note 300 at 71.
[357] Ibid. at 71-72.
[358] Sophie McGlynn *Engendering Truth: Prospects for Truth Commission Policy in Addressing Gendered Violence* 2018) 90. See also Scanlon & Muddell op cit note 91 at 17-18.

themselves or playing recordings and videos of victim testimonies that have removed any identifying characteristics. Brouneus, however, goes as far as to suggest that the nature of SGBV itself hinders victim healing via truth-seeking and makes victims prone to retraumatisation when testifying publicly.[359] Much like Scanlon and Muddell, however, I argue that victims simply require long-term access to medical and psychological services.[360] This is to make sure that victims receive the necessary support after testifying so that they can cope with reliving the trauma at the TC hearings. More specifically, what this additional support does is ensure that victims do not simply have "short trauma exposure" to past suffering and harm without the benefit of psycho-social support to work through the trauma.[361] Ultimately, I argue that if victims are provided with sufficient security and psycho-social support, the risk of victims being retraumatised when testifying at the hearings organised by the TC can be minimised.

Furthermore, regardless of whether testifying at hearings is a therapeutic experience for victims, if well managed, victim testimonies can help acknowledge past abuses publicly. More specifically, TCs can "uncover and magnify the silenced truth of victims and survivors",[362] essentially making their once private, shameful struggles public. This is important because, when harm goes unacknowledged, it can exacerbate intergenerational trauma,[363] and even social impunity for these crimes.[364] However, once victims' lived experiences have been shared in the public sphere, those in attendance (members of the public, commissioners, and other staff) as well as those listening to the hearings in the media, can then acknowledge and validate victims' lived experiences. Because social visibility is dependent on clearly communicated approval and/or validation of others,[365] this public validation and acknowledgement of victims lived experiences can then, by this logic, render them socially visible. This is

[359] Brounéus op cit note 300 at 71.
[360] Scanlon & Muddell op cit note 91 at 17-18. It is worth noting that this argument is rather broad, not focused on SGBV victims.
[361] Brounéus op cit note 300 at 60.
[362] Walling op cit note 352 at 388.
[363] Durbach op cit note 236 at 384.
[364] Greg Grandin and Thomas Miller Klubock highlight how Chile's Rettig Report helped minimise social impunity in *Truth commissions: state terror, history, and memory*, (2007) Cape Town, HSRC Press. 63.
[365] Frank Haldemann 'Drawing the line: amnesty, truth commissions and collective denial' in *Victimological approaches to international crimes: Africa* Antwerp, Intersentia(2011) 272.

particularly important because making victims and their suffering visible can then function to "upwardly revalue" their cultural identities in society; this is because including their lived experiences in the public sphere can correct historical narratives that disrespected victim identities to justify any human rights violations committed under the former regime.[366] In other words, victim testimonies have the potential to reframe past abuses as resulting from prejudice, rather than as resulting from any fault of the victim.[367] In the case of my proposed TC, however, the number of victims of SGBV and femicide in South Africa is very high. Practically, a TC would therefore be unable to achieve the above for each and every victim. That being said, those unable to testify at the SGBV TC themselves, would still witness similar harms to what they have experienced acknowledged in the public sphere. More specifically, I contend that victim testimonies that are possible and organised by the TC would contribute to increasing the visibility of gendered harms in society, as well as promote the upward revaluing of feminine identities and bodies, thereby contributing to broader victim healing in some way.

The above process, however, hinges on whether the TC in question can adequately recognise the complexity of victims' suffering and lived experiences, which is sometimes hindered when cultural biases,[368] or political agendas influence the commission's mandate or framework.[369] More specifically, when commissioners do not adequately differentiate between the lived experiences of different victim groups by failing to take their race, gender, sexual orientation, religion and/or class into account because of their own biases or for the sake of prioritising the consolidation of government power and other political goals, this can result in indirect misrecognition. Essentially, in this case, the patterns of humiliating subordination, rejection, and exclusion based on victims' identities (either because of their race, gender, sexual orientation, religion and/or class) that are associated with collective wrongdoing, are

[366] Elizabeth Stanley 'Truth commissions and the recognition of state crime' (2005) 45 *British Journal of Criminology* 5.
[367] Nancy Fraser 'Social justice in the age of identity politics: Redistribution, recognition, and participation' (1999) 1 *Culture and economy after the cultural turn* 2-3.
[368] Stanley op cit note 366 at 6. Note, Stanley makes this argument in reference to gender biases at South Africa's TRC.
[369] Patricia Lundy & Mark McGovern 'Whose justice? Rethinking transitional justice from the bottom up' (2008) 35 *Journal of law and society* 273. Note, Lundy and McGovern make this argument in reference to Rwanda's TJ process.

not publicly acknowledged, or responded to.[370] Instead, victims can feature more as objects than as subjects at victim hearings, as a result of which they risk being fetishized rather than acknowledged and empowered.[371] Lundy and McGovern, for instance, refer to this process as "window-dressing". [372] As a result, victims that are misrecognised in this way may feel ignored, passive, powerless, voiceless and/or invisible "as human beings, as citizens, and as victims".[373] Moreover, victim input for reparations, justice, psycho-social support, and even system reform, is deprioritised. In such cases, victims are therefore left feeling disenchanted,[374] whereby, the focus on victim healing is often only superficial. I therefore suggest my proposed SGBV TC adopt an intersectional-gendered perspective on violence to understand how experiences of SGBV differ and change when gender intersects with race, class, religion, and sexual orientation.[375] Often used by scholars studying policies on refugees, migrants and those forcibly displaced,[376] intersectional-gendered perspectives on violence have become increasingly popular in the peace and security field to determine which policies are most effective at promoting gender equality and social inclusion.[377] Because feminist scholars have been widely criticised for failing to recognise the complex and unique lived experiences of both the LGBTQ+ community,[378] and women across racial lines under patriarchy,[379] I argue that it is

[370] Haldemann op cit 365 at 271.
[371] Simon Robins 'Failing Victims: The Limits of Transitional Justice in Addressing the Needs of Victims of Violations' (2017) 11 *Hum. Rts. & Int'l Legal Discourse* 57.
[372] Lundy & McGovern op cit note 369 at 292.
[373] Haldemann op cit note 365 at 272.
[374] Robins op cit note 371 at 57.
[375] Intersectionality theory was first put forward by Crenshaw in 1989. It is a theory of feminism which takes the intersection of gender with other identities (such as race, sexual orientation, class, ableism) into account. See Kimberle Crenshaw *Feminist Theory and Antiracist Politics: Demarginalizing the Intersection of Race and Gender in Antidiscrimination Law* (1989) Chicago, Chicago Legal Forum.
[376] Nicola Popović *1325 Snapshots from the Field: Examples of Good Practices and Lessons Learned within Projects on Women, Peace and Security* ifa (Institut für Auslandsbeziehungen eV) (2018) 1.
[377] Pauline Oosterhoff & Raudah M Yunus 'The Effects of Social Assistance Interventions on Gender, Familial and Household Relations Among Refugees and Displaced Populations: A Review of the Literature on Interventions in Syria, Iraq, Jordan and Lebanon' (2022) 2.
[378] Kristi Carter & James Brunton *Transnarratives: Scholarly and Creative Works on Transgender Experience* Canadian Scholars' Press (2021) 317. See also Caroline McFadden 'Critical white feminism interrogating privilege, whiteness, and antiracism in feminist theory' (2011) 16.
[379] Dreama G Moon & Michelle A Holling "'White supremacy in heels":(white) feminism, white supremacy, and discursive violence' (2020) 17 *Communication and Critical/Cultural Studies* 253. See also Ruby Hamad *White tears brown scars: How white feminism betrays women of colour* Hachette UK (2020) 3.

crucial for a SGBV TC to adopt this intersectional-gendered framework to prevent widescale indirect misrecognition at the TC hearings.

3.3 Assessing the remaining transitional justice mechanisms: a reparations programme, institutional reforms, or a SGBV tribunal

Critics might argue that reparations, institutional reforms, and the establishment of a SGBV tribunal would be more effective than the proposed approach, not least because these mechanisms would allow for the striking of a more appropriate balance between justice and prevention goals. In this section I explain why I contend that this may not be the case. First, reparations typically come in four forms. These include nonmaterial, individual-oriented reparations (symbolic gestures made to individual victims such as ceremonial reburials), nonmaterial and group-oriented reparations (symbolic gestures made to victim groups such as erecting a statue or museum, or issuing a public apology), material and individual-oriented reparations (monetary compensation paid to individual victims such as lumpsum payments), and lastly material and group-oriented reparations (examples include group payments or guaranteed access to education/employment opportunities).[380] Secondly, institutional reforms can take the form of increasing regulations, transparency, and accountability of state and industry institutions, or can take the form of lustration.[381] Lastly, special tribunals typically operate using a combination of domestic and international resources, judges and staff, and are particularly useful for states with a weak or unstable judiciary (ie, post-authoritarian and post-civil war states).[382] For the purposes of this section, however, given South Africa is an established democracy, a tribunal can be understood as a special, domestic tribunal set up temporarily to only prosecute SGBV and femicide crimes committed within a particular window.

3.3.1 A reparations programme

[380] David C Gray 'A no-excuse approach to transitional justice: Reparations as tools of extraordinary justice' (2009) 87 *Wash. UL Rev.* 1056.
[381] Letki op cit note 153 at 540.
[382] Stensrud op cit note 182 at 7.

Here, I contend that a reparations programme would be a less effective TJ mechanism to balance both justice and prevention goals than a SGBV TC because, when implemented in isolation, reparations tend to be viewed by victims as a way to buy their silence. First, any justification for implementing a reparations programme rests on a type of responsibility for past abuses,[383] either in the form of collective responsibility, or a responsibility for atonement, transformative justice, or rapid social change. With regards to collective responsibility, the thinking here is that when a group "pursues" abuses through state institutions, it makes sense to hold the whole group responsible for the state-led abuses that took place in the past.[384] This also holds true in cases where it is unrealistic to identify and hold responsible a "discrete set of individuals" because abuses were institutionalised or approved/supported by legal and social norms.[385] This justification therefore prevents any members of the perpetrator group from rejecting a responsibility to the victim group for reparations based on concepts of ethical individualism, arguing that because one did not directly carry out abuses against the victim group, one cannot be held responsible for past abuses and be expected to pay reparations.[386] For example, when institutional abuses have led to the unjust enrichment of members in the perpetrator group, reparations based on collective responsibility are not conceptualised as a form of punishment for individual crimes, but rather a way to correct the unfair disparity via the redistribution of resources (or via affirmative action).[387] This can be understood as a form of corrective justice, ie, when one "harms another by immoral conduct", one is morally obligated to make amends to the victim(s).[388] In other words, perpetrators have a responsibility to compensate victims for their suffering caused by their own immoral behaviour. Forde-Mazrui makes this argument in the context of systemic racial discrimination, arguing that the state is obligated to make amends (for instance through affirmative action programmes or by redistributing resources) to the victims of state-sponsored racial preferences.[389] In the context of the US, she argues that because black Americans

[383] Gray op cit note 380 at 1071.
[384] Ibid. at 1072.
[385] Ibid. at 1072.
[386] Ibid. at 1072.
[387] Ibid. at 1072.
[388] Kim Forde-Mazrui 'Taking the Right Seriously: America's Moral Responsibility for Effects of Past Racial Discrimination' (2002) *UVA School of Law, Public Law Research Paper* 6.
[389] Ibid. at 6.

continue to experience social and economic disadvantages at disproportionate rates because of slavery and Jim Crow laws, the state has a responsibility to pay reparations to the victims and in some way, correct the disparity.[390] Sepinwall makes a similar argument, however focusing on group ontology rather than on group responsibility. More specifically, she argues that all group members are responsible for their "group's existence as a moral agent", and, as a result, can be held responsible for the group's actions, required to pay reparations to discharge the group's "debts".[391] Gray does point out, however, that this justification for reparations requires proving a causal connection between contemporary social and economic disadvantage, and past abuses.[392] While it may seem intuitive that the latter has (at least in part) caused the former, it is difficult to definitively prove that the correlation between the two is actually a causation relationship.[393] Regardless, if causation is widely accepted, then while no single person's wealth or personal property is identified as a product of widescale abuses,[394] a collective responsibility for a pattern of abuses could be established, requiring the perpetrator group (often the state does so on the perpetrators' behalf) to pay reparations and pursue (backward-facing) corrective justice goals to compensate victims for their past suffering.

Alternatively, justifying reparations on the grounds of atonement does not focus on compensating victims for their past suffering,[395] but rather on pursuing forward-facing goals, predominantly reconciliation. This is because when perpetrators "confess the deed", "admit…the deed constitutes an atrocity", "repent, and ask for forgiveness" by paying reparations (typically via the state), they, by this logic, express remorse and take personal responsibility for the past.[396] This then contributes to repairing the foundation of present and future inter-group relations, which may contribute to making the present and future "more liveable".[397] In this way, an apology is understood as a

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[390] Ibid. at 9.
[391] Amy J Sepinwall 'Responsibility for Historical Injustices: Reconceiving the Case for Reparations' (2006) 22 *JL & Pol.* 3.
[392] Gray op cit note 380 at 1074.
[393] Ibid. at 1075.
[394] Ibid. at 1073.
[395] Ibid. at 1080.
[396] Roy L Brooks 'Getting reparations for slavery right-response to Posner and Vermeule' (2004) 80 *Notre Dame L. Rev.* 274.
[397] Ibid. at 274.

precondition for reconciliation by placing "forgiveness on the table".[398] Gray, however, points out that this atonement model relies on establishing moral guilt (rather than criminal guilt), something that can only be assessed internally and is a subjective acceptance of responsibility.[399] In other words, apologies are spontaneous and cannot be demanded,[400] while, practically, abusers are not likely to apologise, suggesting that such a sincere apology would be unlikely.[401] Similarly, reparations can also be conceptualised to pursue forward-facing goals when understood as fulfilling a responsibility for transformative justice. Here, the emphasis of reparations is on rebuilding social connections between perpetrator and victim groups, emphasising how reparations can be a good starting point to re-establish a dialogue between the two groups and eventually (hopefully) lead to better inter-group relations in the future.[402] It is worth noting, however, that some scholars argue that this transformative justice model is flawed and tends to collapse into the atonement model, given that there is no theoretical foundation for the concept of social repair.[403] Lastly, justifying reparations on the grounds of pursuing rapid social change also conceptualises reparations as a potential avenue to pursue forward-facing goals. More specifically, the thinking here is that without policies of retroactive reparation, agents of abuse have little incentive to change their behaviour and quickly adopt human rights practices.[404] However, by this logic, when implementing legal changes that reflect new understandings of criminality and that are retroactively enforced, it forces agents of abuse to react quickly and change their behaviour to reduce their future retroactive liability.[405] Critics point out that this predominantly economic argument assumes that abusers act only out of a self-interest that is both bound to material gain and that holds a long-term view.[406] Ultimately, regardless of how well conceptualisations of reparations to pursue both backward-facing and forward-facing goals hold up, when reparations are implemented in isolation, they become largely ineffective compromises of justice and prevention goals.

