

**WHEN ETHNICITY TRUMPS GENDER:  
A COMPARATIVE ANALYSIS OF HOW TRANSITIONAL  
JUSTICE PROCESSES ADDRESSED VIOLENCE  
AGAINST WOMEN IN BOSNIA-HERZEGOVINA AND  
SOUTH AFRICA**

by

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B.A. Honours History, Extended Minor French  
Simon Fraser University, 2008

MAJOR PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARTS

In the  
School for International Studies

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SIMON FRASER UNIVERSITY

Summer 2010

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## **ABSTRACT**

Recognizing the significant challenges facing women's empowerment, this project examines how transitional justice processes have addressed women's experiences in conflict and post-conflict recovery in Bosnia-Herzegovina and South Africa. This project argues that both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the South African Truth and Reconciliation Commission (TRC) failed to meet their mandates in prioritizing reconciliation for women because the ethnic divisions inherent in both conflicts were enshrined in the legal pursuits of both transitional justice processes. An ethnic framework prioritizes ethnic divisions over the unique and sensitive nature of gendered violence; excluding important challenges facing women such as victimization, patriarchy, stigma and discrimination. This comparative case study does not offer a panacea for ensuring full reintegration and reconciliation for female survivors of sexual violence, but aims to identify common challenges that may face future transitional justice processes.

**Keywords:** women; Bosnia-Herzegovina; South Africa; International Criminal Tribunal for the former Yugoslavia; Truth and Reconciliation Commission; ethnic framework; reconciliation; post-conflict recovery; gendered violence

**Subject Terms:** Transitional Justice, Sexual Violence, Violence against Women

*To all women who have suffered gender-based violence.*

*From all women who stand with them in solidarity.*

## **ACKNOWLEDGEMENTS**

I wish to thank Simon Fraser University's School for International Studies and its faculty for offering a well-rounded and challenging program. To my senior supervisor Dr. Nicole Jackson, supervisor Andrew Mack, Dr. John Harriss, Dr. Alvaro Pereira, Dr. Jeffrey Checkel, and Dr. Jon Scott for guiding me through this Masters endeavour. I want to include a special thank-you to Dr. Kanya Adam, for introducing me to the transitional justice field and encouraging me to pursue a unique and fascinating topic.

I send my deepest thanks to all of those remarkable and influential people who have helped me through this fascinating, arduous, emotional, but extremely rewarding process. Thank you to my family, my friends, my peers, and my professors for their encouragement and support.

# TABLE OF CONTENTS

<b>Approval</b> .....	<b>ii</b>
<b>Abstract</b> .....	<b>iii</b>
<b>Dedication</b> .....	<b>iv</b>
<b>Acknowledgements</b> .....	<b>v</b>
<b>Table of Contents</b> .....	<b>vi</b>
<b>Glossary</b> .....	<b>viii</b>
<b>Chapter 1: Introduction</b> .....	<b>1</b>
1.1 Hypothesis and Thesis .....	6
1.2 Methodology and Data.....	8
1.3 Special Considerations .....	10
1.4 Violence against Women and Intersectionality .....	11
<b>Chapter 2: Bosnia-Herzegovina</b> .....	<b>16</b>
2.1 Bosnia-Herzegovina’s Ethnic Civil War.....	17
2.2 Post-Conflict Transition: Reinforcing Ethnic Divisions .....	19
2.3 ICTY: Addressing Violence against Women in an Ethnic Framework.....	21
2.4 The Case of Foča .....	27
<b>Chapter 3: South Africa</b> .....	<b>33</b>
3.1 South African Apartheid .....	34
3.2 Post-Conflict Transition: Rainbow Nation? .....	37
3.3 TRC: Addressing Violence against Women in an Ethnic Framework .....	40
3.4 The Case of KwaZulu-Natal.....	46
<b>Chapter 4: The Limits of Ethnic Frameworks</b> .....	<b>52</b>
4.1 Victim or Survivor?.....	55
4.2 Patriarchy.....	59
4.3 Stigma and Discrimination .....	62
<b>Chapter 5: Conclusion</b> .....	<b>67</b>
<b>Appendices</b> .....	<b>71</b>
Appendix 1 .....	71
Appendix 2.....	72
Appendix 3.....	74
Appendix 4.....	77
Appendix 5.....	79

<b>Bibliography</b> .....	<b>80</b>
Works Consulted .....	85
Websites Consulted .....	90
Legal Documents .....	90



## GLOSSARY

Democratization	Objectives of both Bosnia-Herzegovina and South Africa in their post-conflict recoveries; implies equal citizenship regardless of ethnicity or gender; holds hope of social relations free of discrimination and violence and opens the space for women to agitate for equal access to social, political, and economic power.
Ethnicity	In its basic definition, an ethnic group shares certain traits including a common name, a believed common descent, elements of a shared culture (most often language or religion), common historical memories, and an attachment to a particular territory.
Ethnic Framework	A perspective that uses ethnicity as the primary marker of perpetrators and victims in conflict; understanding how conflict affects different ethnicities; regards violence against women in conflict as an ethnic crime; using ethnic labels to characterize both victims and perpetrators; i.e.) Serb soldiers raping Muslim women.
Gender	The socially constructed roles, behaviours, activities, and attributes which a society considers appropriate for men and for women.
Gendered Framework	Promoting equal rights to all genders; understanding how conflict affects different genders; identifying gender hierarchies and power relationships; prioritizing gender equity.
Inkatha	Inkatha Cultural Liberation Movement of South Africa; is referred to simply as 'Inkatha' from the time of its reconstitution in 1975 to July 1990 when the organisation was constituted as a political party. Thereafter, it is referred to as the Inkatha Freedom Party or IFP.
Intersectionality	A sociological theory that examines social and cultural matrices of domination and discrimination leading to social inequality. Feminist theory uses intersectionality as a tool to evaluate the multiple layers of oppression facing women.

