

You Strike a Woman; You Strike a Rock: Dignity, Law, and Monuments in South Africa

Oluwaseyi "Shae" Omonijo

A thesis submitted in partial fulfillment of the requirements for the
degree of Bachelor of Arts in Political Science

Advisor: Adom Getachew, PhD

Preceptor: Alex Haskins

April 18, 2018

"Wathint' Abafazi, Wathint' Imbokodo"

you strike a woman, you strike a rock

- The rallying cry of the 1956 South African Women's March

Introduction

Between 1948 and 1993, the National Party controlled the government of South Africa and instituted Apartheid, a system marked by institutionalized racial segregation and discrimination. During this period, the apartheid state engaged in widespread violence including murders, tortures, forced disappearances as well as mass incarceration of activists, and severe socioeconomic exploitation of the majority black and colored population. As a result of such violence, the African National Congress (ANC) created uMkhonto we Sizwe (MK), an armed wing of the organization meant to, in the words of Oliver Tambo, "Make apartheid unworkable. Make South Africa ungovernable. Prepare the conditions for the seizure of power by the people."¹ Close to 13% of the MK were female.² Many of them abandoned their studies, families, and homes to help in the underground resistance against apartheid. The ANC became successful in making South Africa ungovernable in 1990 when Nelson Mandela, once a leader of the MK, was released from prison and negotiations began between the ANC and the National Party to transition from white-minority rule to a full-fledged democracy.

The transition process can be marked by three main legal documents and institutions: the amnesty clause of the interim constitution, the final constitution, and the Truth and Reconciliation Commission (TRC). The transition process began with the signing of the interim constitution in

¹ "Quotations by Oliver Tambo," South African History Online, accessed October 26, 2017, <http://www.sahistory.org.za/topic/quotations-oliver-tambo>.

² Kongko Louis Makau, "Aspects of the Experiences of 10 Women in MK: 1976-1988" (PhD diss., University of Johannesburg, 2013), 18.

1992. Leaders from the National Party and the ANC made a legally binding deal to grant amnesty to those who committed political crimes, both black and white, under apartheid. The National Party made it clear that it would not allow for democratic elections unless the amnesty clause was added to the interim constitution.³ The clause reads in part, "In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions, and offenses associated with political objectives and committed in the course of the conflicts of the past."⁴ This clause has been severely criticized by victims of apartheid and their families who have requested the prosecution of perpetrators.

Despite the controversy surrounding amnesty, the new coalition government adopted one of the most progressive constitutions and legal codes to advance human rights in Africa. Dignity, freedom, and equality are the foundation of the South African constitution in which other social, political, and economic rights are guaranteed. Similarly, for example, the first chapter of the constitution states, "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human Dignity, the achievement of equality and the advancement of human rights and freedoms" This declarative statement is then followed by the Bill of Rights in the Constitution which among its many guarantees include in the following order: the Right to Equality⁵, Respect of Human Dignity, Life and Freedom and Security of Person. Similarly, the South African constitution also protects political and socioeconomic rights such as the right to vote, freedom of association, freedom of occupation, right to housing, healthcare, food, and water. The inclusion of these socioeconomic and political rights based on freedom, equality (specifically

³ Priscila B. Hayner. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. (New York: Routledge, 2011).

⁴ South African Interim Constitution, Post-Amble.

⁵ In the South African constitution equality means substantive equality are inherent in the constitution such as prohibition of discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

equality on the basis of race and sex), and human dignity are what sets the South African constitution apart from other newly independent or transitioned nations at the time. The uniqueness of the South African constitution is what makes it an excellent case study for examining how citizens, specifically black female citizens, choose to lay claim to the rights laid out in the constitution.

While the progressive nature of the constitution laid the foundation for a more equitable future, the transition committee was also concerned with addressing the wrongs of the past. The transition process continued in 1995 when the newly elected parliament passed the Promotion of National Unity and Reconciliation Act to create the Truth and Reconciliation Commission (TRC) tasked with addressing widespread abuse that occurred under the apartheid regime. One of its primary objectives was to “assist in restoring the dignity of victims” and “recommend a set of measures designed to provide reparation and rehabilitation to victims.” The act granted the TRC broad-ranging powers to achieve its objectives such as subpoena, search, and seizure power; the ability to grant amnesties; and the creation of a witness protection program. The TRC was composed of 17 commissioners and 300 staff members responsible for conducting hearings and investigations in multiple locations. Given the size and broad-ranging powers of the TRC, South Africa was poised to begin the difficult process of providing justice and ensuring that everyone could be seen as equal before the law and their fellow citizens. The scope and size of the TRC are what lead scholars within the field of transitional justice to treat the TRC as the pinnacle of what transitional justice institutions should look like.⁶

While the TRC represents a model of transitional justice, many of the promises of dignity,

⁶ Hayner, *Unspeakable Truths*; Eric Stover and Harvey M. Weinstein. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. (Cambridge: Cambridge University Press, 2008); Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs* Spring, (1999).

equality, and freedom found in the new South African constitution remain unfulfilled. Today, black South Africans have higher rates of poverty, sickness, and land dispossession than white South Africans. When comparing disparities between black advancement and white advancement since apartheid, there is little to no improvement for a majority of black South Africans.⁷ White South Africans still possess a majority of the land in South Africa, even though the percentage of white South Africans in the country has decreased.⁸ Similarly, the wealth gap and health gap has not closed between black and white South Africans since the end of apartheid.⁹

Moreover, although violence has declined since apartheid, crime rates remain high.¹⁰ The limits of the transition are especially visible in the economic, political, and social conditions of black women who are less likely to be employed and hold the lowest paid and least skilled jobs in an economy where unemployment is rampant.¹¹ In fact, women's incomes are on average 42% less than men's incomes.¹² Additionally, women face epidemic levels of domestic violence, rape¹³, and HIV/AIDS infection.¹⁴ Gender-based violence in South Africa is amongst the highest in the world.¹⁵ Domestic violence accounts for close to 60% of female murder victims.¹⁶ The conviction rates for rape cases have remained around 4% since the end of apartheid, even though the number

⁷ Anthony Butler, *Contemporary South Africa* (London: Palgrave Macmillan, 2003), 34.

⁸ *Ibid.*, 35.

⁹ *Ibid.*, 36.

¹⁰ "FACTSHEET: South Africa's 2015/16 crime statistics," Africa Check, accessed September 27, 2017, <https://africacheck.org/factsheets/factsheet-south-africas-201516-crime-statistics>.

¹¹ Beth Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa," in *What Happened to Women?: Gender and Reparations for Human Rights Violations*, ed. Ruth Rubio-Marín (New York: Social Sciences Research Council, 2006), 50.

¹² "Status of women and girls in South Africa 2015," One, accessed September 1, 2017, <https://www.one.org/africa/policy/status-of-women-and-girls-in-south-africa>.

¹³ "South African women (and their children) also experience exceptional levels of sexual and physical violence. Around 50 000 rapes are reported per annum, or more than one reported rape per hundred persons in any given year, the highest incidence in the world" Taken from Anthony Butler, *Contemporary South Africa*, 83.

¹⁴ Goldblatt, "Evaluating the Gender Content of Reparations," 52.

¹⁵ *Ibid.*, 64.

¹⁶ "Status of women and girls in South Africa 2015."

of rapes reported has increased.¹⁷

These conditions sit uneasily against the signs of gender equality and inclusion in parliament and legislation. South Africa has the second-largest percentage of women in parliament on the continent, one of the most inclusive legal codes for defining gender-based violence, and formal recognition of women's rights and other intersectional identities such as race and sexuality in the constitution. Yet, black women who sit at the intersection of race, gender, and class have yet to see these promises materialize in their everyday experiences.

Therefore, when understanding the promises made in the constitution such as the right to dignity, freedom, and equality in the context of gender, women legally are valued and protected. Yet, when examining the treatment of black South African women, in particular politically active ones, their experiences are in contrast with that of which they are promised in the constitution.

Therefore, I argue that reparations are central to understanding this aforementioned disjuncture between black South African women's legal rights and lived experiences. Generally speaking, the concept of reparations emerged in the post-holocaust era as a way for states to attempt to amend their relationship with the groups they have historically victimized.¹⁸ Reparations are believed to help encompass the "burden of the wrongdoing" (oftentimes crimes against humanity) by empowering victims and communities to heal from the past through "restitution, rehabilitation, satisfaction and guarantee of non-repetition."¹⁹ While many scholars are interested in reparations for the purposes of empowering historically disadvantaged communities, I am interested in reparations to understand how human dignity can be restored

¹⁷ "Rape in South Africa," Rape Crisis Cape Town Trust, accessed February 11, 2018, <https://rapecrisis.org.za/rape-in-south-africa>.

¹⁸ Ariel Colonomos, *La Morale dans les Relations Internationales* (Paris: Odile Jacob, 2005).

¹⁹ As defined by the "Van Boven Principles", set in the UN document on "The Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law" (UN, 1993).

and protected after the apartheid era and in periods of transitional justice. I do this by specifically analyzing the unique experiences of black, politically-active South African women under apartheid and reparations can serve as a tool for materializing the promises of respect for human dignity made in the constitution.

While there are many ways reparations can be realized such as through monetary payment, restitution of lost property, expungement of criminal records, and so forth, I am primarily interested in reparations in the form of legal redress and public monuments. The goal of providing reparations according to the TRC was to restore the “dignity of survivors of gross human rights violations.” Symbolic and legal reparations are common avenues through which black South African women are holding the government accountable for the promises of respect and protection of human dignity made in the constitution and the TRC that have yet been fulfilled in their lived experiences. By exploring the pursuit of public art and legal redress by black South African women and their families, I seek to provide a greater understanding of the tension that exists between black women’s legal rights and social experiences, as well as how the language of dignity can be used to encompass the tension that exists.

My thesis is primarily concerned with answering the following questions: What does dignity look like to politically active South African women who suffered violence at both the hands of the apartheid state and their comrades? How can the tension between women’s legal right to dignity and the societal treatment of women’s dignity be understood by examining the transition process in South Africa?

These questions are of great importance to black women who were members of the ANC's underground wing, uMkhonto we Sizwe (MK). The MK was formed in response to the banning of the ANC by the apartheid government in the early 1960s. Unable to freely assemble

and plan in public, the MK became an underground network of men and women who trained recruits in tactical defense and offense techniques as well as soft power resistance through literature, underground newspapers, among other means. The inclusion of women in the MK was on the surface, not a contested one. As one former female MK freedom fighter explained, "We lived in the same camps. The women did exactly the same training as the men. Exactly the same. Drilling, handling weapons, topography...everything."²⁰ Yet, the type of violence female Mk freedom fighters faced was compounded due to assaults from both their fellow comrades they were fighting with and the apartheid government they were fighting against. The reality was that many female MK freedom fighters abandoned their maternal and familial duties to fight along with their comrades and when captured by apartheid state officials were often met with gendered violence such as rape, forced sterilization, loss of reproductive abilities, and loss of sanitary hygiene in addition to racial violence and discrimination.²¹ On a different note, women in the MK camps were at times subjected to sexual assault, rape, violence, gender-specific punishment, and unwanted pregnancies.²² Such violence leaves some female Mk fighters, today, traumatized and further silenced by the current ANC-led national government. The compounded nature of the violence experienced by these women shows that they arguably faced the greatest affront to their dignity both during and after apartheid. Similarly, narratives surrounded female MK fighter has been largely absent on the conversation surrounding symbolic reparations and the dignity of South African women this is why I argue that efforts to honor women through public art changes this discourse.

Female MK fighters have been historically excluded from the narrative around the anti-apartheid struggle when compared to their male counterparts such as Nelson Mandela, Thabo

²⁰ Raymond Suttner, *Women in the ANC-led underground* (South Africa: HSRC press), 240.

²¹ Kongko, "Aspects of the Experiences of 10 Women in MK," 31.

²² *Ibid.*, 51-57.

Mbeki, and Jacob Zuma, all former presidents of South Africa. Furthermore, the guarantees of the constitution and the TRC specifically around restoring dignity have not yet been fulfilled for female MK fighters. I argue that the reasons for this are primarily due to the type of violence women suffer, the complexity of gender norms, and how the transition process foreclosed certain avenues for women to have their dignity recognized and respected. Therefore, my thesis seeks partly to explain the contradiction between the promises of the transition process and women's realities and highlight how black South African women lay claim to dignity. The primary ways in which women lay claim to dignity are through the use of public art such as monuments, which is known in the literature as the restorative approach, and legal redress based on the right to dignity, known in the literature as the retributive approach. I argue that women lay claim to dignity by invoking their constitutional right to dignity in court while challenging the amnesty clause and seeking reparations for crimes perpetrated against them. On the other hand, I argue that symbolic reparations through public art also help women claim their dignity by transforming political memory and narratives surrounding the role of women both past and present. While the creation of public art is a way of restoring the dignity of victims, I also argue that the destruction of public art also serves a political purpose, as well, by publicly degrading a woman's dignity.