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[398] Ibid. at 275.
[399] Gray op cit note 380 at 1081.
[400] Ibid. at 1081.
[401] Ibid. at 1082.
[402] Ibid. at 1086.
[403] Ibid. at 1087.
[404] Ibid. at 1088-1089.
[405] Ibid. at 1089.
[406] Ibid. at 1089.

This is because reparations can be perceived as an attempt to placate victims, or as an attempt to buy their silence, without having to pursue any corrective actions or interventions. Sveaass and Margrethe make this argument, for instance, in the context of Argentina. More specifically, when the second democratically elected president, Carlos Saul Menem, implemented the country's initial reparations programme, the state had expressed no intention of prosecuting perpetrators beyond the initial nine mentioned in Chapter 2, and victims who applied for reparations had to renounce rights to further compensation.[407] As a result, these reparations were viewed by many victims as a way for Menem to politically buy their silence and compliance.[408] Similarly, Da Baets and Zeeman point out that the municipality of San Luis Potosi in Mexico erected a statue of femicide victim Karla Pontigo in May 2021 (an example of nonmaterial, group-oriented reparations), while her murder had gone unpunished.[409] Essentially, reparations (when implemented in the absence of other TJ mechanisms) risk deprioritising justice goals. Therefore, balancing the dual TJ pursuits of justice and prevention by paying reparations without implementing another TJ mechanism essentially risks angering the victim group.

3.3.2 Institutional reforms

Here I contend that institutional reforms would, much like a reparations programme, be an insufficient alternative to a SGBV TC largely because such an approach requires sacrificing justice. First, reforming institutions can help to prevent the same institutional failings that allowed atrocities or abuses in the past from reoccurring in the future.[410] Examples include reforming the military, policing and judicial sectors to prevent future state abuse and the persecution of civilians by increasing the transparency and accountability of these institutions.[411] An example of a gender-sensitive institutional reform in the policing sector can be observed in the Argentine

[407] Nora Sveaass & Anne Margrethe Sønneland 'Dealing with the past: Survivors' perspectives on economic reparations in Argentina' (2015) 4 *International Perspectives in Psychology: Research, Practice, Consultation* 233.
[408] Ibid. at 233.
[409] The Network of Concerned Historians. Annual Report 2022. Netherlands: Network of Concerned Historians at 88.
[410] Brahm op cit note 339 at 21.
[411] Ibid. at 25.

and Brazilian women's police stations model. More specifically, these are all-women police units that work parallel to ordinary police to both respond to and prevent SGBV.[412] However, the execution of government policies and institutional reforms will only be as successful as public servants are willing to make them. For instance, Sotheary points out that in Cambodia post-Khmer Rouge, while newly passed laws required consent for marriage, forbade physical abuse, and protected against sexual exploitation and prostitution, this new legislation was relatively ineffective because of the behaviours and biases of police officers and government authorities.[413] Therefore, without a mechanism to engage in cultural biases society-wide, institutional reforms to prevent future abuses will be relatively limited. Public vetting (ie, lustration), however, could remedy this problem. More specifically, lustration has the potential to prevent future discrimination and victimisation by removing from their job posts public servants that are biased against the victim group and who would otherwise continue to have the power to restrict the general public's access to resources and welfare services based on their identity.[414] In this way, lustration may disrupt networks of solidarity and co-operation that are aimed at maintaining the *status quo* in which one group monopolises material wealth and social status.[415] Consequently, lustration has the capacity to remove public servants that have strong negative attitudes towards the victim group from their positions of power, thereby more effectively pursuing prevention goals.

Secondly, institutional reforms (specifically lustration) could also help pursue justice goals. This is because public servants can also be vetted for their involvement in past criminal activity. More specifically, public servants implicated in past economic crimes typically difficult to prove in criminal courts (such as money laundering and personal enrichment) can be punished by removing them from their positions of employment.[416] Therefore, lustration may be used to punish perpetrators of crimes that supported systems of oppression and maintained these networks of solidarity and co-

[412] Kerry Carrington et al 'How women's police stations empower women, widen access to justice and prevent gender violence' (2020) 9 *International journal for crime, justice and social democracy* 43.
[413] You Sotheary 'Guarantees of Non-Recurrence' (2019) *Swiss Peace* Cambodia Working Paper Series 6/2019, Basel, Center for the Study of Humanitarian Law, University of Basel at 24.
[414] Letki op cit note 153 at 540.
[415] Ibid. at 540.
[416] Sixty-eighth session of the United Nations General Assembly supra note 154 at para 54.

operation by removing them from their jobs in the public sector. In other words, instead of pursuing justice goals with a judicial action, lustration does so using an administrative one.[417] However, as Horne points out, lustration (particularly without civil society consultation) can be perceived as violating the individual rights, liberties, and legal guarantees of those vetted.[418] This was the concern in post-apartheid South Africa, leading to the TRC recommending against lustration.[419] Therefore, lustration being a rather undemocratic option, it has rarely been used outside of post-Communist Eastern European states,[420] and is rarely considered a viable practice with which to pursue these kind of justice goals. Furthermore, in the specific case of femicide and SGBV, lustration is even less appropriate. This is because the sheer number of men in society that harbour patriarchal and misogynist beliefs and attitudes, and not to mention those that exacerbate and contribute to the economic dependence of women on men, is far too great to be able to vet and remove them all.

3.3.3 A SGBV tribunal

Regarding the establishment of a special tribunal, I contend that such an approach would emphasize retributive justice over prevention goals, essentially rendering a tribunal largely ineffective at reducing future femicide and SGBV rates. First, as alluded to in Chapter 2, a tribunal, or any kind of criminal prosecution, is the quintessential mechanism with which one can pursue retributive justice goals. Under this retributivism model, criminal prosecutions are carried out by the state, which seeks retribution on behalf of victims for their suffering,[421] because it has a "moral duty to punish past wrongdoing".[422] However, in the case of South Africa, there has been a systemic failure to investigate and prosecute SGBV and femicide cases.[423] In fact, according to The Rape Adjudication and Prosecution Study in South Africa, a national study conducted by the South African Medical Research Council, the conviction rate

[417] Schmid op cit note 269 at 3.
[418] Horne op cit note 155 at 502.
[419] Truth and Reconciliation Commission supra note 18 vol 5, p 310.
[420] Vuks op cit note 156 at 18.
[421] Assiye Aka 'The Principle of Retributive Justice and Subjects: Femicide in Türkiye' (2023) 13 *Sociology Mind* 172.
[422] Michael T Cahill 'Retributive justice in the real world' (2007) 85 *Wash. UL Rev.* 818.
[423] The South African Women Lawyers Association. High Level Session on Gender Based Violence and Femicide 2020. Gauteng, South Africa at 4.

for rape was as low as 8 per cent in 2012.[424] Furthermore, according to police 2022/2023 first quarter statistics, while 9 516 rape cases were opened with SAPS between April and June 2022, there were only 286 rape convictions in that same period.[425] Therefore, an argument could be made in favour of a SGBV tribunal to assist South Africa's overburdened criminal justice system. I contend however, that, much like ordinary criminal prosecutions, a special tribunal would most likely pursue justice for individual or small groups of victims at a time, which would make it a slow and costly process.[426] Moreover, when the number of potential defendants is very large (as it would be in the context of SGBV and femicide), prosecuting them all at a special tribunal is typically beyond the financial, human, and political capacity of the state.[427] This is not to say that criminal prosecution is not pivotal, and that all perpetrators should not face prosecution. Rather, it is to recognise the woeful reality that SGBV and femicide is such an enormous problem in South Africa, and that there are profound practical problems with pursuing criminal prosecutions fully. While this should not be the case, it is. As a result, I contend that a TJ strategy that solely implements criminal prosecutions will in all likelihood lead to only a small number of victims seeing their perpetrators prosecuted, resulting in a large impunity gap with only the most high-profile and most provable cases being prosecuted.[428] As a result, victims are (generally) not included in tribunal proceedings on as large a scale as in TC proceedings. This problem is compounded by the fact that the demands for retributive justice for SGBV crimes are typically in tension with what is achievable, both politically and legally. In fact, even European states, the United States,[429] Australia, and New Zealand all have low rape conviction rates despite their otherwise robust legal systems.[430] This therefore sheds some doubt on whether a SGBV tribunal would be able to satisfy widespread demands for justice from SGBV victims.

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[424] SAMRC Gender and Health Unit 'Rape Adjudication and Prosecution Study in South Africa' available at *https://www.samrc.ac.za/intramural-research-units/rape-adjudication-and-prosecution-study-south-africa*, accessed on 15 March 2023.
[425] South African Police Service 'Minister Bheki Cele: Quarter One Crime Statistics 2022/2023' available at *https://www.gov.za/speeches/minister-bheki-cele-quarter-one-crime-statistics-20222023-19-aug-2022-0000*, accessed on 15 March 2023.
[426] Schmid op cit note 269 at 4.
[427] Ibid. at 2.
[428] Ibid. at 4.
[429] DeGuzman op cit note 273 at 37.
[430] Cassia Spohn 'Sexual assault case processing: The more things change, the more they stay the same' (2020) 9 *International journal for crime, justice and social democracy* 86.

Secondly, under the utilitarianism model,[431] criminal prosecutions pursue prevention goals by aiming to deter future violence when minimizing impunity. By punishing perpetrators, criminal prosecutions are thought to deter others from committing future crimes as potential perpetrators will fear being given the same punishment.[432] Additionally, punishing perpetrators also signals a clean break from an abusive past.[433] By this thinking, criminal prosecutions therefore contribute to re-establishing respect for human rights and the rule of law.[434] That being said, however, criminal prosecutions are also adversarial, pitting groups against each other in court rooms, rather than focusing on repairing the victim-perpetrator relationship.[435] What makes this worse, is that criminal prosecutions risk being interpreted as a form of perpetrator persecution under victor's justice.[436] Arenhovel points out that this is particularly the case if criminal prosecutions are perceived as unfair, targeting a specific group or demographic – for instance, critics of the ICC argue that all indicted and convicted war criminals come from small and mostly poor countries.[437] Then, as a result of this perceived unfairness, the criminal prosecutions in question lose legitimacy and can therefore become a source of strife and tension rather than reconciliation.[438] In the case of femicide and SGBV, a special tribunal could be perceived as a witch hunt, particularly targeting influential men in power. This then risks increasing feelings of animosity and resentment towards women, and subsequently reaffirming negative stereotypes of women used to justify patriarchal and misogynistic attitudes and behaviours. As a result, I argue that a SGBV tribunal would be an ineffective way to reduce future SGBV and femicide rates, whilst also being an inefficient and costly way to pursue widespread retributive justice.

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[431] Cahill op cit note 422 at 817-818.
[432] David Mendeloff 'Punish or persuade? The compellence logic of International Criminal Court intervention in cases of ongoing civilian violence' (2018) 20 *International studies review* 400-401.
[433] Schmid op cit note 269 at at 3.
[434] Jovana Davidovic 'Finding Space for Criminal Prosecutions Post-Conflict' (2016) 33 *Journal of Applied Philosophy* 65.
[435] Pham Quang Dung *The Constraints of Transitional Justice in Promoting Intergroup Reconciliation* (Masters thesis, E-International Relations, 2018) 4.
[436] Mark Arenhövel 'Democratization and transitional justice' (2008) 15 *Democratisation* 576.
[437] Ibid. at 576.
[438] Ibid. at 576. See also Anna Uger 'Examining the Dangers of a "Victor's Justice" Trial Through the Lens of the Trials of Hosni Mubarak and Saddam Hussein' (2013) 174 *Law School Student Scholarship* 22.

This is not to say, however, that I argue for the complete forgoing of criminal prosecutions. In fact, at the beginning of this chapter, I proposed that my SGBV TC work alongside the NPA, forwarding evidence and recommending cases for prosecution. More specifically, TCs have the capacity to amass physical evidence and eye-witness testimonies during their investigations, which can then be forwarded on to the prosecutor's office with recommendations of perpetrators to prosecute.[439] In this way, TCs can support prosecutors to pursue cases against perpetrators in court when they would otherwise not have the financial, human, and political capacity to do so if working solely with the police department also mandated with day-to-day policing. Moreover, in the wake of TC proceedings and truth-seeking processes, societies may see an uptake in victims' demands for retributive justice after the facts about human rights violations have been revealed,[440] which, if the state cannot meet these expectations, risks making victims feel disillusioned and resentful. However, I contend that victim disillusionment and resentment could be minimized were the TC to work in tandem with the NPA from inception. Essentially, TCs that forward names of perpetrators implicated in human rights violations along with evidence of their crimes to the prosecutor's office, have the potential to minimize the prosecutorial impunity and subsequent victim disillusionment and resentment that is often associated with TCs.

Therefore, while I do argue that a SGBV tribunal would be ineffective at reducing femicide and SGBV rates in South Africa (and not to mention a costly and inefficient process), I do not call for total prosecutorial impunity. Rather, I argue that the pursuit of retributive justice goals through criminal prosecutions would be best when accompanying a SGBV TC that pursues both restorative justice and prevention goals.