Patriarchy	Refers to the social, political, and economic system which provides men with unequal power and authority in relation to women in society.
Rape (ICTY)	(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.
Rape (TRC)	South African law defines rape as occurring only between a man and a woman and involving the penetration of the penis into the vagina. Act of forced oral or anal sex and penetration by foreign objects are not considered rape.
Reconciliation	The process of forgiveness that is required to satisfy the primary objective of transitional justice peace processes in which every citizen moves forward towards a shared future. It is intended to be an inclusive process based on the premise that all citizens, including women, deserve a stake in the nation's future.
Restorative Justice	Identifies, acknowledges, and provides compensation to the <i>victims</i> ; as exemplified by the South African Truth and Reconciliation Commission (TRC).
Retributive Justice	Prosecutes <i>perpetrators</i> of human rights abuses; as exemplified by the International Criminal Tribunal for the former Yugoslavia (ICTY).
Sexual Violence	See "Violence against Women"
Transitional Justice	Refers to a variety of judicial and non-judicial means of accountability and responding to past crimes; useful in post-conflict contexts, or in a transition from dictatorship to democracy, or in an established democracy responding to historical wrongs; seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy.

Ubuntu	The Xhosa and Zulu term for a concept of “humanness”; a disposition towards good that makes one feel and act in a humane way towards others. It entered South African English literary and political discourse during the Black Consciousness era of the 1970s and the 1980s and was the main philosophy of the Truth and Reconciliation Commission.
Violence against Women	Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. For the purposes of this project, violence against women is primarily defined as sexual based abuses during conflict, and will thus be used synonymously with the term “sexual violence”.

## CHAPTER 1: INTRODUCTION

*“Leader Remember the day you walked out. The very minute, the very second as your right foot stepped outside the gates of that jail, feasting the air, sun in your face. The joy that washed over you like bucketfuls of honey. The pain that touched your soul like a poisoned arrow of wasted years and potential. At the same time, you eagerly greeted the mammoth task that lay ahead. You vowed and promised to do all in your power to build a better future for you and your people.”<sup>1</sup>*

- Gcinda Mhlope, South Africa

*“I do not know if it is possible to punish this crime. If justice exists at all?! Dear God I hope it does! Maybe somewhere but not here in Bosnia! Not here! Here there is no justice at all!”<sup>2</sup>*

- Bakira, Bosnia

Ethnic divisions, genocide, and widespread and systematic rape characterized the rampant intrastate wars of the 1990s. With unprecedented rates of humanitarian abuses, international pressure, and media sensationalism, Bosnia-Herzegovina (Bosnia) and South Africa faced difficult challenges in their post-conflict recovery. The wartime atrocities of these conflicts were addressed on both an international and a domestic level in transitional justice processes, which were specifically designed to bring perpetrators to justice, reconciliation to

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<sup>1</sup> Excerpt from the poem “Leader Remember” by Gcinda Mhlope, Truth and Reconciliation Commission, “Thandi Shezi,” *Human Rights Violations: Women’s Hearings* (28 July 1997), <http://www.justice.gov.za/trc/special/women/shezi.htm>.

<sup>2</sup> Testimony of Bakira, Amnesty International, “Whose Justice?’: The Women of Bosnia and Herzegovina are Still Waiting” (London: Amnesty International Publications, 2009), <http://www.amnesty.org/>.

survivors and victims, and to ease the process of democratization.<sup>3</sup> The pledge to promote democratization is of critical importance to the transitional justice process, as it implies equal citizenship and equal opportunities to access social, political, and economic power regardless of ethnicity or gender. The mandates of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the South African Truth and Reconciliation Commission (TRC) advocated for peace, reconciliation, and democracy for every citizen.<sup>4</sup> More than a decade later, whether or not the ICTY and the TRC met their mandates is debatable. This project identifies how these particular transitional justice processes overlooked the progress of reconciliation of female victims and survivors of sexual violence. Despite the transitional justice processes' clear attempts to bring equal reconciliation and full democratization to all conflict survivors, both Bosnian and South African women continue to face challenges nearly two decades after their respective conflicts ended.

In the Bosnian case, March 2010 witnessed a landmark resolution passed by the Serbian Parliament apologizing for their role in the 1995 Srebrenica genocide in which approximately eight thousand Bosnian Muslim men and boys were murdered.<sup>5</sup> A momentous symbol of acknowledgment for Europe's worst atrocity since World War II, this can be interpreted as a tentative act of reconciliation between two former warring nations. However, it is more likely that

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<sup>3</sup> International Centre for Transitional Justice, "What is Transitional Justice?," <http://www.ictj.org/en/tj/780.html>.