Often, as will be discussed in the literature review, scholars either argue for or against the use of the retributive or restorative approach, but I argue that both approaches have been utilized by women in particular to lay claim to dignity in absence of not being able to do so during the transition process. However, I argue that black women use both approaches when they invoke the use of *crimen injuria*, a law enacted in the early 1900s in South Africa that criminalizes the impairment of another person's dignity. By invoking this law, women seek both a legal and symbolic avenue to lay claim to the dignity of black female MK fighters who suffered under

apartheid and whose public art honoring their legacy has also been destroyed.

Analyzing the use of both the retributive and restorative approaches to lay claim to dignity will help one understand further the tension between legal rights and social experiences of black South African women.²³ What is at stake in making such a claim is that it challenges the notion that the South African transition process was exemplary, and thus should serve as a model for other countries transitioning from a period of gross human rights violations. By attempting to challenge this notion, it will spark a further discussion on how women, in general, are barred from fully participating in the benefits of a transitional justice project.

I begin to explore these topics by examining the transition process from the interim constitution, permanent constitution, the amnesty provision, and the TRC. I argue that the constitution defines the right to dignity in such a way that affirms a woman's right to it, but that the amnesty provision and TRC impedes the fulfillment of the right and value of dignity. Then, I discuss the structure and goals of the TRC in-depth and how it hindered women from having their dignity respected and inhibited the full transition from apartheid to a more equitable society, both socially and legally. Lastly, I take the case study approach to analyzing how retributive and restorative approaches to laying claim to dignity are more complementary than independent of one another. I study how the disappearance of Nokuthula Simelane, a black female MK fighter, shows the tension between dignity as a right and value as well as approaches the family has taken to ease that tension. Easing this tension consists of the use of trials to affirm the legal right to dignity and the use of symbolic reparations in the form of monuments as a tool for restoring the

²³ "South Africa is widely regarded to have one of the most progressive constitutions in the world, yet the paramount dilemma of human rights within any society is the division between the codified principles of rights ("law in the books") and the application of law ("law in action) (Hajjar, 2008:595)" Quoted from Rhiain Moses, *The Truth and Reconciliation Commission: A Reflection of the Chasm Between Constitutional Rights and the Lived Experience in South Africa*, accessed September 1, 2018, <http://www.sahistory.org.za/article/truth-and-reconciliation-commission-reflection-chasm-between-constitutional-rights-and-lived>.

value of dignity. Specifically, as the Nokuthula family invokes the law of *crimen injuria*, I will show how the use of the law has both legal and symbolic significance in recognizing the dignity of Nokuthula Simelane.

Literature Review

My thesis is primarily concerned with answering the following questions: What does dignity look like to politically active South African women who suffered violence at both the hands of the apartheid state and their comrades? How can the tension between women's legal right to dignity and the societal treatment of women's dignity be understood by examining the transition process in South Africa? To answer these questions, I draw upon three areas of Transitional Justice Literature: Amnesties, Approaches to Reparations, and Gender and Public Art.

Transitional justice is primarily concerned with proper ways to confront a country's violent and fraught past. The methods for accomplishing this are usually through truth commissions, trials, commemorations, institutional reform, and reparations.²⁴ The South African transition process is considered unique and exceptional by many scholars because it included all of the aforementioned methods.²⁵ However, many scholars have highlighted the ways the transition process has been exclusionary towards women. My thesis intervenes in the narrative surrounding the TRC in South Africa along lines of scholars such as Beth Goldblatt and Rubio Martin who argue that the definition of victimhood and guidelines on reparations excluded the specific ways women suffered under apartheid. The South African TRC, should not be treated

²⁴ Juan Mendez, "Accountability for Past Abuses," *Human Rights Quarterly*, 19, no. 2 (1997); David Crocker, "Reckoning with Past Wrongs: A Normative Framework," *Ethics & International Affairs*, 43, no. 13, (1999); Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal*, 16 (2003).

²⁵ Alex Boraine, *A Country Unmasked, Inside South Africa's TRC*, (Oxford: Oxford University Press, 2000); Hayner, *Unspeakable Truths*; Lyn S. Graybill, "Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods," *Third World Quarterly*, 25 (2004).

as exemplary or the pinnacle of how a transition process should be structured or what it should achieve.²⁶ The exclusion of women during the transition process, I argue, is one of the reasons why there exists a tension between women's legal rights and their lived experiences in modern South Africa.

Amnesties

There is a substantive debate in transitional justice literature surrounding the South African transition process, especially the development of the amnesty provision. The conditional amnesty clause of the truth and reconciliation act required the apartheid-era perpetrators to provide full disclosure of their crimes in exchange for relief from criminal or civil prosecution. Many scholars saw the amnesty clause as a "necessary evil" to entice the apartheid government to allow for the peaceful transition from apartheid to democracy.²⁷ The conditions at the time, made the transition to democracy particularly fragile since the National Party had control of the security apparatuses of the state, thus making the imminent use of force a threat to the anti-apartheid activists. Nonetheless, other scholars, believe that establishing a record of the truth is more important for a successful transition and victim than pursuing justice according to law.²⁸ However, since the definition of victimhood was not conducive to encompassing gender-based violence women want to invoke their legal claim to dignity through the courts. The amnesty clause foreclosed this option for many women.

My thesis rejects the notion that reconciliation can only be established through the TRC as

²⁶ Victims of "gross human rights violations" were defined as those who suffered from killing, abduction, torture, and severe ill-treatment. This narrow definition of "victims of apartheid" ignores the ways in which gender-based violence has shaped women's position and agency in society.

²⁷ Beitz, "Human Dignity," 136

²⁸ Graybill, "Pardon, Punishment and Amnesia"; Desmond Tutu, *Truth and Reconciliation Commission Report* (South African Government, 2003).

is insinuated in the amnesty clause in the South African interim constitution.²⁹ The pursuit of reconciliation through the TRC, as one avenue, should not foreclose the potential for obtaining truth, justice, and closure through legal redress. Even if one were to accept the claim that amnesty provides an incentive for perpetrators to tell the truth about their crimes, Jaquemet argues that amnesty laws do not always provide victims and their families with the truth about the crimes that occurred during a conflict. For example, in the case of Lebanon, the amnesty laws prevented families from using legal means to recover the truth about their families' members who disappeared during the conflict.³⁰ The amnesty clause had a similar impact in South Africa, specifically in the case of Nokuthula Simelane. I provide a close analysis of the case of the Nokuthula family's legal battle to find out who is responsible for the disappearance of their daughter. The amnesty clause robbed the Simelane family of any closure or understanding about the "truth" thus putting into question the legitimacy of the claim that granting amnesty in exchange for "truth" was a fair bargain.

After the amnesty clause was placed into law through the Truth and Reconciliation Act, there was an immediate challenge to the clause in the Constitutional court case—*Azanian People's Organization (AZAPO) and others v. President of South Africa and others* (1996). The court ruling upheld the right of the TRC to grant conditional amnesty for perpetrators of politically motivated crimes in exchange for full disclosure of the crimes committed. Similarly, the courts upheld the removal of civil liability along with criminal liability as a result of amnesty. Justice Mohammed, chief justice of the constitutional court, has argued in favor of upholding amnesty by claiming that it is difficult to translate the gross systemic crimes of apartheid into

²⁹ South African Interim Constitution, Post-Amble.

³⁰ Lolanda Jaquemet, "Fighting Amnesia: Ways to Uncover the Truth about Lebanon's Missing," *International Journal of Transitional Justice*, 3, no. 1 (2008), 69-90, <https://doi.org/10.1093/ijtj/ijn019>.

individual legal redress. Therefore, the need for systematic social reconstruction through truth-finding overrides the constitutional right to redress.³¹

Darrel Moellendorf and Richard Wilson have both given profound critiques of the AZAPO decision for its breach of victims' rights in the name of social repair and larger collective political goals. Moellendorf remains unconvinced that there is any relationship between conditional amnesty and truth that would necessitate the closing of an option for prosecution. Moellendorf disagrees with scholars such as Beitz who argue that amnesty was the necessary evil or the "only option" for the new republic to transition successfully. Moellendorf cites Truth Commissions in South America that collected the truth to complement the possibilities of prosecution, not replace it all together. It is the idea that truth commissions were meant to replace not complement the avenues to which victims found ways to reclaim their sense of dignity, that I argue has been detrimental to the ways in which women continue to suffer in part due to the transitional justice process.

Cornell agrees with Moellendorf but argues that the AZAPO decision is not only wrong because it upholds conditional amnesty and denies the right to legal redress, but that it goes against the foundational ideal of dignity in the new South African constitution which is related to freedom and equality. My thesis builds upon Cornell's work further by arguing that the conditional amnesty clause not only violated the right to legal redress but its precedent continues to violate individual's right to and protection of their dignity. Cornell also argues that the AZAPO decision failed to connect its ultimate conclusion to dignity and the impact that the decision could have on the understanding of dignity in the transitional period. Cornell remains critical that the AZAPO decision did not go far enough to uphold constitutional equality and a detailed reparations

³¹ Van Zyl, "Dilemmas of Transitional Justice", 58.

program that could justify the overriding of the constitutional right to seek legal redress.³²

Reparations

The reparations sub-literature in the transitional justice literature focuses on retributive and restorative approaches to reparations. The retributive approach focuses on the punishment of perpetrators in the form of trials and tribunals. Scholars such as Nir Eisikovits argue that trials while retributive must also focus on the victim. In the context of South Africa, some individuals felt that their dignity was recognized when the injuries they faced under apartheid warranted protection by the law.³³ Therefore, the retributive approach also seeks to restore a people's faith in the rule of law and the constitution. My thesis agrees with the sentiment of Eisikovits in that, South African women see the courts as an avenue for having their dignity restored and respected. In particular, I argue that the transitional justice process failed to give women reparations that allowed them to reclaim their dignity in both legal and social terms as outlined above.

There are substantive critiques against the retributive approach. The legalist paradigm that is oftentimes applied to judicial proceedings will not sufficiently address the psycho-emotional trauma that many victims, who would have to testify, faced.³⁴ However, even if certain legal ideals such as that of due process were to be suspended as what occurred during the Nuremberg trials, that would impede upon the rights of both the perpetrator and the victim.

Similarly, the perpetrator/victim dichotomy that is strictly followed in a legal proceeding cannot adequately address situations of mass violence where a person can be both a victim and perpetrator of violence.³⁵ Although Neier uses Rwanda as the basis for complicating the

³² Drucilla Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation*, (Oxford: Oxford University Press, 2014), 34.

³³ Nir Eisikovits, "Transitional Justice," *Stanford University Encyclopedia of Philosophy*, 2009, <http://plato.stanford.edu/archives/spr2009/entries/justice-transitional>.

³⁴ Judith Shklar, *Legalism; Law, Moral and Political Trials* (Cambridge: Harvard University Press, 1963).

³⁵ Aryeh Neier, "Rethinking Truth, Justice and Guilt after Bosnia and Rwanda" in *Human Rights in Political*

victim/perpetrator dichotomy, the same reasoning can be applied to South Africa. The wide-scale violence that occurred in South Africa did not always follow the white vs. non-white narrative of violence. I argue throughout my thesis that gender also played a decisive factor in how black South African women experienced violence by both black and white men under apartheid. While these critiques are valid, I seek to illustrate how the structure of the transition process such as the definition of victim, did not allow women to properly use the TRC as a channel for seeking remedy for their injuries and thus had to pursue legal means.

Another substantive critique of the retributive approach is that it attempts to individualize or reduce a system such as apartheid down to a plaintiff-defendant relationship of harm that can be tried in a court setting. Therefore, prosecutions of only the top-level orchestrators of the systemic violence of apartheid can create what Rosenberg calls an “impunity gap.” It is for this reason that Rosenberg argues that trials cannot address the systematic ways in which apartheid destroyed the black community in South Africa.³⁶

There are also many technical critiques of the retributive approach to reparations. For a country like South Africa, the pursuit of retributive reparations to heal the damage done by apartheid is just not feasible.³⁷ Van Zyl's reasoning behind this claim is that the criminal justice system is struggling to cope with so much of the current crime, that retroactive punishments would clog the system. Similarly, the government cannot afford the cost of multiple high-resourced cases thus leaving the government in an even dire economic situation than it is already

Transition: From Gettysburg to Bosnia, ed. C. Hesse and R. Post (New York: Zone Books, 1999).

³⁶ Tina Rosenberg, *The Haunted Land: Facing Europe's Ghost after Communism* (New York: Random House, 1995).