3.4 Conclusion

At this stage of my thesis, I have shown how a TC can reduce SGBV and femicide rates by promoting a more inclusive shared historical narrative of femicide in South Africa, promoting positive changes in patriarchal attitudes and behaviours, as well as by guiding reparations and institutional reforms aimed at minimizing future violence,

[439] Hayner op cit note 82 at 597.
[440] Aoláin op cit note 243 at 294.

all while pursuing restorative justice for SGBV victims. Moreover, I have also shown why a reparations programme, institutional reforms, or establishing a SGBV tribunal would be ineffective substitutes to a SGBV TC, ultimately arguing that none of these mechanisms would be able to adequately balance both the backward-facing pursuit of justice goals and the forward-facing pursuit of prevention goals as a SGBV TC would be able to. In the next chapter, I will apply these TJ theoretical arguments to the TRC case study.

CHAPTER 4 – JUSTIFYING A SECOND TRUTH COMMISSION POST-TRUTH AND RECONCILIATION COMMISSION

4.1 Introduction

Given the real or perceived failures of South Africa's original TRC process, there might be some scepticism about the proposals advanced in this thesis. In this chapter, I seek to address this question head-on. In order to do so, I will first highlight the main criticisms levelled against the first TRC process. To this end, it must be noted from the outset, that while the TRC has been praised internationally,[441] many scholars (and South Africans) have come to view the TRC rather pessimistically. For one, very few of the perpetrators that the TRC did not grant amnesty to and recommended be prosecuted instead ever went to court. In fact, only one perpetrator of apartheid violence was prosecuted and given a guilty sentence between 2001 and 2009.[442] This has led many victims to resent the TRC and the NPA for allowing this level of impunity.[443] Furthermore, reparations were not implemented by the incoming government quite how the TRC recommended (lumpsum payments issued to individual victims were less than the staggered payments recommended by the TRC). This has left many resentful, feeling that they have been insufficiently compensated for their suffering.[444] More than that, there is also a strong sentiment that the state has not done enough to improve victim groups' living conditions,[445] with inequality still an all too common feature of South African society. For instance, according to a 2022 World Bank report, race contributes around 38.9 per cent to overall inequality in South Africa.[446] Therefore, much doubt has been shed on whether reparations have been

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[441] Jazmin Acuña Cantero *After truth: The Truth and Reconciliation Commission, media and race relations in post-apartheid South Africa* (Government and International Relations Honors Papers, Conneticut College, 2011) 166. at 26.
[442] Hugo Van der Merwe & Guy Lamb 'Transitional Justice and DDR: The Case of South Africa' (2009) *International Center for Transitional Justice* 21.
[443] David Forbes 'Long road to no justice for TRC victims' *Daily Maverick* 2020 available at *https://www.dailymaverick.co.za/article/2020-11-21-long-road-to-no-justice-for-trc-victims/*, accessed on 2 October 2023.
[444] Adam Yates 'Justice Delayed: The TRC Recommendations 20 Years Later' ibid.2018 available at *https://www.dailymaverick.co.za/article/2018-09-05-justice-delayed-the-trc-recommendations-20-years-later/*, accessed on 20 September 2023.
[445] Gray op cit note 380 at 1049-1050.
[446] Victor Sulla et al *Inequality in Southern Africa : An Assessment of the Southern African Customs Union (English)* (2022) Washington, D.C., *World Bank Group*, at 3.

adequately used to decrease victims' vulnerability to current and future race-based discrimination and oppression.

Furthermore, TJ scholars have routinely questioned whether the TRC was able to promote widespread acceptance of a more inclusive narrative on apartheid-era violence, given some South Africans continue to justify racism or reminisce about apartheid. While the TRC did hold special hearings to address the complicity of the media, etc in apartheid abuses and make recommendations for how the media, banking, health, judicial, and police sectors could be reformed to prevent future abuses, the Commission's focus remained on addressing the individual, criminal acts of murder, torture, abduction, and severe ill treatment rather than on institutionalised racism. As a result, Harris, for example, argues that, in some cases, 'race' was collapsed into 'political motive', which, she ultimately argues resulted in "divorcing" race and racial identity from past violence.[447] In this way, racism in South African society (past and ongoing) was not sufficiently addressed by the Commission. Similarly, some scholars also question to what extent the TRC was able to encourage positive changes in inter-group attitudes and behaviours. For example, Chapman and Van der Merwe argue that the TRC was not able to fundamentally change the "prevailing views" of those that had supported the apartheid system of racial discrimination.[448] To this point, a poll from 2013 revealed that four out of every ten white South Africans do not believe that apartheid wrongly oppressed anyone.[449]

Another major critique of the TRC is that it misrecognised victims. For one, some feminist scholars argue that the final report did not apply a gendered lens to apartheid abuses. For instance, the TRC final report did not include a category for sexual violence; rather sexual violence was dealt with ambiguously as a type of torture or ill treatment,[450] thereby failing to adequately address how SGBV was used as a political tool of enforcement by the apartheid state, not to mention the fact that the apartheid

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[447] Bronwyn Harris *Arranging prejudice: Exploring hate crime in post-apartheid South Africa* Centre for the Study of Violence and Reconciliation Cape Town (2004) 6.
[448] Van der Merwe & Chapman op cit note 287 at 215.
[449] eNCA 'White South Africans in Apartheid Denial' available at *https://www.enca.com/south-africa/white-south-africans-apartheid-denial*, accessed on 20 May 2022.
[450] Kusafuka op cit note 244 at 50.

regime was both a patriarchal and racial one. Moreover, others argue the TRC did not adequately differentiate between victims' lived experiences along racial lines. For instance, Stanley specifically highlights Commissioner Archbishop Desmond Tutu and his suggestion that all South Africans, regardless of race, suffered as a result of apartheid.[451] In this way, some argue that the TRC and its Commissioners did not adequately recognise how victims of state crimes and victims of crimes committed by liberation movements differed. Given the above perceived failures, in this chapter, I am therefore predominantly concerned with showing why I still propose a SGBV TC in the below sections despite these concerns.

4.2 TRC background

Before discussing the above perceived failures in more detail, in this section I will first provide some legal and political context regarding how the TRC was initially set up. This will help me establish the Commission's mandates, scope and limitations, and therefore inform the discussions that follow. First, South Africa's transition from the apartheid regime to a democratic state was negotiated between the NP government and the liberation groups in several stages. Therefore, in contrast to Argentina where the incoming-president Raul Alfonsin unilaterally established an official commission of inquiry in his first week in office,[452] South Africa's TJ process was a result of protracted negotiations and a series of compromises.

The first hints of a transition to democracy can be observed in the late 1980s. More specifically, South Africa's 1989 general elections led to the appointment of NP candidate F.W. de Klerk as president after the party campaigned on the promises of a new constitution, power sharing and equal rights.[453] In February 1990, then-president De Klerk announced that his administration would "accord the process of negotiation the highest priority" with the aim of establishing a "totally new and just constitutional dispensation" in an address at the opening of the second session of the ninth

[451] Stanley op cit note 366 at 7.
[452] Hayner op cit note 82 at 615.See also Osiel op cit note 123 at 136.
[453] Norbert Kersting 'Direct democracy in constitutional processes: The South African plebiscite of 1992' (2010) 37 *Politikon* 212.

parliament.[454] The Convention for a Democratic South Africa (CODESA), with participants from 19 different political organisations of which the NP and ANC were seen as the main players,[455] was then founded that same year to negotiate the conditions for the NP handing over their power to a democratic, non-racial government.[456] By December 1991, CODESA participants had signed a declaration of intent, committing themselves to a "united, democratic, non-racial and non-sexist" South Africa and to a new Bill of Rights.[457] The second plenary session, known as CODESA II, was then held in 1992,[458] collapsing after the group reached a deadlock regarding the size of the majority which would be required to determine the final Constitution and after ANC supporters were massacred by Inkatha Freedom Party loyalists believed by some in the ANC to be working on behalf of the NP.[459] Then, in April 1993, the Multi-Party Negotiating Process (MPNP)[460] began, to which 26 delegations from different political parties and organisations were invited and tasked with designing a new electoral administration,[461] and with drafting the interim constitution and a set of constitutional principles on which the final constitution (to be created later by a democratically elected Constitutional Assembly) would be based.[462]

As a result, the interim constitution, known as the Constitution of the Republic of South Africa Act 200, was formally enacted by South African parliament in April 1994.[463] Later, and after the first democratic elections were held, the newly elected parliament (led by then-president Nelson Mandela) reached a consensus regarding a final constitution in 1996 based on the 35 immutable constitutional principles agreed upon during the MPNP.[464] Notably, the interim constitution provided an early outline

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[454] Address by the State President Mr FW de Klerk at the Opening of the Second Session of the Ninth Parliament of the Republic of South Africa in Cape Town on 2 February 1990.
[455] Gretchen Carpenter & Margaret Bewkes 'The path to constitutional democracy in South Africa: an update' (1992) 36 *Journal of African law* 168.
[456] Aeyal M Gross 'The constitution, reconciliation, and transitional justice: lessons from South Africa and Israel' (2004) 40 *Stan. J. Int'l L.* 58.
[457] CODESA Decleration of Intent. First Plenary Meeting of CODESA 1991. World Trade Centre Johannesburg at 1.
[458] Kersting op cit note 453 at 212.
[459] Ibid. at 220.
[460] Sometimes referred to as the Multi-Party Negotiating Forum
[461] Tom Lodge 'How the South African electoral system was negotiated' (2003) 2 *Journal of African elections* 71-73.
[462] Gross op cit note 456 at 58-59.
[463] Constitution of the Republic of South Africa Act 200 of 1993.
[464] Kersting op cit note 453 at 213.

of the TJ process that would follow. More specifically, it detailed the pursuit of national unity, reconciliation and the reconstruction of society by offering reparations to victims, and amnesty to perpetrators for "acts, omissions and offences associated with political objectives…committed in the course of the conflicts of the past" in exchange for truth.[465] The interim constitution also highlighted the state's commitment to "peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[466] The details of the TJ process that South Africa would adopt were then clarified in the 1995 Promotion of National Unity and Reconciliation Act (the TRC Act).

This TRC Act was eventually passed by parliament in 1995 after both the passing of the above interim constitution and a series of conferences hosting TJ experts from Central/South America and Eastern Europe, as well as representatives of domestic organisations in 1994.[467] The resulting Act then detailed how the reparations, amnesty and truth-seeking provisions alluded to in the interim constitution would be implemented, namely through establishing a Truth and Reconciliation Commission. More specifically, the Act detailed a TRC constituting three committees, namely the Committee on Human Rights Violations (chiefly fulfilling a truth-seeking function, mandated with investigating and establishing the truth of past human rights violations),[468] the Committee on Amnesty (responsible for granting amnesty to perpetrators of specifically defined politically motivated crimes regardless of which side of the conflict they fought on),[469] and the Committee on Reparation and Rehabilitation (tasked with making reparation recommendations for victims to the government based on the findings of its fellow committees).[470] In the below sections, I will primarily show why many scholars believe the TRC and its committees did not successfully balance both justice and prevention goals, as well as argue why I think these mistakes can be avoided when implementing my proposed SGBV TC.

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[465] Constitution of the Republic of South Africa Act 200 of 1993 supra note at ch.15, s.251.
[466] Ibid. at ch 15, s 251.
[467] Mark Hay 'Grappling with the past: the Truth and Reconciliation Commission of South Africa' (2000) 1 *African journal on conflict resolution* 33.
[468] Promotion of National Unity and Reconcilation Act 34 of 1995 supra note 143 at ch 3, s 14(1)(a)(v).
[469] Ibid. at ch 4, s 20(1)(b) and s 20(2)(b).
[470] Ibid. at ch 5, s 25(1)(a)(i)(bb-cc) and s 25(1)(b)(i).

4.3 Implementation of TRC recommendations

Broadly speaking, it is typically understood that many (if not most) of the TRC's recommendations were not fully followed through with. To show why, I will focus largely on contrasting the recommendations in the TRC final report with the actions and policies of the incoming government in the years after the report was published in 1998. Notably, the Commission's final report grouped reparations and institutional reform recommendations together as part of a 'reparation and rehabilitation' strategy found in volume 5, chapter 8 and in volume 6, section 5, chapter 7 of the final report. I will therefore discuss and assess the success of the two together in section 4.3.1. From there, I will discuss the Commission's recommendations for criminal prosecution in section 4.3.2. While specific recommendations by the Committee on Amnesty for which perpetrators should be prosecuted by the NPA cannot be found in the final report, a list of perpetrators the Committee granted amnesty to is included in volume 5, chapter 3 alongside recommendations in chapter 8 that all perpetrators denied amnesty and those that did not apply for amnesty be prosecuted.

4.3.1 Reparations and institutional reform recommendations

After collecting information from victims and survivors, NGO and community-based organisations representatives, faith communities and academic institutions,[471] the Reparation and Rehabilitation Committee recommended a five-part reparation and rehabilitation policy. The five components included urgent interim reparation (defined as assistance for people in urgent need of access to necessary services and facilities), individual reparation grants (ie, a financial grant scheme to provide each official victim identified in the final report with a financial grant), symbolic reparation/legal and administrative measures (this included establishing a national day of remembrance and reconciliation, the erection of memorials and monuments, the development of museums, and measures to help family members of apartheid victims get death certificates, as well as measures to expedite outstanding legal matters and to expunge criminal records relating to apartheid dissent), community rehabilitation programmes

[471] Truth and Reconciliation Commission supra note 18 vol 5, p 177.