<sup>4</sup> See Appendices 3 and 4 for a detailed description of the Transitional Justice Mandates of the ICTY and TRC.

<sup>5</sup> "Serbian MPs Offer Apology for Srebrenica Massacre," *BBC News* (31 March 2010) <http://news.bbc.co.uk/2/hi/8594625.stm>.

this narrowly approved resolution was also a strategic move for Serbia to join the European Union,<sup>6</sup> and thus glosses over the realities for many survivors of the Bosnian civil war. In particular, this formal apology camouflages a deeply rooted and unresolved problem plaguing many female survivors. An article published by Amnesty International argues that the government of Bosnia has failed to ensure justice and reparation for thousands of women who were raped during the civil war.<sup>7</sup> This criticism blames the ICTY for creating a culture of impunity for perpetrators of sexual violence who live in the same communities as their victims, and for failing to include reparations as a key priority.<sup>8</sup> It reports that fifteen years since the war, many survivors of sexual violence continue to suffer and to face stigmatization rather than recognition and assistance.

In comparison, scholars often cite the relatively peaceful democratic transition in South Africa following the abolition of apartheid in 1994 as a groundbreaking achievement of transitional justice. Praised for its success in creating a peaceful transition from an oppressive apartheid regime to a democratic system, the TRC is a model for future post-conflict nations.<sup>9</sup> However, despite its initial success, South African women still suffer from gender inequality and sexual violence. A 2009 report released by South Africa's Medical Research Council reveals that one in four South African men admit to being

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<sup>6</sup> "Serbian MPs Offer Apology for Srebrenica Massacre".

<sup>7</sup> "Whose Justice?": The Women of Bosnia and Herzegovina are Still Waiting".

<sup>8</sup> Ibid, 5.

<sup>9</sup> See, for example Andrew Rigby's *Justice and Reconciliation: After the Violence* and editor Robert Rotberg and Dennis Thompson's *Truth v. Justice: The Morality of Truth Commissions*.

perpetrators of rape.<sup>10</sup> Considering that rape and sexual assault were commonly employed as weapons of oppression in the apartheid era, the failure of the TRC to include sexual violence as a crime eligible for amnesty is significant. The continued presence of unaddressed sexual violence is thus an explicit reminder of the gendered underpinnings of the apartheid system, and a fearful testimony to the lingering effects of the psychological damage that many South Africans suffered.<sup>11</sup> Therefore, the current challenges facing women in both Bosnia and South Africa give question to the ability of transitional justice processes to prioritize, not to mention provide, reconciliation for women who suffered gendered abuses during conflict.

This study compares Bosnia and South Africa because of three key similarities both cases share. First, both countries endured ethnic conflicts. Second, both countries experienced extremely high levels of violence against women. Third, both countries underwent democratic transition during the same period, the early to mid-1990s. This is significant because both countries faced similar challenges in their respective nation-building, yet handled this transitional period differently. The Bosnian case will focus on the three years of ethnic conflict (1992-1995) and the jurisdiction of the ICTY (1993- 2010). The South African case will cover the period of heightened armed conflict chosen by the South African Truth and Reconciliation Commission (1 March 1960- 10 May 1994) and the period of the TRC until the release of its Final Report (1995-1998).

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<sup>10</sup> Megan Lindow, "South Africa's Rape Crisis: 1 in 4 Men Say They've Done It" (20 June 2009) *Time*, <http://www.time.com/time/world/article/0,8599,1906000,00.html>.

<sup>11</sup> Vanessa Farr, "The pain of violence is a powerful silencer: African women writing about conflict," *Canadian Woman Studies* 19, no. 4 (2000): <http://proquest.com>.

Furthermore, the comparison between Bosnia and South Africa is significant because while a large academic debate compares restorative versus retributive justice in both countries, these two cases have not been previously compared in terms of recognition of women's experiences of sexual violence. Most importantly, many of the female survivor testimonies used in this project demonstrate that women see themselves in solidarity with other survivors. Therefore, this unique comparative case study supports the importance of including a universal gendered perspective, arguing that the exceptional challenges facing all female survivors of sexual violence transcend geographical and cultural boundaries. In order to systematically compare and contrast both country case studies from this perspective, the project includes a micro-level analysis of two regions within each country, Foča (Bosnia) and KwaZulu-Natal (South Africa). These two micro-level cases are demonstrative because they offer the most primary source material and are directly comparable in terms of both their level and type of violence towards women.