³⁷ Van Zyl, "Dilemmas of Transitional Justice," 50; Mahmood Mamdani, "The Truth According to the Truth and Reconciliation Commission" in *The Politics of Memory: Truth, Healing and Social Justice*, ed. I. Amadiume (New York: Zed Book, 2000), 176-183; Stover and Weinstein, *My Neighbor, My Enemy*, 50.

in.³⁸

The restorative approach to transitional justice has developed as a response to the pitfalls of the retributive approach by focusing on rebuilding communities and helping victims heal from the past. As such, the literature is beginning to shift away from the retributive approach to the restorative approach.³⁹ Stover and Weinstein are the leading scholars advocating for the restorative approach to reparations by focusing on the rehabilitation of victims and communities instead of punishing perpetrators.

Gender and Public Art

My thesis explores the reparations from the perspective of black women. I argue that the intersectional experiences of politically active black South African women such as those who were MK fighters have stifled their access to reparations. The underground wing of the ANC, uMkhonto weSizwe (MK), was a largely male-dominated organization that provided sustained resistance against apartheid through the use of violent and non-violent methods employed by a vast, multinational underground network. The reason for this is partly linked to the continuity of oppression that exists between an oppressive apartheid government and a repressive ANC-led government that continues to impair their dignity. I build off of Margaret Urban Walker's scholarship, which describes how current reparations programs exclude how women suffer from a "continuum of violence." This exclusion is due to the fact that violence against women has become a normative experience in times of conflict and post-conflict so therefore maltreatment against women is not treated as worthy of reparations, whether restorative or retributive, after a conflict. In response to critics who argue about the incompleteness of reparations for victims of

³⁸ Van Zyl, "Dilemmas of Transitional Justice," 51.

³⁹ John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2001). Elizabeth Kiss, "Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice" in *Truth v. Justice: The Morality of Truth Commissions*, ed. Dennis Thompson and Robert Rotberg (Princeton: Princeton University Press, 2000), 68-99.

political violence, Walker states that is important to not take away an avenue of justice when such an opportunity exists no matter how incomplete of an approach it may be. I agree with Walker along these lines but build further by arguing that multiple approaches can be combined to achieve justice and dignity.

Many scholars have written about gender and public art in South Africa, but few have analyzed public art as a form of symbolic reparations. To briefly summarize the literature, Sabine Marschall argues that how women have been honored through public art in South Africa has thus far not centered on women's experiences, past and present, in the process. The actual act of commemorating women in South Africa is a male-dominated field and thus is oftentimes done through a patriarchal lens. Kim Miller explores the visual culture that existed during the anti-apartheid struggle and the ways in which media gave women activists a platform and a voice to advocate for themselves. Miller notes that "memorials and monuments should engage the public in meaningful and significant ways", however, the placement of the only monument dedicated solely to women's efforts has been relegated to a private sphere away from the public eye. My thesis links the absence of public art dedicated to women to the incompleteness of the TRC process and how the current push for public art of women fosters a political conversation on women's dignity and their claim to it.

Development of Dignity Jurisprudence

Within the field of transitional justice, there is a prominent debate over which forms of justice are necessary for a country to heal from its traumatic and fraught past. The International Center for Transitional Justice (ICTJ) co-founded by Alex Boraine, Vice-Chair of the South African TRC, defines transitional justice as "the ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so

serious that the normal justice system will not be able to provide an adequate response.” ICTJ goes on and adds “Transitional justice is rooted in accountability and redress for victims. It recognizes their dignity as citizens and as human beings”. The importance in this definition is not only the emphasis on accountability but the restoration of human dignity as a distinct goal of transitional justice.

The restoration of dignity is the foundation on which human rights, the TRC, and transitional justice is built upon. The development of dignity jurisprudence in post-conflict legal systems has its origins in the immediate aftermath of World War II.⁴⁰ The world was left in shock by the gross human rights violations that occurred in Nazi Germany under Adolf Hitler. Thus, as the world came together to form the United Nations there was a necessity to reaffirm the importance for every nation to treat its citizens with basic human dignity and respect.

To the framers of the United Nations Charter, incorporating the principles of human dignity was essential to designing the post-World War II global order. One of the framers of the charter, Jan Smuts, the statesman and delegate from South Africa, wrote the first draft of the preamble to the UN Charter at the San Francisco Conference in 1945. In his draft, there was no reference to human dignity in the preamble of the charter, a foundational attribute that now characterizes the charter today. In fact, some members of the drafting committee found Smuts’ version to be “Inelegant and excessively long.”⁴¹ Virginia Gildersleeve, the only woman delegate the San Francisco Conference, deliberately amended Smuts preamble to read “to reaffirm faith in the dignity and value of every human being.”⁴²

⁴⁰ Charles R. Beitz, "Human Dignity in the Theory of Human Rights: Nothing but a Phrase," *Philosophy and Public Affairs*, 41, no. 3 (2013), 266.

⁴¹ *Ibid.*, 231.

⁴² Virginia C. Gildersleeve, *Many a Good Crusade* (New York: Macmillan, 1954), 346. Rosalind Rosenberg, "Virginia Gildersleeve: Opening the Gates," Columbia University, accessed February 18, 2018, <http://www.columbia.edu/cu/alumni/Magazine/Summer2001/Gildersleeve.html>

The creation of the UN expanded human rights discourse and the understanding of transitional justice. The concept of dignity eventually became central to South Africa in the post-apartheid era. South Africa has the second largest body of dignity jurisprudence, after Germany.⁴³ This is primarily because, like Germany, the framers of the constitution and post-apartheid legal order wanted dignity to be foundational to all other rights and values for those harmed the most by human rights violations.

The Beginning of the Post-Apartheid Era

The centrality of dignity in the South African legal system began with the process of dismantling the system of apartheid. When F.W. de Klerk was elected President of the National Party in 1989, he lifted the ban on the African National Congress, suspended key laws that made the system of apartheid possible, and order the release of Nelson Mandela from prison. When Mandela was released in February of 1990, it sparked a transitional period under which ANC and the National Party entered negotiations to determine how to transition South Africa from a white minority authoritarian regime to a multiracial democratic society.

There are three distinct road maps for understanding how dignity has been defined in the post-apartheid era. The roadmaps I will discuss are how dignity is defined in the constitution, how the amnesty provision compromises the legal right to dignity as outlined in the constitution, and how the dignity of women was treated during the truth and reconciliation process. While all three avenues are inherently intertwined due to the nature of the transition period, I will discuss the use of dignity in these three stages or paths to reconciliation.

What is Dignity in the Constitution?

⁴³ Stu Woolman, "The Architecture of Dignity," in *The Dignity Jurisprudence of the Constitutional Court of South Africa*, ed. Drucilla Cornell, (New York: Fordham University Press, 2013),74.

The current South African constitution was signed into law in 1996. The first chapter of the constitution denotes South Africa as a sovereign state with the primary value of " Human dignity, the achievement of equality and the advancement of human rights and freedoms."⁴⁴ Thus the constitution begins with defining dignity in terms of value. Dignity is the achievement of equality and the advancement of human rights and freedom. That is to say, that dignity produces other values. If one has dignity then that person is deserving of equality with his or her fellow human being as well as other rights and freedoms. Similarly, this means equality in all respects such as race, class, and gender.

Such a reading of dignity as a value does not exist in the interim constitution that Mandela signed into law in 1993. Nowhere in the preamble or first chapters of the interim constitution does dignity appear. Instead, dignity is discussed solely in terms of a right. Section 10 of the interim constitution reads "every person shall have the right to respect and protection of his or her dignity."⁴⁵ Given the differences between the interim and the permanent constitution, one can infer that the added value of the human dignity portion of the permanent section of the constitution was intentional and eventually expounded upon in the final constitution.

The value of human dignity is outlined in four separate areas of the final constitution. First in the first chapter of the constitution reads, "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human Dignity, the achievement of equality and the advancement of human rights and freedoms." Second, section 7 of the constitution, which opens the bill of rights, reads "The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom." Third, the limitation of rights clause reads "The Rights in the Bill

⁴⁴ South African Constitution, art.1, Sec. 1(a)

⁴⁵ South African Interim Constitution, art. 1, sec. 10.

of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality, and freedom.” Fourth, the section on the “Interpretation of the Bill of Rights” reads, “When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on dignity, equality, and freedom.” One can infer from all of these mentions of dignity in the constitution that it is a foundational value embedded in the constitution since the interpretation of other basic rights are dependent upon whether or not it promotes dignity. Even furthermore, human dignity is also a constitutional value that underlies all the other rights outlined in the constitution.

The Importance of the Difference between Dignity as a Value and Right in South Africa

The difference between dignity as a value and as a right is important in the case of South Africa because of its implication for the structure of a post-apartheid society. Dignity is the inherent worth that each human being has by virtue of being a human being.⁴⁶ Similarly, the post-apartheid constitutional court has treated dignity as a sort of *Grundnorm*⁴⁷ of both society and the law. For example, In *S v. Williams*, the court states, "The constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure they are available to all. In the process, it sets the State up as a model for society as it endeavors to move away from a violent past."⁴⁸ Given this stance by the court, the value of the courts is meant to transcend the confines of the law and impact the values of society. This has further implications when it comes to understanding woman's interactions with the law versus society.

For many South African women, dignity has been a guaranteed right enshrined by the

⁴⁶ "To say a thing has value is to attribute value to it" Charles Beitz, "Human Dignity," 272.

⁴⁷ A German legal concept for a "fundamental norm" that underlies an entire legal system. This term is used frequently by the South African constitutional court in its decisions. It's most notably used by Supreme Court Justice Laurie Ackermann.

⁴⁸ Stu Woolman, "The Architecture of Dignity," 85.

constitution but has failed to transcend fully as a value that is present in everyday South African society. How South African women employ their right to dignity has varied in the post-apartheid South African courts. *Carmichele v. Minister of Safety and Security*⁴⁹, *Van der Merwe v. Road Accident Fund*⁵⁰, and *K v. Minister of Safety and Security*⁵¹ are all examples of women who faced some level of gender-based violence and have invoked their right to dignity in the constitutional court. While all of these women were successful in their petition to have their rights protected, these decisions have yet to actualize into South African society where women still face alarming rates of stalking, domestic violence, and sexual abuse as outlined in the aforementioned cases.⁵² The issue isn't that the South African court is not treating dignity as both a right and value, but that the higher aspirational goal outlined in the constitution of a society built upon human dignity, freedom, and equality has yet to take hold in SA. The responsibility for such a lack of incongruence between dignity as a right and a value does not lie solely in the courts. As will be discussed in further sections this incongruence is also due to or is further perpetuated by other state apparatuses such as the amnesty provision and the truth and reconciliation commission.

Nonetheless, there are certain limitations in understanding dignity as a right in the constitution that informs how women can invoke this right. The accepted view in the literature is that the right to dignity as outlined in the constitution is a relative, not an absolute right. A relative right is one where its protection does not encompass the entirety of its scope—in some instances, it can be limited in proportion to other rights at hand.⁵³ Another reason why the right to human

⁴⁹ *Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001(4) SA 938 (CC)

⁵⁰ *Van Der Merwe v. Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006(4) SA 230(CC)

⁵¹ *K v. Minister of Safety and Security* 2005 (6) SA 419 (CC)

⁵² "Status of women and girls in South Africa 2015." *One*.

⁵³ Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, trans. Daniel Kayros (Cambridge: Cambridge University Press, 2015), 244.

dignity is relative because of the general limitation clause of the constitution that applies to all the rights in the constitution. Thus, when the right to human dignity is brought to the courts, they must determine the proportion of the right to limit in relation to the other rights at hand.

This will be important later for understanding the impact of the amnesty clause.

On the contrary, some scholars challenge whether or not the right to human dignity as outlined in Section 10 of the constitution is truly relative. Francois Venter argues that the language of the right to human dignity proposes two interpretations. The first being that everyone has inherent human dignity.⁵⁴The second is that everyone has the right to have their dignity respected and protected. Thus, the first part of Section 10 is not what determines a right, it is the second part of Section 10 that defines the right in relation to dignity to be one where a person's inherent dignity is respected and protected. The constitutional right at hand is the right to have one's dignity protected and respected. The very construction of Section 10 must be understood through the meaning of its two aforementioned parts. The issue is never whether not women have dignity, but how that dignity is treated by their counterparts.

Taken as a whole, the transition from the interim constitution to the final constitution was an important one. The lack of any conception of dignity as a value in the interim constitution removed the responsibility of the state to promote human dignity in society and legal decisions. The final constitution introduces morality into the law and society by treating dignity as both a value and a right. It creates a system of laws that acknowledges first and foremost the inherent worth of all South African citizens and as such promotes equality in terms of gender and allocates freedom and agency to women. This is primarily a normative interpretation of dignity in the constitution. Therefore, I will discuss further how dignity has been interpreted in the next stage of

⁵⁴ Francois Venter, "Human Dignity as a Constitutional Value: A South African Perspective," *Recht, Staat, Gemeinwohl: Festschrift für Dietrich Rauschnig* (2001), 3.

transition: the amnesty provision.