(referring to community-based services and activities aimed at promoting victim healing and recovery), and lastly institutional reforms (ie, legal, administrative, and institutional measures aimed at preventing recurrence of human rights abuses).[472]

Regarding the first two, ie, urgent interim reparation and individual reparation grants, the final report recommended these be paid in the form of a monetary package rather than a services package. This was to accommodate the fact that victims' needs will change over time and will differ depending on the number of dependents they have or the area they live in, as well as to provide victims with the freedom of choice to determine how they want to use the money to best redress the injustices they have experienced.[473] While the TRC had already started co-ordinating urgent interim reparations before publishing the final report by arranging payments from the President's Fund to victims,[474] the individual reparation grant scheme was not implemented as the TRC recommended. In 2003, then-president Thabo Mbeki announced that the official victims of human rights violations identified by the TRC would each receive a once-off, lumpsum grant of R30 000.[475] This stands in stark contrast to the TRC's recommendation of biannual payments over the course of six years, the value of which would be determined based on the suffering caused by the identified violation, the amount needed to access necessary services, and the amount necessary to subsidise daily living costs (the annual value benchmarked at between R21 700 and R23 023 per annum).[476] In the end, therefore, not only did victims receive less money than what was recommended by the TRC, but they also received everything all at once rather than in a staggered way that could have better promoted sustainable wealth. Moreover, by December 2022, the President's Fund held almost R2 000 000 000 in unspent reparations money, with many victims still waiting to receive the money promised to them decades earlier.[477] Notably, the total cost of the TRC's

[472] Ibid. vol.5, p 175-176.
[473] Ibid. vol.5, p 178-179.
[474] Ibid. vol.5, p 182.
[475] Daniel Steyn 'South Africa: Nearly R2 Billion for Apartheid Reparations Is Unspent' 2022 available at *https://reparationscomm.org/reparations-news/south-africa-nearly-r2-billion-for-apartheid-reparations-is-unspent/#:~:text=Once%2Doff%20individual%20grants,a%20list%20of%2021%2C000%20people.*, accessed on 20 September 2023.
[476] Truth and Reconciliation Commission supra note 18 vol.5, p 184-185.
[477] Steyn op cit note 475.

recommended individual reparation grant scheme would have been R2 864 400 000 over the six-year period,[478] meaning that 14 years after the final TRC report was published, the vast majority of the money recommended be set aside for reparations by the TRC remained inaccessible to victims. As a result, some victims have labelled this an "insult", with others simply losing hope that the government will deliver on the TRC's promises.[479]

With regards to symbolic reparations, one could argue that the government has been rather successful at implementing the Commission's recommendations. Statues of leaders of the anti-apartheid movement can be found all over the country (for instance, multi-million statues of former president Nelson Mandela and Oliver Tambo),[480] the government has established a National Reconciliation Day (16 December),[481] street names and public buildings have been renamed after leaders in the anti-apartheid movement (for example, the street renaming project),[482] and museums have been created to educate South Africans about the atrocities committed under apartheid (for instance, the District Six museum in Cape Town highlighting the effect of forced removals on displaced families).[483] The same cannot, however, necessarily be said for community rehabilitation programmes. For example, the final report recommended (amongst other community initiatives) a programme to demilitarise the youth after their decades-long exposure to and involvement in political violence, a multi-disciplinary programme to help resettle internal or domestic refugees that were forcibly displaced under the apartheid regime, as well as a nationwide initiative to improve education in predominantly black schools.[484] However, more than 20 years later, extremely high rates of violence persist (for instance, there were 27 272 murders

[478] Truth and Reconciliation Commission supra note 18 at vol 5, p 185.
[479] Yates op cit note 444.
[480] Thami Magubane 'Multimillion rand statues of Nelson Mandela and Oliver Tambo to be installed in Durban' *IOL* 2023 available at *https://www.iol.co.za/mercury/news/multimillion-rand-statues-of-nelson-mandela-and-oliver-tambo-to-be-installed-in-durban-b20077d5-09b9-4d40-84dc-f856ddddb757*, accessed on 20 September 2023.
[481] South African Government 'National Reconciliation Day 2022' available at *https://www.gov.za/ReconciliationDay2022*, accessed on 20 September 2023.
[482] Thembani Mkhize Mamokete Modiba, Yashena Naidoo 'Street Renaming' *The Gauteng City-Region Observatory* 2022 available at *https://www.gcro.ac.za/research/project/detail/street-renaming/*, accessed on 20 September 2023.
[483] District Six Museum available at *https://www.districtsix.co.za*, accessed on 20 September 2023.
[484] Truth and Reconciliation Commission supra note 18 at vol 5, p 191-193.

nationwide in the 2022/2023 period),[485] estimates suggest that up to 200 000 South Africans are homeless (despite the government having built about 3 million low-cost homes since the end of apartheid),[486] and South Africa continues to have one of the most unequal schooling systems globally.[487] This therefore raises some serious doubts as to whether reparations have been adequately used to improve apartheid victims' living conditions, as well as to decrease their vulnerability to ongoing and future structural violence in South Africa.

Lastly, with regards to institutional reforms, the TRC made a series of recommendations to reform a number of industries and sectors in the country. Specific industries and sectors included the prison system (ie, human rights training for prison personnel, skills and basic rights training for prisoners, and improved healthcare for prisoners), the business sector (ranging from a wealth tax, a once-off levy on corporate and private income, a retrospective surcharge on corporate profits, the suspension of all taxes on material donations to formerly disadvantaged communities, to affirmative action programmes), land ownership (recommending an audit of all unused and underutilised land to make available to landless people), the banking sector (ie, increasing the transparency and accountability of the South African Reserve Bank, and a subsidised loan scheme for the development of small businesses and labour intensive industries), the justice sector (for example, correcting the racial and gender imbalances of high court judges, and mandatory community service for newly qualified lawyers), the policing, military and intelligence forces (ranging from increasing accountability and transparency through regular audits, human rights training, to independent monitoring), the health sector (for example, affirmative action programmes to increase the number of women and black doctors in the country, human rights training, better human rights training for nonmedical staff, and improving the accessibility of mental health services), and lastly the media industry (including preserving the independence

[485] Nathan Geffen Marecia Damons 'How bad is South Africa's murder rate?' *GroundUp* 2023 available at *https://www.groundup.org.za/article/how-bad-murder-in-south-africa/*, accessed on 20 September 2023.
[486] Eloise Jones 'Addressing Homelessness in South Africa' *Borgen Project* 2023 available at *https://borgenproject.org/homelessness-in-south-africa/*, accessed on 20 September 2023.
[487] Amnesty International 'South Africa: Broken and unequal education perpetuating poverty and inequalty' available at *https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/*, accessed on 13 February.2023.

of the South African Broadcasting Corporation, promoting the multiplicity of media voices through subsidising grassroots publications, and affirmative action programmes to improve diversity in journalism).[488] While it is impossible to assess the extent to which South Africa's democratically elected parliament was able to implement all of these reforms given the scope of this thesis, it is worth noting that a 2022 World Bank report identified South Africa to be the most unequal country in the world, with 80 per cent of the country's wealth being owned by only 10 per cent of the population, a division organised along racial lines.[489] Therefore, despite reforms such as the 2003 Broad-based Black Economic Empowerment Act 53 setting out to address the racial and gender imbalances regarding employment opportunities,[490] South Africa continues to be an extremely divided and unequal country in which black South Africans continue to be vulnerable to discrimination and structural violence. This then suggests that the execution of reforms did not necessarily result in the desired outcome of preventing future discrimination and abuse.

Some scholars suggest that a core reason behind this failure is endemic corruption. Mathiba, for instance, argues that corruption (specifically land-related corruption) has impeded development in South Africa and exacerbated inequality, thereby blocking the country from achieving TJ aims and objectives relating to reducing the vulnerability of formerly disadvantaged groups by reaffirming their socio-economic rights.[491] She goes on to suggest that among those most impacted by land-related corruption and most vulnerable to resulting abuses are women.[492] Van der Merwe and Lamb make a similar argument, suggesting that "the lack of substantial delivery on the promises made" can be linked to ongoing political corruption in the country; going on to suggest that this has meant South Africa's TJ process failed to effectively promote a culture of human rights, the accountability of political leaders, and government transparency.[493] In fact, using the case study of Tunisia, Michalakea argues that anti-corruption efforts and TJ practices both pursue liberal peacebuilding, with both

[488] Truth and Reconciliation Commission supra note 18 at vol 5, p 314-342.
[489] Sulla et al op cit note 446 at 3.
[490] Broad-based Black Economic Empowerment Act 53 of 2003 s 2(a-g).
[491] Gaopalelwe Mathiba 'Corruption in land administration and governance: a hurdle to transitional justice in post-apartheid South Africa?' (2021) 42 *Obiter* 561.
[492] Ibid. at 579.
[493] Van der Merwe & Lamb op cit note 442 at 24.

reinforcing the other.[494] Therefore, according to this thinking, corruption has played a significant role in the poor implementation of the TRC's recommendations.

4.3.1 (a) Application to proposed SGBV truth commission

Ultimately, in this section thus far, I have painted a rather pessimistic picture of how the TRC's recommendations were implemented. This is a difficult problem to address given a TC has no authority over the implementation of their recommendations and, as a result, no tangible benefit may result from TC recommendations. This is not to say, however, that a TC is not the best way to guide reparations and institutional reforms to reduce future femicide and SGBV rates in South Africa. As mentioned in Chapter 3, civil society is the "backbone" of a successful democracy,[495] and can play an important role in holding the government accountable to implementing the TC's proposed reform measures.[496] By counterbalancing the government, mobilising opinion, encouraging the government to impose better rules, and by monitoring state behaviour,[497] South Africa's civil society could help hold the government accountable to any recommendations put forward by a TC, as well as hold the government accountable to any potential corruption that arises. This is especially possible given South Africa has a relatively strong civil society,[498] and has been able to monitor public expenditure trends, government delivery of social development, as well as play an advocacy role to promote accountability of the government in the decades since apartheid ended.[499] Therefore, I contend that a TJ process to address SGBV and femicide in contemporary South Africa stands to be more successful than the TRC when it comes to following through with TC recommendations. Moreover, were the government not to implement the TC's recommendations sufficiently, there is no stopping NGOs and other organisations in the private sector from implementing projects (even if only on a small-scale) based on said recommendations, which would be publicly accessible in the final report.

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[494] Taygeti Michalakea 'Anticorruption and Transitional Justice: A Distinction Without a Difference' (2022) 22 *Human Rights Law Review* 17.
[495] Shawarib op cit note 347 at 82.
[496] Melish op cit note 346 at 7.
[497] Shawarib op cit note 347 at 82.
[498] Allison op cit note 348 at 716, 721.
[499] Patel op cit note 349 at 9.

4.3.2 Criminal prosecution recommendations

As mentioned earlier, South Africa's truth-seeking process included provisions for a *conditional* amnesty. More specifically, those that had committed gross human rights violations during apartheid were invited to apply for amnesty with the Committee on Amnesty, and those that met a set of predetermined conditions would not be prosecuted under criminal law.[500] According to the Act, these conditions were as follows, the violent act was "associated with a political objective",[501] the act was committed between 1 March 1960 and the "cut-off date" (later determined to be 1994),[502] and the applicant "made a full disclosure of all relevant facts".[503] The Committee ended up receiving approximately 7 000 applications for amnesty, of which 1 973 went to public hearings (the rest were rejected during the initial review process).[504] Notably, these hearings were far more legalistic than the victims' hearings, featuring lawyers, legal arguments, and cross-examinations (including those conducted by victims themselves).[505] As a result, Du Toit refers to the amnesty hearings as "quasi-judicial", stating the hearings focused primarily on observing the procedural rights of those implicated in the disclosures and allegations.[506] In fact, the Act stipulated that the Chairperson of the Committee on Amnesty was to be a judge,[507] thereby setting the tone for a legalistic process.

While the amnesty hearings were not concluded by the time of publishing, the final report included a list of nearly 200 names of perpetrators the Committee had granted amnesty to.[508] The final figure after all the amnesty hearings had been held was 849.[509] However, the Committee also handed over information and evidence on some 300 cases to the NPA,[510] recommending criminal prosecution where amnesty was either denied or never sought in the first place, in order to "avoid a culture of impunity and...

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[500] Promotion of National Unity and Reconcilation Act 34 of 1995 supra note 143 at ch 2, s 3(1)(b).
[501] Ibid. at ch 4, s 20(1)(b).
[502] Ibid. at ch 2, s 3(1)(a). See also Van der Merwe & Lamb op cit note 442 at 17.
[503] Promotion of National Unity and Reconcilation Act 34 of 1995 supra note 143 at ch 4, s 20(1)(c).
[504] Van der Merwe & Lamb op cit note 442 at 17.
[505] Ibid. at 17.
[506] André du Toit 'Experiments with truth and justice in South Africa: Stockenström, Gandhi and the TRC' (2005) 31 *Journal of Southern African Studies* 440.
[507] Promotion of National Unity and Reconcilation Act 34 of 1995 supra note 143 at ch 4, s 17(3).
[508] Truth and Reconciliation Commission vol 5, p 119-124.
[509] United States Institute of Peace op cit note 173.
[510] Van der Merwe & Lamb op cit note 442 at 19.

entrench the rule of law" in the country.[511] However, after the NPA placed a moratorium on apartheid-era cases in 2004 due to concerns of the political ramifications of pending cases, a new prosecution policy was introduced in December 2005 that allowed the NPA to either drop or not enter charges against perpetrators in cases that it deemed may undermine reconciliation or the needs of victims without public scrutiny or making the details of the case public.[512] Ultimately, while the policy was overturned by the North Gauteng High Court in 2008,[513] between the closing of the amnesty hearings in 2001 and 2009, only four of these cases were pursued in court (of which only two of the processes were concluded and only one ended in a guilty sentence).[514] To explain this trend, the government pointed to the country's untransformed judiciary, which lacked the political motivation to prosecute.[515]

Notably, this is part of a larger trend of prosecutorial impunity regarding acts of violence committed during apartheid. For instance, former police officer Joao Rodrigues was only charged in 2018 for the murder of Ahmed Essop Timol while he was in detention at John Vorster Square Police Station in Johannesburg in 1971.[516] Because of the lengthy delay in commencing the criminal charges (allegedly due to political interference), Rodrigues requested a permanent stay of prosecution, arguing that (as a result of these delays) he was subject to trial-related prejudice due to the degradation of his own and other witness's memory.[517] The Supreme Court, however, ruled against the request in 2021, confirming the decision of the Gauteng Division of the High Court in 2019.[518] In response, the Directorate for Priority Crime Investigation and the NPA issued a joint statement pledging to "revive these investigations and initiate prosecutions" while describing the delays in prosecuting perpetrators like

[511] Truth and Reconciliation Commission supra 18 vol 5, p 309.
[512] Van der Merwe & Lamb op cit note 442 at 21.
[513] See North Gauteng High Court ruling against a 2005 ammendment to NPA prosecution policy (2008). Or see Lukas Muntingh et al 'An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future' (2017) *Dullah Omar Institute* at 23.
[514] Van der Merwe & Lamb op cit note 442 at 21.
[515] Xolela Mangcu 'The state of race relations in post-apartheid South Africa' (2003) 2004 *State of the nation: South Africa* 92.
[516] *Rodrigues v National Director of Public Prosecutions and Others* 2021 (Supreme Court of Appeal South Africa). para 11.
[517] Ibid. para 78.
[518] Ibid. para 108.