According to the Foča Indictment, hundreds of Bosnian Muslim (Bosniak) women were detained and sexually assaulted during the Serb take-over of the city from April 1992 to February 1993.<sup>12</sup> The purposes of the assaults were to extricate information from the women about the whereabouts of their male relatives, to punish and intimidate them, and for reasons of ethnic

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<sup>12</sup> International Criminal Tribunal for the former Yugoslavia, "Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY'S First Indictment Dealing Specifically with Sexual Offences," (27 June 1996), <http://www.icty.org/>.



discrimination.<sup>13</sup> Similarly, in KwaZulu-Natal, women experienced large-scale sexual violence. Statistics collected from the period of 1990-1994 indicate that fifty-four percent of deponents at the Truth and Reconciliation Commission identified themselves as primary victims of violence.<sup>14</sup> Reports on political conflict in KwaZulu-Natal during the late 1980s and early 1990s show that sexual violation and humiliation were common forms of punishment meted out to women who allegedly 'consorted' with the enemy, not only by the Afrikaner security forces but also by the ANC comrades and Inkatha warriors.<sup>15</sup> Thus, not only did women experience similar episodes of violence in both cases, neither transitional justice process prioritized nor successfully provided women's reconciliation.

## 1.1 Hypothesis and Thesis

This project attempts to answer the following question: **how and why have both restorative and retributive justice models failed to prioritize women's experiences of sexual violence in Bosnia and South Africa?** The project argues that both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the South African Truth and Reconciliation Commission (TRC) failed to meet their mandates in prioritizing reconciliation for women because the ethnic divisions inherent in both conflicts were enshrined in the legal pursuits of both transitional justice processes. The transitional justice processes

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<sup>13</sup> "Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY'S First Indictment Dealing Specifically with Sexual Offences."

<sup>14</sup> Truth and Reconciliation Commission, *Volume Three: Truth and Reconciliation Commission of South Africa Report* (29 October 1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%203.pdf>.

<sup>15</sup> Tina Sideris, "Rape in War and Peace: Social Context, Gender, Power and Identity," in *The Aftermath: Women in Post-Conflict Transformation*, eds. Sheila Meintjes, Anu Pillay and Meredith Turshen, 150-151 (London: Zed Books, 2001).

in Bosnia and South Africa addressed sexual violence by its lesser relationship to larger ethnic crimes; thus overlooking the gendered experience of women during conflict. The prioritization of an ethnic framework ignored a gendered framework, which could have been used mutually inclusively to provide a more holistic and comprehensive approach to sexual violence. This will be argued by drawing on a wealth of qualitative research stemming from survivor testimonies, in an attempt to explain the gulf between the quantitative realities of women's experiences of sexual violence and the absence of reconciliatory efforts on behalf of the transitional justice processes.

Both South Africa and Bosnia are multi-ethnic countries that have experienced extreme violence along ethnic lines. In Bosnia, violence occurred between Bosnian Muslims (Bosniaks), Bosnian Serbs, and Bosnian Croats. In South Africa, violence occurred between the white, black, coloured, and Asian ethnic groups as well as within the ethnic sub-groups, such as the Zulu and the Xhosa in the "black" category. Recent conflicts in both states have been "ethnicized" which means that political violence between challengers and incumbents is framed in ethnic terms.<sup>16</sup> For the purposes of this project, an "ethnic framework" will be defined as a continuation of this ethnicization, suggesting ethnicity is the lens in which all aspects of post-conflict transition pursuits are viewed.

Although many academics note the failure of the transitional justice processes' treatment of sexual violence, the literature does not explicitly attribute

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<sup>16</sup> Rogers Brubaker and David D. Laitin, "Ethnic and Nationalist Violence," *Annual Review of Sociology* 24 (1998), <http://www.ebsco.org/>.

this failure to an ethnic framework. Thus, this project is unique in arguing that the use of an ethnic framework explains women's general lack of reconciliation. Namely, an ethnic framework has a limited scope that only incorporates one segment of society into its fold; it defines perpetrators and victims by their ethnic affiliations. Therefore, it ignores the unique and sensitive nature of gendered violence, excluding important challenges facing women such as victimization, patriarchy, stigma, and discrimination. While an ethnic framework often meets the transitional justice mandate by providing many victims an opportunity for reconciliation and reintegration, its narrow focus does not adequately address *women's* experiences. It is important to note that this comparative case study does *not* offer a panacea for ensuring full reintegration and reconciliation for female survivors of sexual violence, but aims to expose key challenges that may face future transitional justice processes.

## **1.2 Methodology and Data**

Despite important contextual similarities between the two cases, such as the high level of violence against women, being ethnically based conflicts, and having the same period of democratic transition, there are three features inherently different in the two case studies. These include the historical and social context of each country, the type of transitional justice process used, and whether the process was domestically or internationally led. The differences between the two cases complement, rather than detract from, this project because the differences indicate that the outcomes of each process should be dramatically different. Namely, the transitional justice literature indicates that the

restorative justice model has been more successful in achieving reconciliation than the retributive justice model.<sup>17</sup> Therefore, it would be assumed that the South African model would better address women's experiences of wartime violence than the Bosnian case specifically because it is a restorative model. However, despite the expectation that each process would produce different outcomes, both countries not only *addressed* violence against women in a similar ethnic framework, they both *failed* to prioritize women's gendered experiences. Thus, both Bosnia and South Africa did not provide an equal opportunity for justice and reconciliation in the democratization process. This unexpected commonality is intriguing and worthy of further investigation.