The Amnesty Clause: The Post-Amble to the Interim Constitution

The negotiation period ended in October of 1993 with the signing of the interim constitution. One of the most contested points of debate during the construction of the interim constitution was whether or not amnesty would be granted for those who committed widespread human rights violations during apartheid. The issue of amnesty eventually became the pinpoint of the transition period as the National Party threatened to throw South Africa back into disarray if it was not written into the interim constitution. Thus in the eleventh hour, a post-amble was added to the constitution that read, "amnesty shall be granted in respect of acts, omissions, and offences associated with political objectives and committed in the course of conflicts of the past."

A proper analysis of the entire amnesty statement is essential to understanding how it laid a foundation for future debate surrounding how to truly make sure citizens, especially women, can be reconciled with the past. The post-amble to the interim constitution reads:

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions, and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria, and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

While the above passage intended to provide the reasoning behind the amnesty clause, it instead paints a false dichotomy. It places against each other the notion of understanding and vengeance, reparations and retaliation; and *ubuntu*⁵⁵ and victimization. However, it negates the different stages of reconciliation people may go through before they can move on from the past. Many of the families who seek legal redress aren't seeking vengeance, but justice. They see legal redress as a form of reparations, not retaliation. Similarly, what does *ubuntu* mean to survivors of apartheid who've never seen or experienced equality, but only oppression?

The gender-based violence women faced under apartheid was nothing short of a complete disregard for woman's dignity. Therefore, granting amnesty for those who impaired the dignity of politically active South African women is to take away an avenue for women to reclaim their dignity. Therefore, it important to go into detail about how this amnesty provision impacted women.

As discussed previously, the amnesty provision in the interim constitution set the tone for the transition period—peace could only come through compromise. However, the compromise came at the cost of justice for many who suffered under apartheid, impacting women in very nuanced and gender ways. One of the most prominent examples of the aforementioned claim is the case of the apartheid-era assassin, Craig Williamson, who murdered two influential women political activists, Ruth First and Jeanette Schoon.⁵⁶ A prolific scholar and activist, Ruth First, was heavily involved in left-wing student movements as a student when she met Nelson Mandela. She eventually went on to be a secretary for the ANC and MK, its underground wing. In 1960, she was

⁵⁵ Ubuntu is a zulu word for humanity or roughly translated as "I am because we are". Ubuntu philosophy puts a greater emphasis on the protection and benefit of the community. In the context of South Africa, Ubuntu was invoked on multiple occasions during the transition period to encourage doubters of the process to put the healing of the community (the country) first before any individual grievance.

⁵⁶ Peter Vale, "Craig Williamson: The Spy Who Came in for Apartheid," *The Conversation*, April 12, 2017, <http://theconversation.com/craig-williamson-the-spy-who-came-in-for- apartheid-76030>.

captured along with Nelson Mandela and held in solitary confinement for 90 days under which she faced torture. After being released from prison she fled to Mozambique with her husband and daughter. In 1982, Craig Williamson sent a letter bomb to Ruth First that immediately killed her.⁵⁷

Jeanette Schoon faced a similar fate as Ruth First. Schoon became politically active when she joined the South African Congress of Trade Unions (SACTU) with her husband, Marius Schoon. Jeanette eventually fled to Botswana with her family when her husband was banned from South Africa for his anti-apartheid activism. In 1984, Craig Williamson visited the Schoons' home pretending to be a family friend and left a bomb that murdered Jeanette and her six-year-old daughter.⁵⁸

In both cases, the men survived the attack by Craig Williamson. Ruth's husband was left untouched and Jeanette was survived by her young son and husband. In 1995, Williamson applied for amnesty for the murders of these two women and a child. His amnesty hearing lasted a consecutive 21 days. The "truth" that the TRC was expected to get as a compromise for offering amnesty was seldom found. The "truth" that Williamson offered was oftentimes incomplete. The exact details of how the murders were carried out and if other officials could be to blame were vague. Williamson would repeatedly deny knowledge of knowing who the "targets" were of the bomb and provided incomplete information on how he came to discover where Ruth and Jeanette were hiding underground.⁵⁹ During the amnesty hearing, Williamson showed little to no remorse for the killings of these women. It is essential here to note that the amnesty clause did not require that the applicant apologize or feel any remorse for their crimes. As such, when discussing the

⁵⁷ "Ruth Haloise First," *South African History Online*, September 1, 2017, <http://www.sahistory.org.za/people/ruth-heloise-first>.

⁵⁸ "Jeannette Schoon and her daughter are killed by a letter bomb," *South African History Online*, June 18, 2014, <http://www.sahistory.org.za/dated-event/jeannette-schoon-and-her-daughter-are-killed-letter-bomb>.

⁵⁹ Amnesty Committee Hearing, Truth and Reconciliation Commission (2000) <http://www.justice.gov.za/trc/decisions%5C2000/ac20082.htm>.

death of Ruth First at the TRC Williamson testified that he intended to kill Ruth's husband, but thought the death of Ruth was good riddance.⁶⁰

As a result, the amnesty committee determined that Williamson's actions were "not political but that he acted out of personal malice."⁶¹ The TRC amnesty committee acknowledged that his motives were instead associated with political objectives of destabilizing the enemy (i.e. the ANC). When considering the fact that Jeanette's daughter was also killed in the attack the committee notes "Death of any human is always a grave factor in all the unfortunate political killings. The fact that an innocent child was killed added to that and had to be taken into consideration."⁶² Despite this acknowledgment, the committee granted Craig Williamson amnesty.

Williamson committed many crimes against the ANC and other political organizations, yet he only received amnesty for the killings of Ruth First, Jeanette Schoon, and Jeanette's daughter. Thus the family of Ruth First and Jeanette Schoon challenged the granting of amnesty in court. The court eventually upheld the amnesty ruling for Craig Williamson arguing that it did not infringe on the Schoons right to equality before the law. The court argued that "the postscript [post-amble] to the constitution did not deal with civil indemnity but provided for amnesty. The constitution, in the chapter on fundamental rights (chap 3), provided for all to have access to the Courts and there was nothing in the constitution that obliged victims of past human rights abuses with current rights of civil action to abandon those rights and thus to forgive the perpetrators and to reconcile with them."⁶³ This ruling doesn't take into account the "spirit" under which the post-amble to the constitution was written. As discussed earlier the purpose of including the amnesty

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ *Williamson v. Schoon*, 1997.

last minute was to favor truth, reconciliation, and forgiveness (exact words included in the post-amble) over retribution. So, it is true that victims such as Schoon can exercise their right to civil action, but as evidenced in the ruling, it would lead to no action on behalf of the courts to condemn perpetrators of gross human rights abuses.

The TRC and Women's Testimonies

Despite the limits of the amnesty clause, the authors of the interim constitution provided avenues for victims to seek justice for and reaffirm the dignity of those who suffered under apartheid. The Promotion of National Unity and Reconciliation Act 34 of 1995 established the Truth and Reconciliation Commission. Parliament passed the act with audacious goals of creating a record of the human rights violations that occurred under apartheid, facilitating the granting of amnesty, and restoring the "human and civil dignity" of victims and their families. The TRC was composed of 17 commissioners and 300 staff members responsible for conducting hearings and investigations in multiple locations. Given the size and broad-ranging powers of the TRC, South Africa was poised to begin the difficult process of providing justice and ensuring that everyone could be seen as equal before the law and their fellow citizens. Similarly, the act granted the TRC broad-ranging powers to achieve its objectives such as subpoena, search, and seizure power, the ability to grant amnesties, creation of a witness protection program. It is for these reasons that the TRC "provided the most complex and sophisticated mandate for any truth commission to date, with carefully balanced powers and an extensive investigatory reach⁶⁴." Given the broad-ranging powers and the size of the TRC, it is often treated as exemplary of what a transitional justice process should look like and accomplish.

However, given the size and power of the TRC, it was still structurally flawed. The scope of the commission to be able to assist victims in the restoration of their dignity was limited to how

⁶⁴ Hayner, *Unspeakable Truths*, 27.

the TRC act defined victimhood. Victims were those who suffered gross human rights violations defined as " (a) killings, abduction, torture, or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)."⁶⁵ What qualifies this definition within the TRC act is that a person only suffered from a gross human rights violation if the offender acted with a "political motive" between March 1960 and April 1994. Some argue that the legislature had too narrow a definition of victimhood for the purposes of reparations.⁶⁶ If the definition had been expanded, more citizens would be able to make their case for reparations before the TRC committee which means the state would potentially suffer a grave economic burden at a time when administrative resources were at a prime low.

Nonetheless, such a legislative decision had a compounded effect on black South African women's experiences with the TRC. The definition of "gross human rights violations" focused solely on the physical manifestations of apartheid and the abuse of state power. The issue with this is that a large percentage of people who suffered killings, abduction, torture, or severe ill-treatment at the hands of the state were men.⁶⁷ This is mainly due to the fact that more men than women were a part of the underground, anti-apartheid struggle. Women were confined to more private spaces of oppression where the risk of suffering a "gross human rights violation" as defined by the TRC act was less than men.⁶⁸ Yet, this in no way means that women in any way suffered less than men under apartheid, but that the way politically-active black women, in particular, suffered was compounded due to both racism and sexism. Notwithstanding, it is clear why more men than women benefitted from the TRC given the scope of the definition of "gross

⁶⁵ Promotion of National Unity and Reconciliation Act, No. 34 of 1995, South Africa.

⁶⁶ Lovell Fernandez, "Reparations Policy in South Africa for Victims of Apartheid," *Law, Democracy and Development* (2000), 212.

⁶⁷ Goldblatt, "What Happened to Women," 62.

⁶⁸ *Ibid.*

human rights violations."

However, when looking at politically active black South African women who faced the same fate as their male comrades when captured by the state⁶⁹, the definition of "gross human rights violation" did not cover their specific experiences, particularly that of rape. It was not until women activists severely criticized the scope of the definition of gross human rights violations that the TRC included gender-specific crimes in the definition.⁷⁰ Severe ill-treatment now included rape and sexual violence. Similarly, torture was defined through a gender-specific lens as well. Torture included "assault to genitals/breasts, beating if the victim is pregnant or miscarries, electric shocks to genitals/breasts, disinformation (e.g. telling a person that a loved one is dead), genital mutilation, and sexual torture including rape, sexual abuse, threats of rape, touching, nakedness, sexual comments or insults, sexual incitement and deprivation of sanitary facilities for menstruation."⁷¹ If not for the push by women activists, the TRC would not have had the language necessary to provide reparations for women. However, these suggestions were made towards the end of the period in which the TRC operated.

Woman activists pushed for a more inclusive definition of victimhood to further address which political motivations determined whether or not the TRC classified a person as a victim. The TRC act mandated the actions that led to harm being done to a person needed to be "politically motivated" for a person to be considered a victim, especially for the purpose of reparations. The "political motive" component was likely placed there to create a clear demarcation between state responsibility for crimes committed under apartheid and individual malicious wrongdoing.⁷² Whatever the intention may be, the reality is that the TRC had a

⁶⁹ These were individuals who were kidnapped by state officials, usually the police.

⁷⁰ Goldblatt, "What Happened to Women, 63.

⁷¹ Ibid.

⁷² Cornell, *Law and Revolution in South Africa*, 85.

distorted notion of which actions were "politically motivated."

This distorted notion of politically motivated actions is best understood when looking at Nozibonelo Maria Mxathule's testimony during the special women's hearing held by the TRC. Mxathule was a member of the ANC Youth League in the 1980s when she was sexually assaulted by an undercover agent in the ANC Youth League. On July 29th, 1997, Mxathule testified before the TRC where she detailed the sexual assault and torture she suffered at the hand of the informants.⁷³ After submitting her story, the first few questions asked of Mxathule was whether or not she was a part of a political party if other politically active women were in her area, and the motivation for the informant breaking into her house.⁷⁴ In response to the latter question, Mxathule states " This person attempted to rape me because he had lust for me."⁷⁵

What happens is next is worth quoting at length:

CHAIRPERSON: But he was not doing that in a political context, he was just doing it as a man who wanted to do that to you as a person? I am trying to get that clarity.

MS MXATHULE: Yes, because when I explained this to his father, he explained to my father that your child is, they are used to each other.

CHAIRPERSON: Again, I would like us to be clear on this. So, this man wanted to rape you not because it was a, there was no political context. He was just doing it because he is used to doing that.