Rodrigues as "unmerited".[519] Later, in January 2023, the NPA registered 64 new cases for investigation emanating from the TRC.[520] Regardless, the NPA failed to timeously follow through with the TRC's recommendations for prosecution.

4.3.2 (a) Application to proposed SGBV TC

While my proposal does not include an amnesty programme, I stipulated at the beginning of Chapter 3 that my proposed SGBV TC would be responsible for collecting and forwarding any evidence collected to the NPA to help facilitate the criminal prosecution of perpetrators. Therefore, were the NPA to register no new cases emanating from the TC, this would open up my proposed SGBV TC to similar critiques levelled against the TRC in the preceding paragraphs above. However, I contend that one can expect a greater political will to follow through with criminal prosecutions recommended by my proposed TC than was the case in the years following the TRC. This is because the government has already expressed a will to improve conviction rates for rape and other forms of SGBV. For example, at the Second Presidential Summit on Gender-Based Violence and Femicide in 2022, President Cyril Ramaphosa stated that upgrading courts and setting up care centres (detailed in South Africa's 2020 NAP) had been "effective" at improving conviction rates.[521] In fact, the conviction rate for cases reported at these care centres was as high as 77 per cent in the 2021/2022 financial year.[522] Therefore, I argue that the government has already expressed an intention to increase the number of SGBV convictions in the country, as well as has already taken steps towards improving this conviction rate. As a result, I argue that the political will to prosecute perpetrators recommended by the SGBV TC would be relatively high. This is not to say the process would be flawless. Of course, there will always be officials that work towards blocking their own or their loved ones' prosecutions.

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[519] South African Police Service 'Joint Media Statement issued by the National Prosecuting Authority (NPA) and the Directorate for Priority Investigation (Hawks)' available at *https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=33372*, accessed on 20 September 2023.
[520] SABC 'NPA to investigate 64 Apartheid-era cases emanating from the TRC' *SABC News* 2023 available at *https://www.sabcnews.com/sabcnews/npa-to-investigate-64-apartheid-era-cases-emanating-from-trc/*, accessed on 30 March 2023.
[521] South African Government op cit note 11.
[522] Ibid.

4.4 Promoting widespread acceptance of an inclusive shared narrative on apartheid violence

While the TRC was arguably successful when it came to promoting the widespread acceptance of the fact that the apartheid government committed criminal acts, critics argue that the Commission was unable to sufficiently contextualise these acts in the reality of state-sanctioned, structural racism. For purposes of this assessment, the TRC's Committee on Human Rights Violations, tasked with establishing a "complete picture" of human rights violations committed during the 1960 to 1994 period,[523] is the most relevant of all three committees. This is because the Committee published extensive records regarding who the victims of gross human rights violations were, what kind of violence was committed, and who the perpetrators of this violence were.

First, after taking testimonies from 21 227 victims (roughly 2 000 of which attended public hearings),[524] the Committee identified a list of official victims of human rights violations committed under the apartheid regime, which was published across 81 pages in the final TRC report.[525] Secondly, the report also expanded on the categories of human rights violations listed in the TRC Act, which defined gross human rights violations as "the killing, abduction, torture or severe ill-treatment of any person", or "any attempt, conspiracy, incitement, instigation command or procurement" to do so.[526] For instance, the final report clarified that killing included being beaten, burnt, drowned, electrocuted, stabbed, stoned or tortured to death, being poisoned, shot, run-over or executed, being killed in an explosion, by exposure, by a petrol bomb or by necklacing, or dying under suspicious or staged circumstances.[527] Abduction was stated to include both illegal and forcible abductions, as well as disappearances.[528] Torture was identified to include beating, burning, the use of chemicals, deprivation, exposure, electrocution, psychological abuse, bodily mutilation, forced posture, sexual

[523] Truth and Reconciliation Commission supra note 18 vol 5, p 1.
[524] Pumla Gobodo-Madikizela 'Women's contributions to South Africa's truth and reconciliation commission' (2005) *Hunt Alternatives Fund* v. See also United States Institute of Peace op cit note 173.
[525] Truth and Reconciliation Commission vol 5, p 26-107.
[526] Promotion of National Unity and Reconcilation Act 34 of 1995 supra note 143 at ch 1, s 1.
[527] Truth and Reconciliation Commission supra note 18 vol 5, p 17-18.
[528] Ibid. vol 5, p 21.

assault, suffocation, as well as unknown methods.[529] Severe ill-treatment was detailed to include severe beatings, injury due to burning, chemicals, shooting, stoning, teargas, suffocation or being run-over, explosion-related injuries, psychological ill treatment, bodily mutilation, sexual assault and abuse, and injuries relating to attempted necklacing.[530] Moreover, the Committee on Human Rights Violations identified a fifth category of violence which was not classified as a gross violation but deemed important to understand the context in which violations took place, referred to as associated violations.[531] These included the destruction of property, financial impropriety, professional misconduct, theft or fraud, framing, incarceration, deprivation, sexual harassment, violation after death, intimidation or harassment, beating, petrol bombing, and teargassing.[532] Thirdly, Volume 5 of the report also published the names of perpetrators that the TRC had granted amnesty to, spanning five pages.[533] Ultimately, as a result, the findings of the Committee on Human Rights Violations made the details of the human rights violations that were committed under the apartheid regime (including who perpetrated them and against whom) public knowledge.

It then follows that (at least to some extent), the TRC was able to promote the inclusion of victims' lived experiences and memories of past events in a collective and shared understanding of the past by making this record of abuses public knowledge. For instance, Sooka argues that the TRC was able to undermine the former state's claim that it was not a criminal state.[534] This is because, following the TRC hearings and its findings in the final report, South Africans could no longer "deny" that the former regime had operated outside of the law by killing, torturing, abducting, and severely ill-treating the South African citizens that had opposed the policy of apartheid.[535] In fact, the final TRC report identified the post-P.W. Botha regime to be particularly unlawful, stating that "the period during which the South African state ventured to the

[529] Ibid. vol 5, p 18-19.
[530] Ibid. vol 5, p 20-21.
[531] Ibid. vol 5, p 15.
[532] Ibid. vol 5, p 22-23.
[533] Ibid. vol 5, p 119-124.
[534] Yasmin Sooka 'Peace with accountability and respect for human rights: Ensuring sustainable dividends for the future' (2002) 11 *Track Two: Constructive Approaches to Community and Political Conflict* 2.
[535] Ibid. at 2.

realm of criminal misconduct stretches from P.W. Botha's accession to power in 1978 into the early 1990s".[536] The report argues that prior to 1978, the apartheid regime had not yet adopted a policy of systematically killing opponents and political activists, with most state-led deaths in this period a result of unjustifiably lethal force by public-order police officers carrying out a racist security policy.[537] The report then goes on to state that from 1978, the Botha administration applied a "military counter-revolutionary strategy" domestically, with SADF forces no longer directing all military operations at external targets.[538] The report further identifies language in government documents used to refer to internal dissidents that supports this claim, such as "eliminate enemy leaders", "destroy terrorists", "neutralise", "take out" and "wipe out".[539] Therefore, in this way, one could argue that the TRC was able to promote a more inclusive narrative of apartheid violence, making it harder to publicly deny the regime's criminality and the state-led human rights violations committed as part of this domestic military strategy. Of course, this is not to say that the TRC was able to eliminate all denial of past atrocities, just that the Commission was able to promote the widespread acceptance of this more inclusive narrative.

However, several scholars have questioned whether the TRC was able to subvert racial supremacy beliefs, especially amongst perpetrators, supporters, and beneficiaries of the former regime, and create a shared understanding of historical wrongdoing by the state and complicit bystanders regarding racial discrimination. For instance, Ferreira and Janks question whether the TRC sufficiently recognised how "resilient" the discourses of the racial, patriarchal, religious, capitalist, and military ideologies that fostered a climate of violence during apartheid were and continue to be.[540] They go on to argue that the TRC failed to "interrupt" these discourses, leading to continued displays of overt racism in the years after the Commission's proceedings.[541] Similarly, after carrying out a series of qualitative interviews, Adonis highlights ongoing pervasive racism two decades after the final TRC report was published, with one

[536] Truth and Reconciliation Commission vol 5, p 213.
[537] Ibid. vol 5, at 213.
[538] Ibid. vol 5, p 214.
[539] Ibid. vol 5, p 215.
[540] Ana Ferreira & Hilary Janks 'Doves, rainbows and an uneasy peace: Student images of reconciliation in a post-conflict society' (2009) 27 *Perspectives in Education* 143.
[541] Ibid. at 143.

participant stating that white South Africans have been resistant to changing their racist beliefs and practices, even passing them down to future generations.[542] Moreover, Harris highlights the fact that victims of gross human rights violations (as defined by the TRC Act and in the final report) are defined only in terms of intentional acts of violence with a political motive, thereby largely excluding the masses that suffered from apartheid's institutionalised and structural racist policies (such as forced displacements, the migrant-labour system and the Bantu education system) from being classified as victims of the apartheid regime.[543] As a result, Harris argues that, in some cases, 'race' was collapsed into 'political motive', further stating that the relationship between race and politics was never clearly defined and was treated inconsistently in the final TRC report.[544] Ultimately, she argues that this resulted in "divorcing" race and racial identity from past violence.[545] Again, the critique is that the TRC did not sufficiently engage with concepts of institutionalised and endemic racism.

Other scholars, such as Posel, question the extent to which a TC can deliver an "authoritative, official verdict on the recent past" given how contested history and memories of the past are.[546] As mentioned in Chapter 3, each group remembers events differently because their identity influences how they are treated in society and therefore how they experience events and subsequently remember them. Addressing this problem in its first volume, the TRC final report differentiates between four different types of truth. These are factual or forensic truth (referring to impartial and corroborated evidence-based facts), personal or narrative truth (aimed at validating the subjective experiences of apartheid victims previously silenced), social truth (refers to the community's narrative of events that emerges from debate and interaction), and healing or restorative truth (contextualises the facts within human relationships).[547] Posel, however, points out that this methodology is conceptually flawed in that the grounds for differentiating between the four notions of truth are rather vague and

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[542] Cyril K Adonis 'Generational victimhood in post-apartheid South Africa: Perspectives of descendants of victims of apartheid era gross human rights violations' (2018) 24 *International Review of Victimology* 55.
[543] Harris op cit note 447 at 6.
[544] Ibid. at 6.
[545] Ibid. at 6.
[546] Deborah Posel *The TRC Report: What Kind of History?: what Kind of Truth?* University of the Witwatersrand Johannesburg (1999) 11.
[547] Truth and Reconciliation Commission vol 1, p 110-114.

convoluted.[548] More than that, she suggests that differentiating between these different types of truth does not help "manage the tensions between competing versions and perspectives on the past" when the forensic truth, for example, conflicts with the social truth of a particular community.[549] Similarly, Kayser questions whether victims' spoken memory should have been treated as victim testimony at the TRC given its subjective nature,[550] and especially considering that, if all "stories" can be heard as testimony, then it becomes difficult to establish a clear narrative of the past.[551] Ultimately, Posel suggests that more work was needed by the TRC to consider how each type of truth related to and impacted the others.[552] Essentially, the critique here is that history is contested and the TRC did not determine how to both acknowledge contested truths while also promoting a shared narrative for the country.

4.4.1 Application to proposed SGBV truth commission

Above, I mentioned two main critiques of the TRC's ability to promote more inclusive shared narratives, namely that the Commission largely decontextualised human rights violations from the reality of state-sanctioned, institutionalised racism, and that it was unable to both acknowledge contested truths while also promoting a shared historical narrative. I contend, however, that these problems can be easily overcome when implementing my proposed SGBV TC.

First, it is crucial that the proposed commission not only investigates individual incidents of SGBV and femicide, but also contextualises these types of violence in the country's structures of patriarchy, focusing on how one's identity influences one's experience of and vulnerability to SGBV. This would, as mentioned in the last chapter, require an intersectional-gendered approach when researching and conducting hearings. As a result, rather than restricting investigations to the individual, personal motives of a rapist for example, this approach would focus on understanding how the

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[548] Posel op cit note 520 at 12.
[549] Ibid. at 13.
[550] Undine Kayser *To be considered... a post-TRC age?* (1999) Johannesburg, The History Workshop at the University of the Witwatersrand and The Centre for the Study of Violence and Reconciliation, 4.
[551] Ibid. at 5.
[552] Posel op cit note 520 at 13.

victim's gender, race, class, religion, and sexual orientation intersect under patriarchal institutions to increase their vulnerability to SGBV and femicide. Moreover, I propose the TC also investigates gendered harms caused by structural violence, ie, how the economic dependence of women on men under patriarchy tends to make them more vulnerable to acts of violence and abuse. Essentially, I assert that adopting an intersectional-gendered approach to researching and conducting interviews would help contextualise individual acts of SGBV and femicide in the reality of patriarchy in South Africa.