In order to prove that violence against women was addressed in a larger ethnic framework in both cases, this project conducted discourse analysis<sup>18</sup> on primary documents as its primary methodology. This particular methodology connects the importance of language used in the official rhetoric of transitional justice processes to the language used by victims and perpetrators in their testimonies to confirm the ethnicization of sexual violence. The analyzed texts include court testimonies, publications, and press releases from the ICTY and the South African TRC.<sup>19</sup> Due to the fiscal and temporal barriers to conducting ethnographic fieldwork, this project also relies on empirical research conducted

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<sup>17</sup> See, for example Vesna Nikolic-Ristanovic, "Sexual Violence, International Law and Restorative Justice," in *International Law: Modern Feminist Approaches*, eds. Doris Buss and Ambreena Manji; Majbritt Lyck, *Peace Operations and International Criminal Justice: Building Peace after Mass Atrocities*; Andrew Rigby's *Justice and Reconciliation: After the Violence*; and editor Robert Rotberg and Dennis Thompson's *Truth v. Justice: The Morality of Truth Commissions*.

<sup>18</sup> See Appendix 1.

<sup>19</sup> Courtesy of the transitional justice websites: (ICTY) <http://www.icty.org/> and (TRC) <http://www.justice.gov.za/trc/>

by other scholars, including ethnographic field reports, recorded interviews, and documentary films that give women's accounts of their experiences during both transitional justice processes.<sup>20</sup>

It is important to note that the project uses the transitional justice processes (ICTY and TRC) as the principle actors. While it is argued that both transitional justice processes institutionalized an ethnic framework in their treatment of all crimes including violence against women, the evidence suggests that many female survivors themselves *also* framed their experiences in ethnic terms. Chapter Four discusses the different ways in which women label themselves, such as "survivors" and "victims"; and describe their experiences, whether in "ethnic" or "gendered" terms. However, the transitional justice processes in both cases framed women's experiences solely in ethnic terms, thus negating any other frame a survivor may use. Disregarding the self-identification of survivors, both transitional justice processes institutionalized a distinctly ethnic framework which perpetuated ethnic divisions and ignored gendered experiences.

### **1.3 Special Considerations**

It is important to acknowledge that sexual violence did not occur solely against women in either Bosnia or South Africa. For example, testimonies given during ICTY trials and the TRC hearings reveal that sexual violation and sexual

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<sup>20</sup> See, for example Fiona Ross' *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa*; Antjie Krog's *Country of my Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa*; and Mandy Jacobsen and Carmen Talenka's documentary *Calling the Ghosts*.

mutilation occurred in concentration camps and during police detention against both females *and* males.<sup>21</sup> Due to the limited scope of the project and the limited resources discussing men's experiences of sexual violence in both cases, this project will focus solely on women's experience of sexual violence on both sides of the conflict. However, it is important to recognize that if the use of a larger ethnic framework in the transitional justice processes trumps the gendered nature of sexual violence, it also overlooks the experiences of men.

#### **1.4 Violence against Women and Intersectionality**

This project argues that there is a link between female survivors' lack of reconciliation and the tendency of transitional justice processes to focus solely on the ethnic components of a conflict. In order to fully grasp the complicated relationship between the two, it is important to understand how women's experiences have been largely neglected in international law and how women, in comparison to men, often face different and numerous challenges.

The way in which international legal scholarship has addressed sexual violence has evolved in five main stages. The first recorded acknowledgment of violence against women during conflict began with the Geneva Conventions in 1949 that specifically stated that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, forced prostitution, or any

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<sup>21</sup> See, for example Kelly D. Askin, "Sexual Violence and Indictments of the Yugoslav and Rwandan Tribunals: Current Status," *The American Journal of International Law*, 93, No. 1 (1999): <http://www.jstor.org/> and Antjie Krog's *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa*.

form of indecent assault."<sup>22</sup> Second, writing in the 1970s, Susan Brownmiller argued that rape during conflict is both an attack on women and part of an attack against the "enemy" as proof of victory.<sup>23</sup> Third, largely due to the media sensationalism surrounding the large-scale rape campaigns in the former Yugoslavia in the 1990s, feminists discussed sexual violence in nationalist terms. Namely, women personified the nation-state and their victimization during conflict was thus directed against a national collectivity.<sup>24</sup>

Fourth, recent scholarship views rape as a "weapon of war" in cases like Rwanda, the Congo, and Darfur. Doris Buss argues that this label represents a significant shift in the way sexual violence has been understood in international law and policy.<sup>25</sup> However, in her case study of rape in Rwanda, she argues that the identification of the 'Rwandan Tutsi Woman' as the "victim" ignored other categories of victims including Hutu women, and men of both groups. While the current view on sexual violence in conflict acknowledges the significance and prevalence of this important issue, Buss argues that rape as a "weapon of war" disregards the larger social, political, and economic structures that shape violence and conflict.<sup>26</sup> Finally, since the 1998 Rome Statute and the creation of the International Criminal Court in 2002, there has been an official acknowledgment of the gendered nature of war crimes and the seriousness of

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<sup>22</sup> Todd A. Salzman, "Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia," *Human Rights Quarterly* 20, no. 2 (1998), <http://www.jstor.org/>.

<sup>23</sup> Doris Buss, "Rethinking 'Rape as a Weapon of War'," *Feminist Legal Studies* 17, No.2 (2009), <http://www.springerlink.com>.

<sup>24</sup> *Ibid*, 148.