MS MXATHULE: The riots were not yet over in Jubatine at that time. We were

⁷³ Her interview was in Setswana and then translated into English. Translators often times were not accurate or reliable.

⁷⁴ Nozibonelo Maria Mxathule Testimony, Human Rights Violation Committee, Truth and Reconciliation Commission (1997), <http://www.justice.gov.za/trc/special/women/mxathule.htm>.

⁷⁵ Ibid.

still involved in the political struggle.⁷⁶

The chairperson seemed eager to follow a formula to see if Mxathule's experiences qualified her to be a "victim" as outlined by the TRC act. The man who attempted to rape Mxathule before kidnapping and torturing her was an agent of the state, even if he was working as an undercover informant. The fact that Mxathule knew the undercover agent personally, shouldn't distract from the fact that while acting in his capacity as a state agent he attempted to rape her. Yet, the chairperson shifts the violence that occurred from being between a state agent and a citizen to being between two persons by asking, "he was just doing it as a man who wanted to do that to you as a person?" This attempt to shift the context of perpetrator and victim is important because it is an attempt to remove current state liability for the harm that Mxathule suffered. If "political motive" and victimhood cannot be established, then Mxathule's case cannot warrant redress or reparations. So it's even more important that Mxathule attempts to re-shift the conversation by pushing back on what the chairperson meant by "political motives" when asked again if there was any political context. She states that she was still involved in the political struggle at the time that the government informant came to her home. For the chairperson to try to establish that "there was no political context" to the assault Mxathule faced is to undermine the role sexual assault played in punishing women in particular who moved out of their traditional gender role to fight against the apartheid state.

The same day as Mxathule's testimony, Dr. Sheila Meintjie, a prominent South African feminist and scholar, testified before the TRC where she clearly stated that there is a thin line between domestic violence and political violence.⁷⁷ Therefore, when evaluating violence against women and the power dynamics it reinforces, it is inherently political to strip women of their

⁷⁶ Ibid.

⁷⁷ Dr. Sheila Meintjies Testimony, Human Rights Violations Committee, Truth and Reconciliation Commission (1997), <http://www.justice.gov.za/trc/special/women/meintjie.htm>

dignity to subjugate them to a weaker state of being and civil class.

The depoliticization of rape and sexual assault by the TRC has its roots in the working committee of the TRC.⁷⁸ At the time, there existed no international standard for defining a political offense. Thus, the working committee decided that determining the political nature of a crime would have to be on an individual basis. The committee adopted the Norgaard Principles as a guide for evaluating the political nature of crimes. The principles were established by Professor Carl Norgaard in 1989 in response to Namibian independence from the South African Apartheid state. There are 5 criteria for evaluating whether or not a crime was political: (1) the motivation of the offender (2) political and military context (3) action (whether it was an overthrow, etc.) (4) the legal/factual nature of the offense and (5) the relationship between the offense and the political objective.⁷⁹ According to this set of criteria, "rape could never be considered a political offence."⁸⁰

Similarly, the Norgaard principles create a standard that the only form of victimization that was worthy of reparations and rehabilitation was harm committed by state actors against individuals. It negates the fact that other political actors such as members of MK and other opposition movements committed rape as well. Such a distinction narrows the path in which women can seek reparations for crimes committed by both the apartheid government and the MK wing, many of which are in the current South African government.

A prominent example of the depoliticization of violence against women is Thandi Modise's experience with the TRC. Thandi Modise became involved with the ANC after the Soweto Uprising of 1976 that led to the murder of countless youth. The uprising was a political

⁷⁸Groote Schurr Working Group Report, Republic of South Africa, Sec. 6.5.2(a).

⁷⁹ Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*, (New York: Routledge Press, 2014), 51.

⁸⁰ The Truth and Reconciliation Commission Report, Volume 1, Chap. 4, 51.

awakening and for some a turning point that encouraged a lot of youth to become active members of political groups like the ANC. Therefore, Modise fled to Tanzania to join the armed wing of the ANC in hopes of creating revolutionary change.

Of her incoming class of 100 soldiers, only 6 were women.⁸¹ Modise learned only during her training that being both a female and a freedom fighter was a difficult state of existence. Modise recounts her experience in the training camps:

There was this idea that we needed to be super-fit. Against the enemy, the South African state then, and against men who just wanted to take advantage of us. Because right there in Tanzania there had been an incident, there had been a terrible fight, something, I mean, which before 1990 we had been keeping quiet about. But there had been a fight one night over girls...because there had been a feeling among some men that because there are these five, six women there, 'Why should they be sex starved?' and there were others who said, 'No, they are not here to be sex slaves, if they want to have affairs they will have affairs, if they don't want to, then you are there to protect them'...

Modise's comments in many ways characterize the precarious conditions under which women had to operate under when they joined the armed wing of the ANC. Her experience also speaks to the level of comradery, either natural or forced, that silences women. The fact that she would have never been able to "air the dirty laundry" of the sexual assault that was rampant, shows how women's stories have been silenced in favor of maintaining the "good image" of the famous (mostly male) freedom fighters.

⁸¹ Thandi Modise, *A Woman in War*, (South Africa: Agenda Feminist, 1999), 3.

Although Modise and Mxathule's experiences are just two examples of how women were treated during the TRC, many of the women who went before the TRC were treated in a similar fashion. In some ways, the TRC led to a retraumatization due to women testifying in detail about their assault, rape, and abuse and having no guarantee of reparations or retribution. The committee members of the TRC treated gender-based violence as an accepted fact of society.

Women were abused before apartheid, under apartheid, and after apartheid and thus was stripped of any political context and treated solely as continuing societal problem. This can also be seen in the type of testimonies women gave at the TRC. Although 58% of those who testified before the TRC were women, the majority of the testimonies were about how their husbands, children, siblings, parents; etc. suffered and was rarely about their own suffering.⁸² Therefore, women themselves are not always willing to discuss the particularities of gender-based violence, despite how common it is. This normalization of gender-based violence has now become internalized by many women leading them to not deem their suffering as a part of the mandate of the TRC.

Given these facts, when a woman does decide to testify before the TRC she faces an extra level of scrutiny as exemplified by Modise's and Mxathule's experiences. Given experiences like this, women like Modise and Mxathule could not have their dignity recognized before the TRC, therefore challenging scholars who say the TRC was truly successful in reaching its goal of restoring dignity to victims.

The Nokuthula Simelane Case: Restorative and Retributive Approaches to Dignity

As discussed previously, women struggled but failed to have their dignity recognized and respected during the transition process, therefore women have begun to forge new paths for laying

⁸² "Women tended to downplay or omit their own harsh treatment at the hands of the authorities when talking of their relatives. Women's groups encouraged the TRC to probe these issues and ensure that women's own experiences were validated even where the evidence was not necessary for the formal purpose of defining them as victims." GoldBlatt, "What Happened to Women," 55.

claim to their dignity. There are two main approaches to claiming this right to dignity– the retributive or legal approach and the restorative approach or symbolic approach. The retributive approach focuses on the punishment of perpetrators while the restorative approach focuses on the rehabilitation and restoration of victims and their communities' dignity. I will outline how the retributive and restorative approaches are more complementary than contentious for women today seeking to lay claim to their dignity. In particular, the retributive approach can have symbolic effects by providing closure and semblance of reconciliation for victims while the restorative approach can punish perpetrators who destroy symbolic monuments that honor women's dignity.

Background of the Simelane Case

In the late 1990s, the TRC held the amnesty hearing for former members of the apartheid state security branch (SIU) who were responsible for the kidnapping, torture, and forced disappearance of Nokuthula Simelane. In 1983, Simelane was a 23-year-old university graduate when she joined Umkhonto we Sizwe (MK), the armed wing of the ANC. There are key aspects of this case that help one understand the importance of laying claim to dignity for black politically active South African women. The first is the nature of the violence that women like Simelane suffered at the hands of both black and white men. Secondly, Simelane's family's request during the TRC to know the location of Nokuthula's remains so that the family can bury her with dignity. Lastly, is the legal challenge made against the granting of amnesty for Simelane's torture and disappearance.

At the time, women made up no more than 15-20% of the armed wing of the ANC.⁸³ The woman who did join were often university graduates, students, or young mothers who left behind their lives to fight underground. In the underground camps, women faced the threat of physical

⁸³ Kongko Louis Makau, "Aspects of the Experiences of 10 Women in MK: 1976-1988" (PhD diss., University of Johannesburg, 2013), 18.

assault, sexual abuse, and unsanitary living conditions.⁸⁴ If a woman were to become pregnant while in the camp, she was oftentimes sent to Tanzania with little support. The full extent of the violence MK women faced is still unknown due to the intimidation techniques of the current ANC-led government. For example, MK leaders such as Thabo Mbeki and Jacob Zuma exercised their political power to silence the testimonies and actions of women who did wish to speak up about the violence they faced.⁸⁵

While it is unclear whether Simelane faced any abuse while in the ANC camps, many women of her stature did. In 1983, Simelane was working as a courier for MK when she reentered the country to meet with Mkhonsa, another MK member in Johannesburg. Mkhonsa turned out to be an *Askari*⁸⁶, a former MK fighter turned apartheid state operative. Mkhonsa brought her to the Carlton center where a van and another state operative waited and kidnapped Simelane. She was then transported to a secluded unmarked farm where she was subjected to solitary confinement and torture. She was repeatedly choked with a wet bag placed over her head while security branch officers repeatedly assaulted her body. Similarly, electric shocks were administered on her breasts and genitalia resulting in convulsions. When she wasn't being tortured and interrogated, she was chained to her bed with leg irons and guarded by two black security branch officers.⁸⁷ In fact, Simelane was "seriously" concerned by the amount of exposure she had to the black security branch officers, according to the white SIU officers' testimonies.⁸⁸ Other than the two black men guarding her, she allegedly witnessed multiple black men at the farm who were working for the security branch to whom she pleaded that they

⁸⁴ Ibid, 26.

⁸⁵ Hayner, *Unspeakable Truths*, 30.

⁸⁶ This was the term used in Thembi Simelane's affidavit.

⁸⁷ The Truth and Reconciliation Report, Republic of South Africa, Vol. 6, Sec.3, Chap. 1, Para. 202.

⁸⁸ Amnesty Committee, Truth and Reconciliation Commission (2000), <http://www.justice.gov.za/trc/amntrans/2000/200530pt.htm>.

do not tell the MK that she had given the security branch information.⁸⁹ At the end of the five weeks of torture, she was so brutally beaten and assaulted that she could not walk and was barely recognizable. According to the testimonies of both the black and white SIU officers, Simelane was last seen with "her hands and feet cuffed in the back of Coetzee's vehicle."⁹⁰

The full extent of Simelane's torture was never revealed. However, it is important to note that Pretorius, one of the head perpetrators on the farm admitted before the amnesty committee that how they tortured women was different than how they tortured men.

Moreover, we know from other accounts of women who have been tortured by the state that the damage was extensive. In describing torture at the hands of a white policeman one black woman stated, "When men stood ground against the physical abuse there was a sense of respect...But when a woman refused to bow down...then that released the wrath of the torturers, because in their own discourse a *woman*, a *black 'meid*, 'a *'kaffirmeid*⁹¹ had no right to have the strength to withstand their torture."⁹² Therefore, race and gender-informed how black women experienced torture at the hands of white men. Yet, Simelane was not only tortured by white men. She also was tortured by two black SIU officers who administered the electrical shocks to her body, repeatedly slapped and punched her, in addition to guarding her while she was chained to her bed.

Notably, race also informed who received blame and punishment for Nokuthula's torture and disappearance. There was a stark divergence between the black and white SIU officers on where Nokuthula finally died and who delivered the final strike. The two black security branch

⁸⁹ "I'm not sure who, but there were other black members, other than Veyi and Selamolela and Sefuti, who was also there from time to time and then there was Mothiba, that was there, you will recall he was referred to, or referred to as the father figure and then there was Radebe as well and Langa, so there were quite a number of them that frequented the farm and Coetzee, Pretorius and Mong went on to say that she requested them to keep the fact that she had turned, a secret from the black members" Source: Amnesty Committee, Truth and Reconciliation Commission (2000), <http://www.justice.gov.za/trc/amntrans/2000/200530pt.htm>.

⁹⁰ Ibid.

⁹¹ An Afrikaner slur for black women, in particular.