Regarding the second critique, ie whether it is possible to establish an authoritative truth if truth is inherently contested, it is quite a complex problem that all TCs face. On the one hand, establishing shared and 'authoritative' factual or forensic truths is rather simple. For instance, where there is physical evidence or eyewitness accounts that corroborate victim testimony, it would be very difficult to contest that these acts of gendered violence took place. Moreover, if enough evidence is collected to corroborate many victim accounts of SGBV, then it would also become difficult to contest that South Africa has a massive and pervasive SGBV and femicide problem. However, on the other hand, it is harder to promote and establish a shared narrative on the more abstract problem of institutionalised patriarchy, given physical evidence cannot necessarily be collected to definitively corroborate and prove the existence of patriarchy and/or its connection to SGBV and femicide. I therefore propose that the SGBV TC focuses on establishing narrower, more provable shared 'truths'. Specific examples of these 'truths' include narratives that women are more likely to experience SGBV than men, that women are more likely to live below the poverty line than their male counterparts, that poorer women are more likely to experience SGBV or femicide than wealthier women, that men that hold more 'traditional' views on gender norms are more likely to be violent towards women than men that hold more equitable views on gender relations, and/or that traditionally hyper-masculine policing structures stigmatise victims and prevent them from reporting SGBV. Therefore, while I acknowledge that it may not be possible to promote and establish a shared, 'authoritative' truth regarding how patriarchy exacerbates SGBV and femicide, I contend that it would be possible to promote and establish narrower and more provable

'truths', that when put together, imply and show that patriarchy exacerbates and perpetuates SGBV and femicide.

4.5 Encouraging positive changes in cross-racial attitudes and behaviours

In Chapter 3, I mentioned that a TC has the potential to encourage positive changes in inter-group empathy (and therefore attitudes and behaviours) when presenting both victim and perpetrator groups with new information about each other that was not commonly known or acknowledged before the TC proceedings. In the case of the TRC, the victim hearings arguably presented wider society with new information regarding victims' pain and suffering that had not been widely acknowledged until then. For one, Aiken argues that the TRC hearings provided members of "previously antagonistic groups" the chance to hear the "Other's story", typically for the first time.[553] Similarly, Kayser points out that the Commission's hearings and findings "admitted a language of pain" and the "narration of…atrocity" into South African discourse in an unprecedented way.[554] Aiken goes further to suggest that, as a result, the TRC provided South Africans the opportunity to re-examine their own complicity in past violence and abuse.[555] Gobodo-Madikizela takes this further, suggesting that this re-examination of complicity sometimes extended to remorse. More specifically, she gives an anecdotal account of how a police conspirator implicated in the deaths of the Gugulethu Seven grew "anxious" as he was confronted by the pain and anger of his victims' mothers when desperately asking for their forgiveness.[556] Moreover, Gobodo-Madikizela references psychoanalysis theory that suggests witnessing the effects of trauma helps develop a capacity to recognise the thoughts and feelings of another, to explain (possibly) why witnessing victims' testimony at a TC could encourage feelings of empathy and remorse in bystanders and perpetrators.[557]

However, Barnard-Naude points out that many victims felt pressure at the TRC hearings to express forgiveness for past abuses in the name of national unity and

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[553] Aiken op cit note 321 at 25.
[554] Kayser op cit note 550 at 4.
[555] Aiken op cit note 321 at 25.
[556] Pumla Gobodo-Madikizela 'Trauma, forgiveness and the witnessing dance: Making public spaces intimate' (2008) 53 *Journal of Analytical Psychology* 179-181.
[557] Ibid. at 172.

reconciliation.[558] Similarly, Brudholm argues that because the TRC promoted forgiveness, reconciliation and healing as "overriding values", resentment and calls for retribution were seen only as "destructive".[559] In fact, Brudholm argues that some TRC Commissioners (specifically singling out Archbishop Desmond Tutu) "repeatedly lauded" victims that forgave and reconciled with their perpetrators over those that did (or could) not.[560] Using the TRC as an example, Brudholm then argues that TCs do not typically consider the value and legitimacy of such 'negative emotions', labelling them rather as "hindrances to reconciliation".[561] Essentially, this can then result in a 're-shaming' of victims, whereby those that opt not to forgive are stigmatised and perceived negatively.

Regardless however, research, suggests that cross-racial attitudes did not improve much in the decade or so after the TRC hearings. For example, as recently as 2013, a poll revealed that four out of every ten white South Africans do not believe that apartheid wrongly oppressed anyone.[562] Furthermore, Chapman and Van der Merwe argue that the TRC was not able to fundamentally change the "prevailing views" of those that had supported the apartheid system of racial discrimination.[563] They go on to explain that the majority of white South Africans did not believe that they had a "special responsibility" toward fellow citizens regarding past violence in the years after apartheid.[564] Field, however, points out that it is "unrealistic" to expect a temporary commission like the TRC to be able to fully heal a nation.[565] By this thinking, therefore, TCs are rather ineffective mechanisms when it comes to changing inter-group attitudes.

4.5.1 Application to proposed SGBV truth commission

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[558] Jaco Barnard-Naudé 'On Apology and the Failure of Shame in the TRC' in *Unsettling Apologies* Bristol University Press(2022) 269.
[559] Thomas Brudholm 'Revisiting resentments: Jean Améry and the dark side of forgiveness and reconciliation' (2006) 5 *Journal of Human Rights* 10.
[560] Ibid. at 10.
[561] Ibid. at 9.
[562] eNCA op cit note 423.
[563] Van der Merwe & Chapman op cit note 287 at 215.
[564] Ibid. at 215.
[565] Sean Field *Memory, the TRC and the significance of oral history in post-apartheid South Africa* University of the Witwatersrand (1999) 7.

Here, I assert that the TRC's failures/limitations described above, ie stigmatising victims that do not forgive their perpetrators and failing to change the prevailing views amongst members of the perpetrator group, are not relevant to the proposed SGBV TC. First, I argue it is unlikely that concepts such as forgiveness and unity would be emphasised as greatly during my proposed SGBV TC as they were during TRC proceedings. This is because the SGBV TC, set up in an established democracy, would not be mandated with achieving reconciliation nor with pursuing nation-building initiatives. In other words, there would be no need to forward unity through forgiveness in order to ensure and maintain peace and political stability.

Secondly, I contend that aiming to fundamentally change the views of the supporters and beneficiaries of patriarchy is simply too ambitious a goal. Rather, I argue that a SGBV TC stands to encourage inter-group empathy. This is particularly important in the context of SGBV given the fact that feminist scholars such as Saez *et al.* argue that, women being dehumanised under patriarchy, men often lack empathy for women, viewing them not as people but as objects, which in turn leads to an increased willingness to inflict pain,[566] ie, exacerbating violence against women. Therefore, while I acknowledge that a TC may not be able to significantly change the prevailing views of men in South Africa, it may promote increased empathy for women, and in so doing, may reduce violent tendencies towards them.

4.6 Recognising victims

Whether the TRC was able to sufficiently help victims heal and pursue restorative justice remains highly contested, with several scholars suggesting that indirect misrecognition of victims was rampant during the TRC hearings and in the final report. To better understand these critics, I will focus on the hearings held by the Committee on Human Rights Violations. As noted in section 4.4, the TRC recorded testimonies from 21 227 victims, of which 2 000 attended public hearings held by the Committee.[567] These hearings, unlike the rather legalistic amnesty hearings described in section 4.3.2, were primarily concerned with providing a public platform on which

[566] Sáez et al op cit note 60 at 1436.
[567] Gobodo-Madikizela op cit note 524 at v. See also United States Institute of Peace op cit note 173.

individual victims could tell their 'stories' in diverse and communal settings, with the intention of publicly and officially acknowledging these 'stories' of pain and suffering.[568] To determine how successful these hearings were, Skinner carried out a study (published in 2000) interviewing 18 subjects before testifying, a week after testifying, and five months after testifying at the TRC victim hearings to determine their attitudes towards and perceptions of the TRC.[569] Ultimately, he concluded that the TRC was rated rather favourably, seen as a place for truth to be revealed, a place to talk about past abuses, and a place for suffering and contributions to the struggle to be acknowledged.[570] More specifically, interviewees noted relief after being able to talk about the trauma they experienced for the first time, joy at being able to discuss what had happened to them without any fear, increased visibility in and subsequently more inclusion into their community, and acknowledgement by the wider community that NP rhetoric labelling liberation movements as enemies was false.[571] Therefore, in the period immediately after the victim hearings, there is evidence to suggest that testifying at the TRC contributed to victim healing through the public acknowledgment of trauma.

However, Skinner further highlights that many victims concluded that the TRC proceedings were too rushed, did not give them enough time to process past events (particularly for victims in rural areas), did not adequately facilitate confrontation with perpetrators to resolve ongoing conflict and tensions, and did not end in the timeous paying of reparations.[572] Therefore, at the time of writing in 2000, Skinner concludes that the TRC should be treated as a "starting point", after which the state and NGOs should build on this healing and reconciliation work to make sure all "stories are completed".[573] Similarly, Stanley argues that a TC is less effective in the long-run when perceived as a "quick fix".[574] More specifically, she argues that for a TC to be effective, it must be followed by further, politically-difficult action that disrupts

[568] Du Toit op cit note 506 at 440.
[569] Donald Skinner 'An evaluation of a set of TRC public hearings in Worcester: a small rural community in South Africa' (2000) 5 *Psychology, health & medicine* 97.
[570] Ibid. at 100.
[571] Ibid. at 101-102.
[572] Ibid. at 105.
[573] Ibid. at 106.
[574] Stanley op cit note 366 at 8.

victims' disadvantaged status.[575] In the context of the TRC, Stanley highlights that victims became disillusioned (much like Skinner) once the truth-seeking process had concluded and past suffering was publicly acknowledged, but they had not yet received adequate help to improve their circumstances,[576] ie, reparations. Ultimately, victims felt disillusioned due to a lack of continued efforts to correct past injustices after the TRC proceedings concluded, thereby souring their perceptions of the TRC over time.

Other critics argue that the TRC overstepped the boundaries of a TC by pursuing mandates best suited for criminal courts, and in so doing distracted from the goal of victim healing. For one, Field points out that both the legalism of the TRC proceedings and the Commission's emphasis on achieving political closure directly influenced who was allowed to testify, what was included in testimonies, and how it was testified to the public and the Commissioners, suggesting that this restricted the TRC's ability to help victims heal and achieve emotional closure.[577] Du Toit further highlights this legalistic focus of the TRC, pointing out that while publicly acknowledging victims' 'stories' was the focus of the first year of TRC proceedings, by the time the final report was published in 1998, the methodologies of data-processing and corroboration of statements had become the Commission's focus during the amnesty hearings.[578] In other words, the focus of proceedings shifted from acknowledging personal victim truths to recording objective findings and identifying perpetrators "morally responsible and politically accountable".[579] This stands in stark contrast to the Argentine CONADEP and Chilean Rettig Report discussed in Chapter 2, which both avoided making perpetrator findings (focusing rather on reporting on victims' experiences of gross human rights violations), identifying this as a function of the criminal courts.[580] In fact, according to Du Toit, this focus on making perpetrator findings using a legalistic approach over focusing solely on reporting gross human rights violations led to the TRC "overstepping the boundaries" of an investigative body and carrying out a mandate more appropriate for criminal courts.[581] An exacerbating factor was that the

[575] Ibid. at 8.
[576] Ibid. at 8.
[577] Field op cit note 565 at 7.
[578] Du Toit op cit note 506 at 440.
[579] Ibid. at 440, 446.
[580] Ibid. at 445-446.
[581] Ibid. at 447.

TRC failed to clarify what role its perpetrator findings would play in legal proceedings, ie, to be used independently of or in place of court verdicts, or to be used in court proceedings to successfully prosecute perpetrators.[582] Du Toit ultimately argues that this contributed to confrontation between the Commission and members of both outgoing and incoming members of parliament.[583] Therefore, the TRC's focus on recording objective findings and identifying perpetrators distracted from the goal of victim healing and pursuing restorative justice, contributing rather to friction between the Commission and members of parliament.

Additionally, several scholars point out that the TRC indirectly misrecognised many victims, which in turn puts into question whether the TRC was able to sufficiently contribute to victim healing through acknowledgment. For one, Stanley argues that the TRC tended to simplify identities and promote homogeneity in the name of national unity and reconciliation, not always adequately differentiating between the lived experiences of white South Africans that suffered at the hands of liberation movements and those of South Africans that suffered at the hands of apartheid enforcers.[584] More specifically, she refers to TRC Commissioner Archbishop Desmond Tutu and his commentary (such as "it is wonderful for the country to experience that – black or white – we all feel the same pain") throughout the proceedings which suggested that all South Africans suffered wounds inflicted by the apartheid state, regardless of race.[585] In this way, the TRC therefore did not sufficiently differentiate victims' lived experiences according to their race-based identities, prioritising a political agenda (ie, national unity) over victim recognition,[586] and subsequently deprioritising victim healing.