<sup>25</sup> *Ibid*, 148.

<sup>26</sup> *Ibid*, 160.

sexual violence.<sup>27</sup> Therefore, this project acknowledges the important developments in international law in recognizing women's experience of violence. However, there remain significant shortcomings in the international jurisprudence of sexual violence, namely that it ignores the multifaceted and unique challenges facing female survivors.

In order to understand the limitations of transitional justice processes in successfully incorporating women into their reconciliation objective, this project incorporates the feminist theory of intersectionality. Intersectionality, in its broadest definition, is a sociological method that analyzes how individuals and groups of people fit into a particular matrix of domination and power relations.<sup>28</sup> Feminists use the intersectionality paradigm to contend that universally, women face unique and multi-layered challenges due to the combination of race and gender. One perspective of the intersectionality theory argues for an *ethnic framework* when dealing with violence against women: women who suffer ethnically-based (or "genocidal") sexual violence suffer not only as women, but also as agents for the destruction of their ethnic group.<sup>29</sup> This perspective was popularized by feminists writing in the mid-1990s. Discussing the Bosnian rape campaigns, feminist Catharine MacKinnon advocated for a clear identification of

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<sup>27</sup> Christopher W. Mullins, "We are Going to Rape You and Taste Tutsi Women," *Brit. J. Criminol* 49 (2009), <http://bjc.oxfordjournals.org/>.

<sup>28</sup> Doris Buss, "Sexual Violence, Ethnicity, and Intersectionality in International Criminal Law," in *Intersectionality and Beyond: Law, Power and the Politics of Location*, eds. Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman, 109 (New York: Routledge-Cavendish, 2009).

<sup>29</sup> Fiona de Londras, "Telling Stories and Hearing Truths: Providing an Effective Remedy to Genocidal Sexual Violence against Women," in *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, eds. Ralph Henham and Paul Behrens, 115 (Aldershot: Ashgate Publishing Limited, 2007).



the conflict in ethnic terms because she argued that a focus on mass rape as a “gender crime” risked minimizing its genocidal components.<sup>30</sup> In contrast, feminist Rhonda Copelon used the intersectionality theory to argue for a *gendered framework*: that focusing on the uniqueness of ‘genocidal rape’ risked obscuring the ‘normality’ of rape.<sup>31</sup> Copelon advocated for “gendered justice,” recognizing that persecution based solely on gender is a crime in its own right and should be addressed as such.<sup>32</sup>

By situating itself directly between these feminist debates, this project suggests that the two frameworks do *not* have to be mutually exclusive. Namely, MacKinnon’s ethnic framework illuminated the realities of women’s multi-faceted challenges and thus contributed to improvements in international jurisprudence concerning violence against women in conflicts. The danger with an ethnic framework, however, is that it can be counterproductive if not accompanied by a gendered framework because it can obscure larger problems facing women. The resonating theme in both the evolution of international law and the theory of intersectionality suggests that sexual violence is often judged for how it affects *greater society*, not just women themselves. Furthermore, not all women identify with the particular labels enshrined in transitional justice processes, discussed in detail in Chapter Four. While there has been clear progress in international jurisprudence and in feminist theory, this project demonstrates that there remains room for improvement in transitional justice processes.

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<sup>30</sup> “Sexual Violence, Ethnicity, and Intersectionality in International Criminal Law,” 109.

<sup>31</sup> *Ibid*, 109.

<sup>32</sup> *Ibid*, 110.

The project is organized as follows: Chapter Two and Three analyze and explain how, in both case studies, the transitional justice processes prioritized the ethnic components of sexual violence over the gendered components. A discourse analysis of testimonies from both cases reveals the negative implications of this particular paradigm. These chapters also present the findings of discourse analysis on the testimonies of two micro-level case studies, Foča in Bosnia and KwaZulu-Natal in South Africa. Chapter Four addresses the negative implications of ignoring the gendered components of sexual violence in both Bosnia and South Africa using the feminist theory of intersectionality, looking particularly at victimization, patriarchy, stigma, and discrimination. The project's final chapter summarizes the main findings and offers suggestions for further areas of investigation and study.

## CHAPTER 2: BOSNIA-HERZEGOVINA

*But once he had done what he was about -- I mean, once he had raped me, when he finished raping me, he sat down and lit a cigarette, and he said that he could perhaps do more, much more, but that I was about the same age as his daughter, and so he wouldn't do anything more for the moment.*<sup>33</sup>

- "Witness 50", Bosnia

The case study of Bosnia-Herzegovina (Bosnia) demonstrates how ethnicity characterized the civil war itself, influenced the creation of the Dayton Peace Accords, and led to the further polarization of ethnic groups in an attempt to cease hostilities and curb future conflicts. Framed by the heightened awareness and ethnicization of the Bosnian war, a discourse analysis of witness testimonies suggests that the ICTY followed this trend by *explicitly* focusing on the ethnic aspects of the war. The Tribunal's explicit focus on ethnicity, as well as survivor testimony confirming the ethnicization of violence, indicates the prevalence of an ethnic framework. While it is perhaps unsurprising that the transitional justice processes incorporated and addressed the ethnic tensions of the war, this chapter argues that the use of an ethnic framework obscured the gendered nature of sexual violence to the detriment of female survivors.