⁹² Goldblatt, "What Happened to the Women," 52.

officers, "perpetrators," consistently disagreed with the white perpetrators on the issue of whether or not the torture led Simelane to give up information on MK fighters and their activities. Even up to this day, it is unclear whether the SIU killed Nokuthula because she wouldn't inform on her comrades or if the ANC killed her because they thought she did inform on the underground mission. Whether or not Nokuthula gave information that led to the discovery of MK fighters' activities is an important issue. If Simelane did inform on the MK then that would provide probable cause for the ANC to execute her, as was common practice when the MK discovered government informants. As such, the two black SIU officers argued that she did not give information on the underground activities, thus removing the possibility that the ANC could have executed her, and eventually received amnesty for the abduction and torture of Simelane. However, the three white officers only received amnesty for Nokuthula's abduction. Since the white officers were denied amnesty for the torture of Nokuthula Simelane their case was forwarded to the National Prosecuting Authority (NPA) to be tried, which I will discuss later, has yet to be investigated for trial. Either way, both the apartheid and post-apartheid era government refuse to take responsibility for Nokuthula's disappearance.

The current government's refusal to take responsibility is important because I argue that there is a connection between the black SIU officers' testimony and their receiving amnesty. As I discussed earlier the ANC and its underground wing also committed gross human rights abuses such as torture, murder, and sexual assault against women in their camps. The punishment for those who were considered informants on the ANC was often death. Given these crimes, ANC leaders submitted a joint application for amnesty for all the human rights violations committed under apartheid. The amnesty committee granted amnesty to all 37, male, ANC applicants without

a formal hearing, asking for further details, and disclosure of all the facts of the crimes.⁹³ One of the ANC leaders pardoned was the chief officer of the TRC. The purpose of mentioning this is to further underscore the fact that the ANC protects its own (who are males, at least). There is a level of comradery that exists in the ANC and the MK in particular, that would commit each male member to hide each other's secrets or human rights violations. Therefore, it would be possible that the two black SIU officers were conveniently granted amnesty for not potentially implicating the ANC in the death of Nokuthula Simelane. Similar to the testimonies of Modise and Mxathule that were previously discussed, the current ANC government continues to impair the dignity of the women who struggled side by side with them by closing off avenues for them to have their dignity recognized before the law and before society.

Although the transition process foreclosed avenues for women to have their dignity recognized and respected, black women in post-apartheid South Africa have created their paths to laying claim to their understanding of dignity. For the sake of chronological order, I will begin first by analyzing the Simelanes' immediate legal response to the amnesty hearing. Then, I will discuss their symbolic response in resurrecting a statue in Nokuthula's name after the family faced resistance from the NPA in prosecuting Nokuthula's disappearance.⁹⁴ Lastly, I will discuss the Simelane's call for *crimen injuria* after the destruction of Nokuthula's monument that occurred a few years after it was built. The purpose of the chronological analysis is to show the evolution of the Simelane's formulation of a path towards claiming dignity from a retributive to a restorative approach and ending with the use of *crimen injuria* which I argue has both legal (retributive) and symbolic (restorative) elements that prove to be more complementary.

Retributive Approach

⁹³ Hayner. *Unspeakable Truths*, 30.

⁹⁴ From now on I will use Nokuthula's first name when referring to her instead of her last name since her immediate family members, who share the same last name, will also be discussed.

This granting of amnesty meant that the Simelane family could not bring a case for any criminal or civil liability against the two black SIU officers. However, they were allowed to bring a case against the white SIU officers for the torture of Simelane since they only received amnesty for her abduction. After going through the amnesty process, the Simelane family was left with few options and a renewed sense of what dignity meant how they wanted to lay claim to it. Dignity means two main things for them: respect for one's body and recognition of another's dignity.

First, dignity meant showing respect for Nokuthula's body. The family repeated on multiple occasions that they just want to know where the remains of their daughter were so that they could bury her with the dignity that she deserves. Simelane's father notably said during the TRC hearing "All what we want now are her remains so we could bury Nokuthula in a decent way. In our culture, we bury people decently and we would like to do that."⁹⁵ This specific reading of dignity here is of dignity as a value. Simelane's inherent worth as a human being means that she must be buried according to her family's customs and traditions. Therefore, the inability to have the legal avenue to force the perpetrators to not only recognize the devaluing of Simelane's dignity but to also honor Simelane's right to have her dignity protected and respected is one reason the family finds the retributive approach necessary to find the remains of Nokuthula.

The Simelane's understanding of dignity challenges the claim in the amnesty provision that the only way to get the truth from perpetrators is by providing the option of amnesty. However, the family takes the approach that the imminent threat of prosecution can be critical to extracting the truth about Simelane's disappearance.⁹⁶ The amnesty hearing failed to disclose all

⁹⁵ "The Simelane Matter", Amnesty Committee, South African Truth and Reconciliation Commission (2000), <http://www.justice.gov.za/trc/hrvtrans%5Cleandra/simelane.htm>.

⁹⁶ Jeremy Sarkin, "Dealing with Enforced Disappearances in South Africa (With A Focus On the Nokuthula Simelane Case) And Around the World: The Need to Ensure Progress On the Rights

information relating to Nokuthula's kidnapping, torture, and the location of her remains.

Therefore, the desired outcome for this lawsuit is to learn the truth about what happened to Nokuthula so that (1) her body can be found and buried with the dignity that she deserved and (2) to force the state to herein respect the dignity of her, women, and families in South African society. Nokuthula Simelane's mother, Ernestina Simelane, makes her intentions clear for why she is pursuing legal retribution. Ernestina states during a news conference, " I want answers before they die before they go to their graves with their horrible secrets. I go to bed and dream ... of Nokuthula calling me for help ... if only someone can say something, just tell me where she's buried. These men must tell me so I can die peacefully."⁹⁷ This agony that Nokuthula's mom faces now shows that the amnesty provision was an unfair bargain. Instead of receiving the truth in exchange for retribution, the Simelane family remains empty-handed.

Second, the Simelane family also sees dignity as a right that needs to be recognized. The issue of dignity is not only just about Nokuthula but her sister and mother who live in uncertainty about the fate of Nokuthula. For years after the amnesty hearing, the Simelane family requested that the National Prosecuting Authority (NPA) take up Nokuthula's case. Since the current government is controlled by the ANC, there has been a lack of political will to take on the case due to the fact that ANC leaders in power have a reputation at stake if the case is investigated by the NPA. As was discussed in the background of the Simelane case, it is still unclear on the evidence gathered during the amnesty hearing whether or not ANC leaders ordered the killing of Nokuthula after discovering she had been converted into an apartheid government informant.

Therefore, an investigation and prosecution for the torture and forced disappearance of Nokuthula

to Truth, Justice and Reparations in Practice" *Speculum Juris*, 29, no. 1 (2015).

⁹⁷ Jason Burke, "Four former apartheid era guards on trial over 1983 student murder," *The Guardian*, <https://www.theguardian.com/world/2016/feb/26/four-former-apartheid-era-guards-on-trial-over-1983-student>.

Simelane would open up the possibility of lawsuits against current ANC members.⁹⁸

On this note, Thembi elaborates further on the lack of political will. " The underlying rationale of the Government's opposition to the pursuit of the so-called political cases is disturbing. I submit that such manipulation of the criminal justice system to protect 'cadres' from prosecution, serves an ulterior purpose, constitutes bad faith, is irrational and amounts to a subversion of the rule of law."⁹⁹ Thembi, being a politician herself, touches on the length that men will go to hold on to power and, by holding on to power, continuously subjugate women's narratives that may "threaten" this hold on power.¹⁰⁰ The reality is that Simelane was a "cadre" and soldier for the ANC, but the lack of concern for prosecuting the case shows how deeply imbedded patriarchy was in the system of apartheid. Black female MK fighters faced a double form of marginalization due to racism in the apartheid government and sexism within the ANC. Some scholars have theorized that the system of apartheid contributed to an enhanced form of black masculinity due to heightened oppression that allowed for them to transfer that oppression to women and thus simultaneously subjecting women to second-class status, worth and dignity.¹⁰¹ However, this subjugation of a woman's dignity continues into the post-apartheid era because although the racial oppression has been lifted, there is still this patriarchal belief that the dignity of that of a man and that of a woman are fundamentally different.

The unwillingness of the NPA to help solve the disappearance of Nokuthula Simelane

⁹⁸ Sarkin, February 26, 2016, "Nokuthula Simelane and Reparations: A Legal Framework,"32

⁹⁹ Thembi Nkadimeng Simelane, *Founding Affidavit*, 2015.

¹⁰⁰ A primary reason why women's narratives like that of Simelane are a threat to post-apartheid governments is because of the "authenticators" that gave them that power. Thabo Mbeki and Jacob Zuma were both members of MK and because of the nature of the underground movement, they legitimize their power by constantly spewing narratives that paint them as "saviors of the nation". Therefore, if a woman who faced similar oppressive relationship but at the hands of the ANC, this would question the legitimacy of this mainstream ANC narrative.

¹⁰¹ Helen Moffett, "‘These Women, They Force Us to Rape Them’: Rape as Narrative of Social Control in Post-Apartheid South Africa," *Journal of Southern African Studies* 32:1, 129-144 (2006) DOI: 10.1080/03057070500493845.

prompted the family in 2007 to file a lawsuit against the state. The lawsuit not only challenges the state's lack of prosecution but also argues that the amnesty clause of the interim constitution is antithetical to the Simelanes' right to dignity as well as other constitutional rights. In the lawsuit, Nokuthula's sister, Thembi Nkadameng Simelane, along with other families makes two very distinct claims to dignity using the same language found in the constitution. First, Thembi states in an interview about the case that "The unreasonable delay in investigating this case and the prolonged delay in taking a prosecutorial decision; or referring the case to an inquest has violated my right to dignity. Such lapses have denied me and my family, as well as that of our wider community, the acknowledgment of our intrinsic worth as human beings."¹⁰² When discussing the prolonged delay in prosecutions Thembi further states that such a delay also "demeans South African society as a whole by betraying the constitutional compact made with victims as enshrined in the epilogue to the constitution of the Republic of South Africa Act 200 of 1993 and by undermining the purpose and spirit behind the TRC amnesty process."¹⁰³

Scholars have argued that applying a legalist paradigm is inadequate for addressing the social and psychological aspects of mass violence.¹⁰⁴ More practical critiques lie in the nature of the post-apartheid court system. Scholars such as Paul van Zyl argue that a newly transitioned government could not afford the cost of multiple high resourced cases and similarly could not afford the payout from multiple successful civil cases. Specifically, the prosecution of apartheid-era crimes would clog an already dysfunctional legal system whereby in 1996 only 4% of those convicted of major crimes (murder, rape, assault, etc.) spend more than 2 years in jail.¹⁰⁵ The practical critiques for the use of the retributive approach are warranted. While it's clear the NPA

¹⁰² Thembi Nkadameng Simelane, Founding Affidavit, 2015.

¹⁰³ Ibid.

¹⁰⁴ Shklar, *Legalism; Law, Moral and Political Trials*, 63.

¹⁰⁵ Van Zyl, "Dilemmas of Transitional Justice," 52.

has political motives for not prosecuting the case, there are also systemic issues with the current South African legal system as van Zyl notes above that would make the conviction for the crimes committed against Nokuthula a difficult and long process.

Restorative Approach

While the push for the NPA to take up Nokuthula's case continues the family shifted focus to a more restorative and symbolic approach to laying claim to dignity. Two years after challenging the amnesty provision in court, the Mpumalanga Provincial government commissioned a statue of Nokuthula Simelane in her hometown of the Bethal Precinct. This statue is one of the few solo statues that honor a woman for contributions to the freedom struggle in South Africa.¹⁰⁶ The only known statues that honor women are the Elizabeth Salt statue, Bloemfontein Women's Memorial, and the Woman's March memorial in Pretoria. The Elizabeth Salt monument honors a white British woman that fetched gun powder for British soldiers during the war against indigenous people in 1819. The Bloemfontein memorial honors the Dutch women and children who died in concentration camps during the Anglo-Boer war of 1899. Lastly, the women's memorial, which is still under construction as of the summer of 2017, is dedicated to Lillian Ngoyi, Helen Joseph, Charlotte Maxeke, and Sophia Williams De Bruyn, four women who led the women's march in 1956 to protest the pass laws. Therefore, the statue of Nokuthula Simelane was the only statue at the time that honored a black South African woman for her contributions to the freedom struggle.

The public recognition of Nokuthula's life and the story is a form of symbolic reparations that was promised by the TRC but fulfilled by her community. This community is not only the Mpulanaga government community but also a non-governmental group known as the Khulumani

¹⁰⁶ Khulumani Youth Dialogue, March 12, 2011.