Other scholars make a similar argument regarding gender-based identities. Kusafuka, for instance, argues that the TRC was not successful at "recording and addressing a gendered history of human rights violations".[587] Similarly, Goldblatt calls the final TRC report "curiously gender-blind", only briefly mentioning the needs of women as

[582] Ibid. at 447.
[583] Ibid. at 447.
[584] Stanley op cit note 366 at 7.
[585] Ibid. at 7. See also Richard A Wilson 'Reconciliation and revenge in post-apartheid South Africa: Rethinking legal pluralism and human rights' (2000) 41 *Current Anthropology* 80.
[586] Stanley op cit note 366 at 7.
[587] Kusafuka op cit note 244 at 57-58.

a disadvantaged group.[588] It is worth mentioning, however, that the TRC did hold the Special Women's Hearing in 1996 and 1997, specifically mandated with collecting women's experiences of apartheid.[589] These hearings were held in front of an all-women panel of commissioners with mostly women public audiences to encourage women to come forward and testify about specific gendered harms related to their experiences of harassment, detention, abduction, torture, imprisonment, rape and other psychological and economic losses.[590] Furthermore, 56.5 per cent of the total 21 227 testimonies collected by the TRC were presented by women.[591] That being said, engagement with how gender influenced the lived experiences of women (and particularly black women) under apartheid was relatively superficial. As already mentioned, a "gross violation of human rights" was defined by the TRC Act to be the killing, abduction, torture, or severe ill-treatment of any person, or any attempt, conspiracy, incitement, instigation, or command to do so.[592] At the time of drafting the TRC legislation, therefore, there was no specific reference to rape and sexual assault; rather, civil society groups began lobbying to address the gender-blind legislation only once the legal framework for the TRC had already been finalised.[593] Arguing that women experienced physical and psychological torture differently to men (typically in the form of sexual violence), these interventions by feminist activists led to the inclusion of rape and sexual assault in definitions of 'torture' and 'severe ill-treatment' in the final TRC report.[594] These interventions also led to the TRC's research department issuing a report on feminist theories of women's political struggles under apartheid, gendered aspects to physical, social and economic harms, as well as the role of patriarchal structures in subordinating women and in relegating rape and SGBV to the private sphere (fostering an unwillingness to prosecute rape and domestic violence in South Africa).[595] However, this report did not go beyond the draft stage, ultimately incorporated "sparingly and fragmentally" in the final TRC report, with the report failing to adequately analyse the links between past political struggle and ongoing high

[588] Beth Goldblatt 'Evaluating the gender content of reparations: Lessons from South Africa' (2006) *What happened to the women* 72.
[589] Kusafuka op cit note 244 at 55.
[590] Ibid. at 55.
[591] Gobodo-Madikizela op cit note 524 at v.
[592] Promotion of National Unity and Reconcilation Act 34 of 1995 supra note 143 at ch 1, s 1.
[593] Kusafuka op cit note 244 at 50.
[594] Ibid. at 50.
[595] Ibid. at 59-60.

rates of SGBV in the country.[596] Moreover, when the final report described domestic violence, it was described as a consequence of the disintegration of family structures caused by apartheid's racial policies of migrant labour, prolonged detention and exile,[597] failing to engage with any gendered hierarchies that may exist in family structures. In fact, the final report acknowledged these limitations itself. More specifically, regarding the 'way forward', volume 5 of the final report includes a statement by then-TRC Chairperson of the Commission on Gender, Thenjiwe Mtintso, in which she identifies the systematic violence against women (and children) during and post-apartheid to be at "genocide levels", with patriarchy and a resistance towards challenging male authority and control as the root causes for SGBV in the country.[598] Moreover, in this statement made during the TRC proceedings, she also warns that were the TRC not to adequately engage with institutionalised patriarchy, the country would need another TC to do so in the future.[599] Therefore, this is exactly what I propose. Given these significant gender gaps in the final TRC report, I contend that South Africa needs a second TC, one that addresses gendered harms under patriarchy.

4.6.1 Application to proposed SGBV truth commission

Here, I assert that my proposed SGBV TC would not face the same challenges to pursuing restorative justice as the TRC did, including rushed proceedings, overstepping the boundaries of a TC, and indirectly misrecognising victims. First, it is important that the proposed SGBV TC is understood simply as a first step, to be followed by increased state intervention that provides victims with psycho-social support to help them process their trauma, community programmes that facilitate conversations between men and women on the topics of patriarchy and SGBV, as well as the provision of reparations.

Secondly, I contend that, much like the TCs established in Australia and Canada to address colonial abuses described in Chapter 2, my proposed SGBV TC would not be mandated with granting amnesty, and therefore would not hold such 'quasi-judicial'

[596] Ibid. at 60.
[597] Truth and Reconciliation Commission supra note 18 vol 5, p 156-157.
[598] Ibid. at vol 5, p 418.
[599] Ibid. at vol 5, p 418-419.

hearings in the first place. More specifically, the commission would not be mandated with pursuing a 'political closure', given it would be set up in an already established democracy. Rather, it would be tasked with liaising with the criminal courts, forwarding any useful evidence collected during the hearings to the NPA and investigative authorities who would then be responsible for pursuing criminal prosecutions. In other words, making perpetrator findings would remain the responsibility of the criminal justice system.

Lastly, by adopting intersectional-gendered perspectives on violence, I contend that the proposed SGBV TC can avoid indirectly misrecognising victims on the same scale as the TRC. As described in Chapter 3, an intersectional-gendered approach would allow the commissioners to consider how gender, class, race, religion and sexual orientation all intersect under patriarchy to shape victims' lived experiences when conducting interviews, as well as allow researchers and those responsible for writing the final report to do the same. Moreover, such an approach to research would produce statistics on SGBV and femicide in South Africa disaggregated by race and sexual orientation, scarcely available at the moment. These statistics could then help inform any reform recommendations, as well as help monitor levels of violence amongst these particular demographics. Therefore, were the proposed SGBV TC to adopt an intersectional-gendered approach to conducting research and interviews, I assert that the TC would be able to avoid the large-scale indirect misrecognition of victims critics argue the TRC was guilty of.

4.7 Conclusion

In this chapter, I set out to address the elephant in the room so-to-speak, answering the following question: why am I proposing a TC 30 years after the TRC, now considered controversial with many scholars regarding it to have been a failure? Ultimately, I argued that given the context of present-day South Africa (ie, an established democracy with a relatively strong civil society), given the TC is treated as a starting point followed by significant state intervention, and given the TC adopts an intersectional-gendered perspective on violence, many of the TRC's perceived failures can be avoided in a second iteration focusing on SGBV and femicide. In my final chapter, Chapter 5, I will then show why a SGBV TC would help pursue both justice

goals for SGBV victims and prevention goals to reduce future levels of gendered violence in contemporary South Africa.

CHAPTER 5 – CONCLUSION

5.1 Introduction

Few dispute that South Africa has a significant SGBV and femicide problem. Thus, it is clear serious intervention is necessary to reduce future rates of gendered violence in the country. Furthermore, as mentioned in Chapter 3, there has also been a systemic failure to prosecute perpetrators of SGBV in the country. Calls for justice are therefore not fully met, nowhere close, in fact. A mechanism to pursue both prevention and justice goals regarding gendered violence in South Africa is therefore sorely needed. In this thesis thus far, I have proposed South Africa set up a SGBV TC to pursue both these goals. More specifically, I contend the proposed TC could do so by pursuing restorative justice for SGBV victims via truth-seeking, and by reducing future violence through promoting more inclusive shared narratives on SGBV, encouraging positive changes in patriarchal attitudes and behaviours, as well as through guiding reparations and institutional reforms aimed at reducing future SGBV and femicide rates.

To best achieve these goals, I propose that the TC be divided into three different committees (much like the TRC), all adopting intersectional-gendered perspectives on violence. The first would be tasked with truth-seeking. More specifically, this committee would be mandated with collecting victim and eyewitness testimonies on a public platform, as well as with collecting physical supporting evidence to be forwarded to the NPA with recommendations for criminal prosecution. To prevent the widescale indirect misrecognition of victims, it is key this committee implement intersectional-gendered policies to overcome barriers to women's participation in the victim hearings. Specific examples of these policies include providing childcare or transport assistance to those financially disadvantaged victims; special anonymity provisions or witness protection for SGBV victims that are members of communities where SGBV is particularly stigmatised; and creating special sub-committees for SGBV crimes such as corrective rape that target homosexual women. Again, it is worth noting that it would be impossible for a SGBV TC to invite all victims of gendered harms to participate in the hearings simply due to the scope of SGBV in South Africa. However, I argue that given the systemic failure to prosecute these crimes in South Africa, a TC, while limited by the country's financial and human capacity, would still

represent a more efficient way to pursue widespread justice for victims and to include more victims directly in justice proceedings than is currently possible with South Africa's existing judicial system.

The second committee would then be tasked with hosting public forums open to wider society. This committee would provide a public platform on which communities would be able to discuss and engage in debates on topics such as social responsibility towards SGBV and femicide victims, the complicity of bystanders, attitudes/beliefs regarding male dominance/control, the role of women in the private and public spheres, and definitions of masculinity, to name a few. Moreover, when discussing these topics, it is important that all debate chairpersons are educated and informed on how gender intersects with race, sexual orientation, religion and class under patriarchy to shape SGBV and femicide victims' lived experiences and vulnerability. The last committee would then be tasked with making recommendations to the government, ranging from institutional reforms to reparations programmes. These recommendations would be informed both by the findings of the two preceding committees, as well as by the committee's own independent research into the correlation between patriarchy and SGBV/femicide. Again, when conducting independent research, researchers should be mandated with paying special attention to how the needs of SGBV victims may differ depending on their sexual orientation, religion, class and/or race. Once all hearings and proceedings are concluded, the findings made by all three committees would then be published in the TC's final report, to then be widely disseminated to the public in as many languages as possible.

Notably, in contrast to the TRC, I have not suggested any provisions for amnesty. Given that South Africa is an established democracy and is not negotiating a transition from war to peace, or from authoritarianism to democracy, I do not propose an amnesty provision on the basis that the compromise is not necessary to achieve social stability. Removing the amnesty provision, does however mean that SGBV and femicide perpetrators would not have an incentive to participate in TC proceedings. One way to solve the issue could be to offer reduced sentencing for perpetrators that participate and testify in front of the commission. This is already an accepted practice in the courts of law, whereby perpetrators that co-operate with investigators as state witnesses or

that plead guilty are sometimes given shorter sentences.[600] In this way, perpetrators that opt not to testify at the commission would get harsher prison sentences than those that did. That is, were the commission to collect enough evidence against them to forward to the NPA for prosecution.

5.2 Restorative justice

Given South Africa's criminal justice system is presently overburdened, stigma within policing and judicial structures (as well as in broader society) often prevents women from reporting SGBV, and given SGBV crimes can be legally difficult to prove, calls for justice by victims of gendered violence have mostly gone unmet. Here, in this section, I argue that South Africa needs a SGBV TC to pursue widespread restorative justice for victims of SGBV and femicide where the criminal justice system has failed victims for whatever reason, as well as to improve how the criminal justice system deals with SGBV and femicide cases going forward.

First, in the short-term, I contend that a SGBV TC could fill the above justice gap by providing a one-off benefit to SGBV and femicide victims. On the one hand, a TC could do so by providing victims a platform on which they could pursue restorative justice goals when testifying at the victim hearings instead of waiting on the state to pursue retributive justice goals on their behalf (which often does not materialise). More specifically, while criminal prosecutions are lengthy, with the state typically prosecuting one perpetrator at a time and therefore pursuing retributive justice goals for small groups of victims, a TC can function as a platform on which many victims can pursue restorative justice goals at once, with thousands of victim hearings taking place over the course of a few months or years. While this would not increase criminal prosecutions nor convictions for SGBV cases, truth-seeking (as shown in Chapter 3) has the potential to help victims heal from their trauma on a large scale. This is particularly relevant to the context of femicide and SGBV in South Africa, given that, as already mentioned in section 1.3.1, gendered harms such as intimate partner violence have been linked to suicide and post-traumatic stress disorder, amongst other

[600] Criminal Procedure Act 51 of 1977 ch 15, s 105(A)(1)(a)(ii)(dd).

mental health problems.[601] Therefore, healing through truth-seeking and not to mention with the assistance of free (or at least subsidised) government-provided psycho-social support that can be provided before, during and after testifying at the proposed SGBV TC, is crucial in a country like South Africa where those women most vulnerable to SGBV and femicide are typically found in poorer households, and where access to psycho-social support offered by the state is so scarce.[602] On the other hand, a second one-off benefit associated with a SGBV TC is that the commission could help alleviate pressure on existing policing and judicial structures in the country. By collecting victims' testimonies and supporting evidence, and where possible, forwarding said evidence and eyewitness testimonies to the SAPS and NPA, the SGBV TC has the potential to alleviate pressure on the presently overloaded investigative and prosecuting authorities. Essentially, by collecting this evidence, a SGBV TC has the potential to take some of the burden off existing policing structures and, hopefully, make investigations into SGBV easier for the police, and in turn (by this logic) lead to more efficient criminal prosecutions by the NPA. Therefore, I argue that a SGBV TC has the potential to help victims on a one-off basis by providing a platform on which they can pursue victim healing via truth-seeking (much needed given South Africa's high femicide and SGBV rates, particularly amongst the country's poor), as well as by taking pressure off the authorities responsible for investigating and collecting evidence relating to SGBV cases and hopefully increasing the efficiency of SGBV criminal prosecutions.

Secondly, in the long-term, I argue that a TC has the capacity to boost both the reporting of and the conviction rates for SGBV by improving the manner in which the criminal justice system (namely, police officers and prosecutors) deals with SGBV and femicide. First, as argued in Chapter 3, a TC has the capacity to improve patriarchal attitudes and behaviours. More specifically, were my proposed SGBV TC to be successful and able to promote increased empathy for women in broader society, this could change how SGBV is perceived. In turn, this could then help destigmatise SGBV and encourage women to come forward and report SGBV incidents to the police in

[601] Lagdon et al op cit note 40 at 2.
[602] For information regarding the scarcity of psycho-social support in South Africa, see Peacock op cit note 41 at 1896.

greater numbers, as well as destigmatise SGBV specifically amongst police officers and prosecutors, which would, hopefully, then lead to an increased will to investigate and prosecute SGBV cases by the SAPS and NPA, respectively. This is particularly important given one of the most prominent barriers to the prosecution of rape in particular (according to Torrey) is the "law's adoption of, or at least willingness to tolerate…myths about rape" that justify SGBV and place the blame with victims.[603] Secondly, were the TC to recommend well-crafted institutional reforms that were in turn successfully implemented by the government, these reforms could also have the capacity to improve reporting and conviction rates for SGBV. For example, reforms that decrease stigma around SGBV could encourage women to report these incidents at higher rates, and encourage women to come forward sooner which could then help police to collect the evidence needed for successful criminal prosecutions more timeously and effectively; gender-sensitive policies that effectively provide women with emergency housing could help women leave abusive relationships and report abusers at higher rates without as much fear of retribution and homelessness; setting up care centres in which women can report SGBV incidents via official channels in a more welcoming, victim-centric environment than police stations designed to receive and hold perpetrators in custodial cells could also lead to increased reporting; improved human rights training programmes for police officers, prosecutors, judges and other staff could improve how SGBV victims are treated and how well cases are investigated by decreasing the stigma around gendered harms. Ultimately, therefore, a SGBV TC has the potential to improve both the reporting and conviction rates for SGBV and femicide going forward by encouraging positive changes in patriarchal attitudes and behaviours, and by guiding reparations and institutional reforms.