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<sup>33</sup> Testimony of "Witness 50", International Criminal Tribunal for the former Yugoslavia, "Case IT-96-23-T & 23/1-T: Prosecutor vs. Kunarac et al. ("Foča")," (29 & 30 March 2000), <http://www.icty.org/sid/188>.

This chapter highlights the prevalence of an ethnic framework beginning with the civil war through to the transitional justice processes. The first three sections will give a brief historical review of the ethnic nature of the civil war, followed by the post-conflict transition outlined by the Dayton Peace Accords and the International Criminal Tribunal for the former Yugoslavia. The final section illustrates the persistence of an ethnic framework during this period through a micro-level case study of crimes of sexual violence that occurred in the Bosnian town of Foča. Foča is exemplary for two reasons: first, it fits the typical ethnic framework of Bosnian Serbs raping Bosnian Muslims; second, it is directly comparable to the experiences of South African women in KwaZulu-Natal because of the high level and concentration of sexual violence (discussed in Chapter Three). The Foča case succinctly illustrates how ethnicity obscured gender, the implications of which are discussed in Chapter Four.

## **2.1 Bosnia-Herzegovina's Ethnic Civil War**

While sexual violence is typical of most conflicts, this project looks particularly at how sexual violence is addressed when ethnicity plays a key role in conflict. A prime example of ethnic civil war, Bosnia's ethnic tensions culminated to an explosive level during the breakdown of the former Yugoslavia. A 1991 census stated that Bosnia's population consisted of 43.7 percent ethnic Bosnian Muslim (Bosniak), 31.4 percent ethnic Serb, and 17.3 percent ethnic Croat.<sup>34</sup> Therefore, Bosnia was a unique case during the disintegration of Yugoslavia in

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<sup>34</sup> Lenard Cohen, *Broken Bonds: The Disintegration of Yugoslavia* (Boulder, Colorado: Westview Press Inc., 1993), 236.

the 1990s because of its ethnically heterogeneous characteristics, home to three different ethnicities with very different aims and allegiances.

The Bosnian war (1992-1995) included a Croat-Muslim 'war within a war' but was mainly a conflict between armed units of the three major national ethnicities living in Bosnia: Serbs against the Bosniaks and Croats.<sup>35</sup> The war began after both Croatia and Slovenia seceded from Yugoslavia in 1991. The Bosnian government, under its Muslim President Alija Izetbegovic, formally applied to the European Community for recognition as an independent state and held a referendum in February 1992.<sup>36</sup> Bosniaks and Bosnian Croats voted 99.7% in favour of independence while Bosnian Serbs did not participate, and fearing exclusion from governance, began to prepare for hostilities.<sup>37</sup> Thus, the war was ethnically divided from its onset, as Bosnian Serbs fought for territorial expansion at the expense of the other two ethnic groups.

The Bosnian civil war resulted in the deaths of approximately two hundred thousand people, and was notorious for its acts of genocide against Bosniaks and an unprecedented number of rapes committed against women. It is estimated that between thirty and fifty thousand women were raped in a three-year period, ninety percent of which were Bosniak women.<sup>38</sup> A United Nations report concluded that these rapes were not merely by-products of war, but were acts of deliberate and systematic violence conducted by Serb forces as part of

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<sup>35</sup> Nenad Zakošek, "Democratization, State-building and War: The Cases of Serbia and Croatia," *Democratization* 15, no 3 (2008), 592.

<sup>36</sup> Cohen, 236-237.

<sup>37</sup> *Ibid*, 237.

<sup>38</sup> Andrew Rigby, *Justice and Reconciliation: After the Violence* (Boulder: Lynne Rienner Publishers, 2001), 173.

their wartime strategy.<sup>39</sup> Forced impregnation resulted in many births, for which estimates are difficult to calculate due to poor records and under-reporting. However, a United Nations investigation identified at least one hundred and nineteen reported pregnancies in 1992 alone.<sup>40</sup> The extensive media coverage of the war contributed to a large humanitarian response to end the conflict expeditiously as well as bring the perpetrators of war crimes to justice, which led to the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993. The ethnic tensions that had exploded during the civil war were reinforced in the nation's post-conflict transition, which helps to explain the persistence of an ethnic framework.

## **2.2 Post-Conflict Transition: Reinforcing Ethnic Divisions**

A dilemma facing Bosnia's post-conflict transition was the high demand for justice from both the survivors and the international community, coupled with limited state resources and capacities able to meet this demand.<sup>41</sup> The United States arranged a peace agreement, entitled the Dayton Peace Accords (Dayton), which ended the war in 1995. Dayton was initially intended to be a short-term restoration project to end the fighting while facilitating a quick

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<sup>39</sup> Salzman, 361.

<sup>40</sup> Ibid, 362.

<sup>41</sup> Iavor Rangelov and Marika Theros, "Transitional Justice in Bosnian and Herzegovina: Cohenerence and Complementarity of EU Institutions and Civil Society," in *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development (The Nuremberg Declaration on Peace and Justice)* eds.Kai Ambos, Judith Large and Marieke Wierda, 358 (Heidelberg: Springer, 2009).

transition to stable democratic rule.<sup>42</sup> Rather than creating a fully reintegrated society, Dayton ensured that the Bosnian nation would remain divided along politicized ethnic lines.