Support Group. The mission of the Khulumani group is to "build an inclusive and just society in which the dignity of people harmed by apartheid is restored through the process of transforming victims into victors."¹⁰⁷ They do this by assisting mostly women victims in economic, symbolic, and other forms of reparations through advocacy. The director of the Khulumani group, Dr. Majorie Jobson, has worked extensively on the intersection of art, politics, dignity, and the Nokuthula Simelane case. In Dr. Jobson's words, she "deeply regrets this act of vandalism and what it symbolises of the unrepentant attitudes of some South Africans who have never appreciated the huge cost paid by a few for the freedom of our country in the struggle that sought to make it a place where people of all races might find a home."¹⁰⁸

Memorialization both as a state and community endeavor is essential for shaping political narratives around what kind of violence was perpetrated under apartheid. The dismal amount of women's monuments perpetuates a certain kind of political and gender narrative. There are more statues of Nelson Mandela than there are of women in South Africa.¹⁰⁹ It reinforces a patriarchal reading of history by placing men, regardless of race, as the worthiest of veneration and public appreciation. In some ways, it perpetuates what Margaret Urban Walker calls the "continuum of violence." What walker means by this is that there is a culture of sexual violence against women in South African society that constitutes it as "everyday violence." This is to say that the maltreatment of women is a problem of everyday society both before, during, and after apartheid. While Walker acknowledges that that apartheid can exacerbate instances of sexual violence, apartheid is not the sole cause of such violence. Yet, Walker suggests further that "it is the suffering that is paradigmatically that of men in war - or men killed or disappeared in political

¹⁰⁷ Dr. Marjorie Jobson, Director of the Khulumani Group. Interview by Shae Omonijo. Pretoria, South Africa. July 7, 2017.

¹⁰⁸ Ibid.

¹⁰⁹ Gary Baines, "The Politics of Public History in Post-Apartheid South Africa," 4.

activity - that deserves attention, and women may be intimidated and shamed for suggesting that their suffering deserves acknowledgement, much less redress. In this way, women's own suffering 'become invisible even to themselves.'¹¹⁰ Similarly, the fact that sexual violence is exacerbated, yet not adequately addressed in instances of redress that contributes to further marginalization of women in post-apartheid society.

Women being treated as less than men in public spaces was true before, during and now after apartheid. As one Khulumani member said, "Due to narrow conceptions around memorialization, that state processes of memorialization have simplistically tried to 'replace white men with black men'. This he argued was further marginalizing groups such as women and the working-class groups that have made the most significant contribution to the liberation struggle."¹¹¹ Thus, this shift in power that this member describes from white men to black men, not only symbolizes the continuation of patriarchy, but also a shift on who controls what the nation chooses to remember.

As much as memorialization is about the control of political narratives about women and their place in the anti-apartheid struggle, it also about agency. This is where memorialization and dignity intersect. One of the ways that dignity is discussed in the constitution is that it implies dignity is the inherent worth accorded to each human being that allows them the opportunity for agency and self-governance.¹¹² Women are afforded agency by virtue of their "humanness" and worth allowing them the capacity to choose their own actions. Therefore, when ANC men in

¹¹⁰ Margaret Urban Walker, "Gender and Violence in Focus: A Background for Gender Justice in Reparations" in *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* eds. Ruth Rubio-Marín (Cambridge: Cambridge University Press, 2009), 44.

¹¹¹ Ereshnee Naidu, "Symbolic Reparations: A Fractured Opportunity" Center for the Study of Violence and Reconciliation, 2.

¹¹² "An essential feature of South African constitutional politics that flows from the place of dignity in our basic law is the recognition of the ability of all human beings—through their capacity to reason—to legislate for themselves." Stu Woolman, "The Architecture of Dignity," 79

government control the process of memorialization and choose who gets to have their contributions and dignity recognized, they are neglecting women's inherent agency. Women normally cannot control how they are perceived in public art which is further reason more for why the Nokuthula Simelane statue was a form of resistance from this status quo.¹¹³ The statue is an expression of the agency of the Simelane family, in particular Thembi, and the symbolic agency of Nokuthula's story which the ANC government has failed to investigate as outlined previously.

The substantive critique to the restorative approach, symbolic in particular, is that in light of the very tangible issues that women face, income inequality, health epidemics, gender-based violence that public art can somehow alleviate these issues. As one interviewee put it, "I want to make this point again that symbolism can only play a very small part in solving our problems."¹¹⁴ This is an important point to keep in mind and integral to why I argue that symbolic reparations can only partially explain the ongoing tension between women's legal rights and their lived experiences.

Complimentary Use of the Retributive and Restorative Approach

Given the substantive critiques outlined against the retributive and restorative approach, I argue that black women are now using both approaches complementary to lay claim to their dignity. While the creation of public art is a way of restoring the dignity of victims and trials are a method of punishing perpetrators, I also argue that the destruction of public art also serves a political purpose and can help demonstrate how complementary the retributive and restorative can be.

¹¹³ To further explain I refer to Margaret Urban Walker when she states, "Cultural symbolic resources are apt to be controlled in many social settings by powerful men rather than by women. The protection or abuse of women, both in times of conflict and repression and in the aftermath, will invariably be seen as statements not only about women and men, but about society's moral, political, and cultural values and identity" Walker, "Gender and Violence in Focus," 33.

¹¹⁴ Interviewee quoted in Naidu, "Symbolic Reparations," 4.

On January 25th, 2011, two white Afrikaner males sawed off the Nokuthula Simelane Statue and placed it in the back of their vehicle in the middle of the night, severely damaging the statue. The practical reenactment of Simelane's kidnapping and torture, by sawing off Nokuthula's statue and placing it in the trunk of a vehicle, illustrates how deeply racism and sexism are still embedded in South African society. The statue was eventually repaired and resurrected, but on April 16, 2015, the statue was defaced again with paint. The perpetrators for the 2015 defacing of the statue are unknown.

Eventually, the NPA charged the two perpetrators with theft and vandalism. However, these charges were not enough. The Simelane family requested that the charge of *crimen injuria* be added to the list of charges. *Crimen injuria* in South African criminal law is the act of “unlawfully, intentionally and seriously impairing the dignity or privacy of another.”¹¹⁵ Once used as a defense for predominantly white women, *crimen injuria* in many ways is now being repurposed for the protection of black South African women’s dignity in ways that both the constitution and the TRC reparations committee failed to do. The Simelane family's insistence on the charge of *crimen injuria* is in line with their mission to have the state recognize and respect the dignity of Simelane and others like her.

The application of the *crimen injuria* charge is also significant since its historical use has been in the defense of white South African women. What constitutes *crimen injuria* was first determined by the South African court in 1908. In *R. v. Umfaan, 1908* the court established that it must first “determine whether there has objectively been an impairment of complainant’s dignity and then to infer from that fact the element of intention.”¹¹⁶ Yet, it is important to note that the South African court system was far from objective when determining the merits of *crimen injuria*

¹¹⁵ "Common Law Offenses-Definitions," *South African Police Service*, accessed September 1, 2017, <https://www.saps.gov.za/faqdetail.php?fid=9>.

¹¹⁶ 75 S. African L.J. 237, 281 (1958)

in a charge against defendants. In *R. v Umfaam*, there was a “difference in color” between the defendant and the complainant, thus the courts determined that “the difference in color, therefore, between the parties is clearly a factor in the decision whether a *crimen injuria* has been proved.”¹¹⁷ Due to the fact that a white woman brought a case on the basis of *crimen injuria* against a colored man in *R. v. Umfaan*, the charge of *crimen injuria* was deemed appropriate. Thus, *crimen injuria* became a legal avenue for white women to have their dignity protected.

Essentially, one of the first times the charge of *crimen injuria* is used in the South African court system was for the protection of a white woman’s dignity. As an effective measure, white women continued to employ the use of *crimen injuria* in the court system. In *R. v. van Meer* (1923), a 24-year-old woman was being sexually harassed by a 47-year-old man while at a public library. The man was convicted of *crimen injuria* by a local South African court because he was “behaving in a deliberately objectionable manner with intent to insult and injure the complainant in her modesty.”¹¹⁸ Although, the courts had established in 1927 that the intent of the action that leads to a charge of *crimen injuria* is not as important as the impairment of dignity itself.¹¹⁹ In 1963, a black man was convicted of *crimen injuria* for calling his white female co-worker “sunshine.”¹²⁰ Similarly, in 1975, a black employee at a company was accused of sexual harassment by his white female co-worker in *S v. K, 1975*.¹²¹ The black employee was convicted of *crimen injuria*.

All in all, these cases show that *crimen injuria* has in the past been used, for the most part, for the protection of white women’s dignity, mainly since non-white women were not

¹¹⁷ Ibid.

¹¹⁸ 40 S. African L.J. 147, 175 (1923)

¹¹⁹ *R. v. Holliday*, 1927 established that the “intention to convey insult is not an essential element of *crimen injuria*”

¹²⁰ Cf *S v Ngwenya* 1962 (1) SA 367 (N).

¹²¹ Ibid.

considered citizens, barely human beings at the time. However, in the most recent decade, the charge of *crimen injuria* has been used by black South Africans against Afrikaners who use racial slurs and epithets to insult their dignity. Even more so, it is becoming a tool used by Black South African women, in particular, to respect the dignity of the black women who died in the freedom struggle under apartheid.

The case of the missing Nokuthula Simelane statue went to the Mpumalanga district court in October of 2011. Even though the two or more men were responsible for the crime, only one male, a 25-year-old Cornelius van Tonder, was formally charged. In the words of Thembi, van Tonder "got a bail of R500 for damaging a statue worth R2m."¹²² The handling of the case was inadequate according to Thembi because she and her family believe that the destruction of the statue was politically motivated. The method of destruction suggests that the perpetrators knew the significance of sawing, chaining, and placing the statue in the back of their trunk.

Therefore, in addition to the *crimen injuria* charge, there are other key changes that Thembi advocated for with the case. Initially, the prosecutor and magistrate were white, a fact that disturbed Thembi because of the nature of Afrikaner patriarchy that dominated society when Simelane was alive and in present-day South Africa. Primarily, the lack of recognition and respect for the dignity of Nokuthula Simelane both under apartheid and post-apartheid is even more cause for why there need to be more public representations of narratives that challenge the dominance of white and/or male power. The perpetrators were two young white males who possess a level of toxic masculinity that is threatened by the presence of such a monument. The reality is that the monuments of Nelson Mandela or other male apartheid liberation icons are not under threat of destruction. It is the space that the Simelane statue commands and the narrative it tells, that makes

¹²² "Simelane Family Not Happy" Khulumani Support Group, accessed March 23, 2011, <https://www.khulumani.net/khulumani/in-the-news/item/443-simelane-family-not-happy.html>.

it a constant threat to white masculinity. Therefore, an all white judicial team doesn't do much in restoring faith in the rule of law that is predicated on respect for individual worth and dignity and thus equality before the law as outlined in the constitution. Thembi was successful in requesting a new judicial team and van Tonder was found guilty of all charges including *crimen injuria*.

I argue the use of *crimen injuria* has both restorative and retributive elements. The invoking of *crimen injuria* was retributive in the sense that it focused on individually punishing van Tonder for vandalism, theft, and impairment of the dignity of another. This trial focused on reestablishing a rule of law, an ongoing political project in post-apartheid South Africa. Another step towards Rule of law is reached when a black woman can bring a case against a white man and both parties to receive equal treatment before the law. As noted earlier successful uses of *crimen injuria* to punish perpetrators had only been successful for white women under apartheid. Thembi was able to successfully force the state to recognize her and her sister's right to dignity by requesting the charge of *crimen injuria* by added. This is what Thembi and her family have sought to accomplish since challenging the amnesty decision back in 2007.

The restorative approach shifts the purpose of the trial from punishment for a crime committed between an individual perpetrator and victim to "promoting the individual's duty to a larger group" and community.¹²³ In this sense, the destruction of the monument not only impacted her family but her community as well. For those who live in the Bethel community and knew Nokuthula personally, or have read about her story, the placement of her monument was a constant form of remembrance. When it comes to forced disappearances, one of the political objectives of such an act is to force society to forget the person in question and to institutionally erase their humanity by denying them an identity, death certificate, and any legal rights.

¹²³ Kora Andrieu, "Transitional Justice: A New Discipline in Human Rights," Online Encyclopedia of Mass Violence (2010), 10.

Therefore, to place a monument in Nokuthula's honor in her community is not only a form of resistance but also communal healing for those who lost women like Nokuthula who remain disappeared.

Thus, the community impact of the trial is just as important as the outcome. Bruce Ackerman calls trials "constitutional moments" where a socio-political narrative emerges before the South African public.¹²⁴ Trials are a "moral moment" for shaping the post-apartheid South African society by allowing the public to form a social solidarity by collectively rejecting the crimes of the accused and reaffirming violated values such as dignity, equality, and freedom.¹²⁵ In this way, trials can serve as educational to society, a way to reaffirm the dignity of women who suffered in a way that has yet to penetrate mainstream South African society.¹²⁶ In fact, I had first learned of *crimen injuria* and Nokuthula Simelane after reading about the trial while doing field research for this project in the summer of 2017. The Simelane case, in particular, challenges the impunity in which crimes against women were committed during and after apartheid. It seeks to make sense of the disjuncture between women's legal right to dignity and the maltreatment of women's dignity.