5.3 Promoting a more inclusive shared narrative of femicide and SGBV

As first referenced in section 3.2.1, in a 2010 survey, one in three South African men admitted to rape, three in four to GBV acts, and nine in ten admitted to believing women should obey their husbands.[604] Also first raised in section 3.2.1, according to a 2001 Human Rights Watch report, eight out of ten men in the Gauteng region

[603] Torrey op cit note 314 at 1014.
[604] Smith op cit note 302.

believed that women and girls caused sexual violence.[605] Similarly, as previously alluded to in sections 3.2.1 and 5.3 above, Torrey highlights how this victim blaming can manifest in the form of rape myths, ie, lies that typically defame women, placing the blame of their own victimhood on themselves. Specifically in the context of South Africa, the 2013 study commissioned by the Department of Women, Children and People with Disabilities first referenced in section 3.2.1 suggests that male sexual entitlement is rather socially acceptable in the country, as are ideas that women and girls are responsible for their own rape.[606] Ultimately, I contend that a SGBV TC has the capacity to promote narratives of SGBV that incorporate victims' lived experiences of this type of violence and that are more inclusive than these rape myths that are so prolific in societies worldwide, and particularly in South African society.

For starters, a SGBV TC stands to garner mass media attention in newspapers, on TV, and in social media, much like I detailed the TRC did in Chapter 4. Notably, to optimise media attention, my proposed SGBV TC would need to establish a robust media management team to liaise with media outlets and make reporting on victim hearings accessible, and to avoid the premature leaking of information, or the leaking of sensitive information (particularly important in the context of femicide and SGBV because many victims will opt for anonymity). This would then be complemented by the TC publishing a final report containing details of each victim testimony, which would ultimately be disseminated nationwide in as many languages as possible. If done correctly, the hope is then that exposure to the stories recounted at the TC presents broader society with alternative narratives on SGBV to existing, dominant patriarchal narratives that are often expressed through rape myths, and in this way has the potential to positively influence how broader society interprets past and ongoing patterns of violence by popularising more inclusive narratives of gendered harms in political/societal discourses. Examples of these more inclusive narratives include promoting a shared understanding that women do not 'bring rape onto themselves' nor do they deserve any type of SGBV, that patriarchal structures increase women's dependence on men and therefore their vulnerability to SGBV, that patriarchal institutions fail to sufficiently protect women from gendered harms and sometimes

[605] Human Rights Watch op cit note 303.
[606] The Department of Women, Children & People with Disabilities op cit note 304 at 50.

exacerbate such harms, and that many beneficiaries of patriarchal institutions and structures in society are complicit (sometimes unknowingly) in these gendered harms. Ultimately, the hope is that broad acceptance and popularising of the above new and inclusive narratives on SGBV could then, by this logic, minimise the dominance of 'rape myth' narratives in society.

Moreover, as already mentioned, my proposed TC would also be tasked with holding open, public forums for wider society to discuss topics such as social responsibility towards SGBV and femicide victims, the complicity of bystanders, attitudes/beliefs regarding male dominance/control, the role of women in the private vs public sphere, and definitions of masculinity. In this way, the TC would directly engage the public in debate on these topics, not limiting the process to just direct victims and/or eyewitnesses. The hope for these forums is that they would further promote a shared narrative of femicide and SGBV, highlighting the root causes thereof. For instance, violent and toxic masculinities which justify SGBV and foster a culture of violence; patriarchal institutions which perpetuate gendered hierarchies and fail to protect women from SGBV; patriarchal attitudes and beliefs which justify male dominance and control, as well as relegate women and their lived experiences to the private sphere; and ignorance towards wider society's complicity in perpetuating and promoting these patriarchal attitudes and beliefs. Therefore, I argue that a SGBV TC is necessary to promote a shared narrative of femicide and SGBV in the country, one that identifies patriarchal institutions, structures, and beliefs as root causes. This then presents a framework with which to identify points of intervention to reduce future levels of violence, as well as combats victim blaming narratives which increase impunity for SGBV crimes in criminal courts and justify past and ongoing gendered harms.

5.4 Minimising future patriarchal attitudes and behaviours

As already mentioned in section 3.2.1, according to a 2013 study commissioned by the Department of Women, Children and People with Disabilities, South African research suggests that there is a connection between anti-social personality traits and the killing of intimate partners (femicide), and a connection between rape and men with

dimensions of psychopathy and lower empathy,[607] a trend keeping entirely with international literature.[608] Similarly, the 2012 South African study by Jewkes *et al.* first raised in sections 1.3.1 and 3.2.2 found that men who only had a relationship or sex with women predicated on their fulfilling a provider role, or who only had sex with prostitutes, showed the highest levels of psychopathic traits.[609] Many of them had also been physically violent towards women on multiple occasions, or had raped women in the past.[610] Moreover, the men who had done neither displayed significantly higher levels of empathy towards women.[611] Specifically regarding intimate partner violence, as alluded to in sections 1.3.1 and 4.5.1, Saez *et al.* found that the sexual objectification of women hinders "attributions of humanity to women", which is then associated with an increased willingness to carry out violent acts against women.[612] Therefore, there is evidence to suggest that men who view women as objects or in subordinate roles tend to have lower levels of empathy for women, which in turn is often associated with higher tendencies for violence against women. Ultimately, in this section, I propose that South Africa implements a SGBV TC in the hopes of enhancing men's empathy for and understanding of women, with the overarching goal being to reduce future SGBV and femicide rates.

As mentioned in Chapters 3 and 4, TCs tend to draw a lot of media attention, leading to the widespread dissemination of victim testimonies which (if well managed) often contain information about, perspectives on, and narratives, interpretations and memories of past events that may be new to the broader public or that had never been publicly acknowledged prior to the hearings. In the case of the TRC, I highlighted how the victim testimonies organised by the Committee on Human Rights Violations arguably "admitted a language of pain" and the "narration of…atrocity" into South African discourse in an unprecedented way,[613] which some scholars argue provided South Africans the opportunity to re-examine their own complicity in past violence

[607] Ibid. at 12.
[608] Ibid. at 51.
[609] Jewkes et al op cit note 323 at 6.
[610] Ibid. at 6.
[611] Ibid. at 6.
[612] Sáez et al op cit note 60 at 1448.
[613] Kayser op cit note 550 at 4.

and abuse,[614] with others suggesting that this re-examination of complicity sometimes extended to remorse.[615] I argue that victim hearings at a SGBV TC stand to achieve similar results. More specifically, given that there is extensive stigma around SGBV in South Africa,[616] such victim hearings would, presumably, be the first time that victims would discuss their lived experiences of SGBV and femicide in public, as well as the first time their lived experiences would be publicly acknowledged, at least on such a large scale. I then argue that, by this logic, this widescale public acknowledgement of victims' perspectives on SGBV in broader society for the first time could present beneficiaries of patriarchy the opportunity to self-reflect and re-examine their own complicity in gendered harms, whether direct acts of violence or indirect structural violence (such as exacerbating or exploiting the economic dependence of women on men under patriarchy). While it is impossible to say that this self-reflection will, in this way, lead all perpetrators of SGBV and femicide to feel remorse for past violence committed and lead to a wholesale increase in empathy towards women in society, it would be an important, and arguably necessary, starting point. This is because popularising women's lived experiences of SGBV in political/societal discourses and destigmatising these harms has the potential to provide men open to self-reflection the opportunity to re-examine their role in supporting/upholding patriarchy and in perpetrating/perpetuating gendered harms, and to re-examine the empathy they typically afford to women. From there, continued government intervention, for example in the form of community education programmes, could continue this work of promoting self-reflection and empathy, and hopefully reach meaningfully through to more and more men over time, across generations.

Similarly, these victim hearings would also be complemented by the public forums detailed in section 5.1. By discussing topics on social responsibility towards SGBV and femicide victims, the role that beneficiaries and supporters of patriarchy play in perpetuating gendered harms, attitudes/beliefs regarding male dominance/control, the

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[614] Aiken op cit note 321 at 25.
[615] Gobodo-Madikizela gives an anecdotal account of how a police conspirator implicated in the deaths of the Gugulethu Seven grew "anxious" as he was confronted by the pain and anger of his victims' mothers when desperately asking for their forgiveness. See Gobodo-Madikizela op cit note 556 at 179-181.
[616] The Department of Women, Children & People with Disabilities op cit note 304 at 50.

role of women in the private vs public sphere, rape myths, male sexual entitlement, and definitions of masculinity, the forums represent a second opportunity for South Africans to self-reflect and re-examine their own past behaviours towards women by presenting new perspectives on and interpretations of SGBV, as well as by encouraging debate on these topics. Furthermore, these forums would represent an opportunity for many to participate actively in the TC proceedings on a much larger scale than at the ordinary victim hearings (that is, were they to seize said opportunity). Ultimately, I argue that a SGBV TC (via organising both victim hearings and public forums) has the capacity to encourage increased empathy for women in society, and, as a result, to promote positive changes in patriarchal attitudes and behaviours, which, in the long-term could, by this thinking, reduce future SGBV and femicide rates were the TC to be followed up with community education programmes.

5.5 Guiding reparations and institutional reforms

Regarding reform recommendations, it is worth noting that the government already pledged to conceptualise and implement institutional reforms to eradicate SGBV at the 2018 Presidential Summit. More specifically, the document resulting from this summit, The Gender-based Violence and Femicide National Strategic Plan for 2020-2030, included reforms such as improving equitable representation of women, increased job opportunities for women, the inclusion of GBV services in the workplace, and measures to promote increased valuing of women's unpaid labour.[617] As a result, the government has already proposed gender-sensitive institutional reforms intended to improve the socio-economic and political positions that women occupy in the country. That being said, thus far, reparations have not yet been considered (either monetary reparations or in the form of memorialisation efforts) nor have more substantial institutional reforms aimed at restructuring societal institutions. Therefore, I argue that such reforms and reparations require a further in-depth investigation into the root causes of femicide to accurately determine how best to intervene: I propose a SGBV TC to do so.

[617] Youth and Persons with Disabilities Interim Steering Committee on GBVF. National Strategic Plan on Gender-Based Violence & Femicide 2020. 1 vol. Pretoria: Department of Women supra note 68 at 64-79.

Regarding reparations, a SGBV TC, through victim testimonies and research into patriarchy, could determine how best to meet victims' long-term needs. In other words, a TC's research and findings could shed light on victims' priorities, ie, whether they need psycho-social support, better access to healthcare, increased job opportunities, lumpsum payments, or housing grants. Other findings may help determine whether SGBV and femicide victims would appreciate memorialisation efforts such as the Mexico model I mentioned in Chapter 2. More specifically, this includes statues commemorating victims, changing road names, or building community centres that celebrate victims of SGBV and femicide. Further findings may help determine how to maximise the success of reparations in the form of community programmes, such as patriarchy and SGBV education initiatives and awareness programmes. In terms of institutional reforms, a SGBV TC would also be able to produce research to inform how institutions should be restructured to begin dismantling patriarchal hierarchies. For instance, a TC could shed some light on to how best to optimise existing affirmative action programmes to increase women's representation in decision-making roles; on whether more collaboration between SAPS/NPA and grassroots women's organisations is necessary to respond to and prevent SGBV and femicide; or on whether institutions need much more drastic restructuring, such as the Argentine and Brazilian women's police stations model mentioned in section 3.2.2 whereby all-women police units that work parallel to ordinary police to respond to and prevent SGBV.[618] Therefore, here, I contend that a SGBV TC is necessary to guide reparations programmes to adequately compensate victims for their past suffering, as well as to guide the restructuring of societal institutions to reduce future femicide and SGBV rates by reforming patriarchal structures.

5.6 Conclusion

In this final chapter, I hoped to detail how a SGBV TC has the potential to achieve the following goals: restorative justice for SGBV and femicide victims, promote a more inclusive shared narrative on SGBV and femicide in South Africa, promote positive changes in patriarchal attitudes and behaviours, as well as guide reparations and institutional reforms aimed at reducing future SGBV and femicide rates. To do so, I

[618] Carrington et al op cit note 412 at 43.

outlined the TC structure that I have in mind, namely three committees tasked with investigating SGBV and femicide, hosting public forums to debate topics relating to gendered harms and to patriarchy, and making reparations and reform recommendations, respectively, all using an intersectional-gendered framework.

Ultimately, I argued that a SGBV TC could, in the short-term, function as a one-off benefit to SGBV victims by pursuing restorative justice goals, and by alleviating pressure on South Africa's overburdened investigative authorities by collecting evidence to, in turn, facilitate more efficient criminal prosecutions. Moreover, I argued that, in the long-term a SGBV TC has the capacity to change the way the criminal justice system treats SGBV and femicide by encouraging positive changes in patriarchal attitudes and beliefs in society, and by guiding the implementation of well-crafted institutional reforms. Furthermore, I also argued that a SGBV TC could promote more inclusive shared narratives on SGBV to counterbalance prolific rape myths in the country that justify/perpetuate SGBV and contribute to impunity for these gendered harms, largely by popularising victims' lived experiences in political/societal discourses. Similarly, I also argued that a SGBV TC could promote empathy for women in society and encourage positive changes in patriarchal attitudes and behaviours in society by presenting beneficiaries of patriarchy the opportunity to re-examine their own complicity in gendered harms. Lastly, I contended that a SGBV TC is well positioned to guide the implementation of reparations programmes that adequately compensate victims for their past (and ongoing) suffering, as well as guide the restructuring of societal institutions that aim to reduce future femicide and SGBV rates by reforming patriarchal structures.

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