To make sense of this disjuncture, the Simelane family evolved their approach to laying claim to dignity from a retributive to a restorative approach and finally using both complementary. As Stover and Weinstein note, "Trials as national ritual or performance are conceptualized as critical to reconciliation because catharsis of truth-telling, along with the inscribing of national memories, will lead to decrease in [mental] suffering and a renewed

¹²⁴ Bruce Ackerman, *We the People*, vol. 2: Transformations (Cambridge: Harvard University Press, 1991), 12.

¹²⁵ This line of reasoning was first suggested by the French sociologist, Emile Durkheim and John Dewey.

¹²⁶ Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick: Transaction Publishers, 1997), 37.

commitment to reconciliation."¹²⁷ To extrapolate this further, whether it is a monument or a trial, political narratives and "truths" about women like Nokuthula Simelane can enter mainstream societal consciousness, forcing people in society to think about a women's place in society. It allows for the public, specifically men to engage in a reciprocity of recognition of a woman's sense of dignity. The right to dignity, itself, needs to be recognized and respected for society to begin to uphold it as a value. Some men, in particular, refuse to engage voluntarily with this exercise of recognition and thus refuse to prosecute cases or react violently by destroying a monument. Therefore, the Simelane family's utilization of both the retributive and restorative approach by invoking *crimen injuria* demonstrates how more complimentary than independent of one another the approaches are to laying claim to dignity and having this claim recognized by a male-dominated society.

Conclusion

In August of 1956, women from all over South Africa came to Pretoria to march to the Union buildings to protest the expanding apartheid state. As they marched, women sang "Wathint' Abafazi, Wathint' Imbokodo", a Zulu phrase meaning "you strike a woman, you strike a rock." This rallying cry has two significant meanings for this thesis. First, to "strike a woman" highlights how politically active black South African women suffered from unspeakable violence under apartheid. Secondly, "to strike a woman, is to strike a rock", in a symbolic sense, highlights the current destruction of women's monuments, usually made of cement, marble, or bronze. Although women have suffered from both physical and symbolic assaults on their dignity under apartheid such as in the case of Nokuthula Simelane, women in the post-apartheid era are now using both legal and symbolic means to reclaim their dignity. What is at stake here is not only how women lay claim to dignity, but the source of the tension between dignity as a right and a value. The end

¹²⁷ Stover and Weinstein, *My Neighbor, My Enemy*, 12.

of apartheid brought a promise of dignity, gender equality, and freedom for all South African citizens. However, this promise fell short of being fulfilled in the everyday life of black South African women. I argued that the tension between women's legal and social recognition of dignity is partially due to the transition process and how women's experiences under apartheid didn't warrant them the right to have their dignity recognized and respected, therefore challenging the exemplariness of the South African transition process. In analyzing the major pitfalls of the TRC and the ways women have sought to make up for them, I challenge the existing scholarship that places the South African TRC as the pinnacle of Transitional Justice. This is what is at stake when one accepts the basic premise of this thesis, that women who have layered identities such as being black and politically active (going against gender norms at the time) were let down by this transition process and thus had to create their own paths to laying claim to their dignity. The complementary use of the retributive and restorative approach not only allows for black South African women to lay claim to their dignity and that of their loved ones but forces the state and society to recognize the inherent dignity of women.

Bibliography

- "Common Law Offenses-Definitions," South African Police Service. Accessed September 1, 2017, <https://www.saps.gov.za/faqdetail.php?fid=9>.
- "FACTSHEET: South Africa's 2015/16 crime statistics." Africa Check. Accessed September 27, 2017. <https://africacheck.org/factsheets/factsheet-south-africas-201516-crime-statistics>.
- "Jeannette Schoon and her daughter are killed by a letter bomb." *South African History Online*. June 18, 2014. <http://www.sahistory.org.za/dated-event/jeannette-schoon-and-her-daughter-are-killed-letter-bomb>.
- "Quotations by Oliver Tambo." South African History Online. Accessed October 26, 2017. <http://www.sahistory.org.za/topic/quotations-oliver-tambo>.
- "Rape in South Africa." Rape Crisis Cape Town Trust. Accessed February 11, 2018. <https://rapecrisis.org.za/rape-in-south-africa>.
- "Ruth Haloise First." *South African History Online*. September 1, 2017. <http://www.sahistory.org.za/people/ruth-heloise-first>.
- "Simelane Family Not Happy." Khulumani Support Group. Accessed March 23, 2011, <https://www.khulumani.net/khulumani/in-the-news/item/443-simelane-family-not-happy.html>.
- "Status of women and girls in South Africa 2015." *One*. Accessed September 1, 2017. <https://www.one.org/africa/policy/status-of-women-and-girls-in-south-africa>.
- "The Simelane Matter." Amnesty Committee. South African Truth and Reconciliation Commission (2000). <http://www.justice.gov.za/trc/hrvtrans%5Cleandra/simelane.htm>.
- 40 S. African L.J. 147, 175 (1923)
- 75 S. African L.J. 237, 281 (1958)
- Ackerman, Bruce. *We the People, vol. 2: Transformations*. Cambridge: Harvard University Press, 1991.
- Amnesty Committee Hearing. Truth and Reconciliation Commission (2000). <http://www.justice.gov.za/trc/decisions%5C2000/ac20082.htm>.
- Andrieu, Kora. "Transitional Justice: A New Discipline in Human Rights." *Encyclopedia of Mass Violence* (2010).
- Baines, Gary. "The Politics of Public History in Post-Apartheid South Africa." *Journal of South African History*.
- Barak, Aharon. *Human Dignity: The Constitutional Value and the Constitutional Right*. Translated by Daniel Kayros. Cambridge: Cambridge University Press, 2015.
- Beitz, Charles R. "Human Dignity in the Theory of Human Rights: Nothing but a Phrase." *Philosophy and Public Affairs* 41, no. 3 (2013).
- Boraine, Alex. *A Country Unmasked, Inside South Africa's TRC*. Oxford: Oxford University Press, 2000).
- Braithwaite, John. *Restorative Justice and Responsive Regulation*. New York: Oxford University Press, 2001.
- Burke, Jason. "Four former apartheid era guards on trial over 1983 student murder." *The*

- Guardian*. <https://www.theguardian.com/world/2016/feb/26/four-former-apartheid-era-guards-on-trial-over-1983-student>.
- Butler, Anthony. *Contemporary South Africa*. London: Palgrave Macmillan, 2003.
- Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001(4) SA 938 (CC).
- Cf S v Ngwenya 1962 (1) SA 367 (N).
- Colonomos, Ariel. *La Morale dans les Relations Internationales*. Paris: Odile Jacob, 2005.
- Cornell, Drucilla. *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation*. Oxford: Oxford University Press, 2014.
- Crocker, David. "Reckoning with Past Wrongs: A Normative Framework." *Ethics & International Affairs*. 43, no. 13, 1999.
- Dr. Sheila Meintjies Testimony. Human Rights Violations Committee. Truth and Reconciliation Commission (1997).
<http://www.justice.gov.za/trc/special/women/meintjie.htm>.
- Eisikovits, Nir. "Transitional Justice." *Stanford University Encyclopedia of Philosophy* (2009). <http://plato.stanford.edu/archives/spr2009/entries/justice-transitional>.
- Fernandez, Lovell. "Reparations Policy in South Africa for Victims of Apartheid." *Law, Democracy and Development* (2000).
- Gildersleeve, Virginia C. *Many a Good Crusade*. New York: Macmillan, 1954.
- Goldblatt, Beth. "Evaluating the Gender Content of Reparations: Lessons from South Africa." in *What Happened to Women?: Gender and Reparations for Human Rights Violations*. edited by Ruth Rubio-Marín. New York: Social Sciences Research Council, 2006.
- Government of South Africa. 1993. Constitution of the Republic of South Africa (Interim). Government of South Africa. 1993. Groote Schurr Working Group Report.
- Government of South Africa. 1996. Constitution of the Republic of South Africa.
- Government of South Africa. 2001. The Truth and Reconciliation Commission Report. Volume 1. Government of South Africa. 2003. The Truth and Reconciliation Commission Report. Volume 6. Government of South Africa. Promotion of National Unity and Reconciliation Act, No. 34 of 1995. Graybill, Lyn S. "Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods." *Third World Quarterly* 25 (2004).
- Hayner, Priscila B. Hayner. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2011.
- Jaquemet, Lolanda. "Fighting Amnesia: Ways to Uncover the Truth about Lebanon's Missing." *International Journal of Transitional Justice* 3, no. 1 (2008).
<https://doi.org/10.1093/ijtj/ijn019>.
- K v. Minister of Safety and Security 2005 (6) SA 419 (CC). Khulumani Youth Dialogue. Khulumani Group. March 12, 2011.
- Kiss, Elizabeth. "Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice" in *Truth v. Justice: The Morality of Truth Commissions*, edited by Dennis Thompson and Robert Rotberg. Princeton: Princeton University Press, 2000.

- Makau, Kongko Louis. "Aspects of the Experiences of 10 Women in MK: 1976-1988." (PhD diss., University of Johannesburg, 2013).
- Mamdani, Mahmood. "The Truth According to the Truth and Reconciliation Commission" in *The Politics of Memory: Truth, Healing and Social Justice*, ed. I. Amadiume. New York: Zed Book, 2000.
- Mendez, Juan. "Accountability for Past Abuses." *Human Rights Quarterly*. 19, no. 2, 1997.
- Modise, Thandi. *A Woman in War*. South Africa: Agenda Feminist, 1999.
- Moses, Rhiain. "The Truth and Reconciliation Commission: A Reflection of the Chasm Between Constitutional Rights and the Lived Experience in South Africa." South African History Online. Accessed September 1, 2018.
<http://www.sahistory.org.za/article/truth-and-reconciliation-commission-reflection-chasm-between-constitutional-rights-and-lived>.
- Naidu, Ereshnee. "Symbolic Reparations: A Fractured Opportunity." Center for the Study of Violence and Reconciliation.
- Neier, Aryeh. "Rethinking Truth, Justice and Guilt after Bosnia and Rwanda" in *Human Rights in Political Transition: From Gettysburg to Bosnia*, edited by C. Hesse and R. Post. New York: Zone Books, 1999.
- Nozibonelo Maria Mxathule Testimony. Human Rights Violation Committee. Truth and Reconciliation Commission (1997).
<http://www.justice.gov.za/trc/special/women/mxathule.htm>.
- Osiel, Mark. *Mass Atrocity, Collective Memory and the Law*. New Brunswick: Transaction Publishers, 1997.
- Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," *Journal of International Affairs Spring*, (1999).
- R. v. Holliday, 1927
- Rosenberg, Rosalind. "Virginia Gildersleeve: Opening the Gates." Columbia University. Accessed February 18, 2018.
<http://www.columbia.edu/cu/alumni/Magazine/Summer2001/Gildersleeve.html>
- Rosenberg, Tina. *The Haunted Land: Facing Europe's Ghost after Communism*. New York: Random House, 1995.
- Sarkin, Jeremy. "Dealing with Enforced Disappearances in South Africa (With A Focus On the Nokuthula Simelane Case) And Around the World: The Need To Ensure Progress On The Rights To Truth, Justice, And Reparations In Practice." *Speculum Juris* 29, no. 1 (2015).
- Shklar, Judith. *Legalism; Law, Moral and Political Trials*. Cambridge: Harvard University Press, 1963.
- Simelane, Thembi Nkadimeng. Founding Affidavit. *National Prosecuting Authority v Simelane and Others* (2015).
- Sitze, Adam. *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*. New York: Routledge Press, 2014.
- Stover, Eric, and Harvey M. Weinstein. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. Cambridge: Cambridge University Press, 2008.
- Suttner, Raymond. *Women in the ANC-led underground*. South Africa: HSRC press, 2013.
- Teitel, Ruti. "Transitional Justice Genealogy." *Harvard Human Rights*

Journal. 16 (2003).

Vale, Peter. "Craig Williamson: The Spy Who Came in for Apartheid." *The Conversation*. April 12, 2017. <http://theconversation.com/craig-williamson-the-spy-who-came-in-for-apartheid-76030>.

Van Der Merwe v. Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae) 2006(4) SA 230(CC).

Walker, Margaret Urban. "Gender and Violence in Focus: A Background for Gender Justice in Reparations" in *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* edited by Ruth Rubio-Marín. Cambridge: Cambridge University Press, 2009.

Williamson v. Schoon, 1997.

Woolman, Stu. "The Architecture of Dignity." in *The Dignity Jurisprudence of the Constitutional Court of South Africa*, edited by Drucilla Cornell. New York: Fordham University Press, 2013.