The decision to polarize the two principle fighting groups, the Serbs from the Bosniaks/Croats, was influenced by the viewpoint that negotiated settlements following ethnic civil war are less likely to relapse into conflict if they rely on regional autonomy or partition rather than centralized power sharing.<sup>43</sup> Due to the conflicting opinions between the parties (Bosniaks wanted a unitary state while Serbs demanded ethnic division), Dayton opted for the creation of two semi-autonomous republics: the Republika Srpska (RS) consisting of 49% of the territory and the Bosniak-Croat Federation (the Federation) consisting of 51% of the territory, each with its own police, army, and powers of taxation.<sup>44</sup> An international body known as the Peace Implementation Council (PIC), comprised of fifty-five countries and agencies responsible for the assisting the state financially, providing troops, or directly running operations, oversaw Bosnia.<sup>45</sup> Finally, the High Representative (HR) was appointed by the PIC and was designed to facilitate the state's own efforts to implement the peace agreement.<sup>46</sup>

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<sup>42</sup> Mark Baskin, "Interim Notions of Statehood in Bosnia-Herzegovina: A Permanent Transition?" in *Interim Governments: Institutional Bridges to Peace and Democracy?* eds, Karen Guttieri and Jessica Piombo, 274 (Washington, D.C.: Endowment of the United States Institute of Peace, 2007).

<sup>43</sup> Alan J. Kuperman, "Power Sharing or Partition? History's Lessons for keeping the peace in Bosnia", in *Bosnian Security After Dayton: New Perspectives*, ed. Michael A. Innes, 28 (New York: Routledge, 2006).

<sup>44</sup> Marcus Cox, "Bosnia and Herzegovina: The Limits of Liberal Imperialism" in *Building States to Build Peace*, eds. Charles T. Call with Vanessa Wyeth, 252 (Boulder: Lynne Rienner Publishers, 2008).

<sup>45</sup> Baskin, 274.

<sup>46</sup> Ibid, 274.

Thus, Dayton created a loose federal structure and granted significant autonomy to the republics based on ethnic divisions. While this decision expeditiously ended three years worth of warfare rife with human rights violations, it was detrimental to long term reconciliation.

### **2.3 ICTY: Addressing Violence against Women in an Ethnic Framework**

*Trials emphasize the weapon rather than the wound.*<sup>47</sup>

Continuing in the same vein as the Dayton Peace Accord, the International Criminal Tribunal for the former Yugoslavia (ICTY) focused its prosecutions of war crimes on the same ethnic divisions that had characterized the conflict. Again, while it is perhaps not surprising that the issue of ethnicity needed to be addressed, it is important to understand how the Tribunal's exclusive focus on ethnicity ignored women's gendered experiences.

In response to the mass atrocities and crimes against humanity in Yugoslavia, the United Nations established the ICTY, a form of retributive justice. United Nations Security Council (UNSC) Resolution 827 declared that the objectives of the ICTY were to bring to justice persons responsible for violations of international humanitarian law, to render justice for victims, to deter future crimes, and to contribute to the restoration of peace by promoting reconciliation.<sup>48</sup> The tribunal was responsible for prosecuting perpetrators of

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<sup>47</sup> de Londras, 119.

<sup>48</sup> Majbritt Lyck, *Peace Operations and International Criminal Justice: Building Peace after Mass Atrocities* (New York: Routledge, 2009), 28. (See Appendix 3)



violence, including Serbian President Slobodan Milošević and other high-ranking officials. Unlike South Africa, repeated attempts to establish a Truth and Reconciliation Commission failed.<sup>49</sup> This was largely due to the Tribunal's opposition, which feared that a Truth Commission would interfere with its jurisdiction and prosecution of war crimes.<sup>50</sup>

The ICTY is commendable in many ways. Specifically, it strengthened the jurisprudence of sexual violence, specifically rape. For example, the Tadić case was the first time in which sexual crimes received concerted judicial testament in international law.<sup>51</sup> Similarly, the Čelebići case in 1998 recognized rape as an instrument of torture.<sup>52</sup> The Foča case, discussed in detail in the next section, saw sexual crimes as the sole focus of prosecution for the first time in the history of international law.<sup>53</sup> Thus the main achievements of the ICTY are that sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and other forms of sexual violence are officially classified as crimes against humanity. However, the ethnic divisions of the war remain visible in the legal language of these important developments. In order to demonstrate how ethnicity permeated the achievements and mandates of the ICTY, it is imperative to look at its Statute.<sup>54</sup>

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<sup>49</sup> Rangelov and Theros, 360.

<sup>50</sup> Ibid, 360.

<sup>51</sup> Vesna Nikolic-Ristanovic, "Sexual Violence, International Law and Restorative Justice," in *International Law: Modern Feminist Approaches*, eds. Doris Buss and Ambreena Manji, 281 (Portland: Hart Publishing, 2005).

<sup>52</sup> Ibid, 281.

<sup>53</sup> Ibid, 281.

<sup>54</sup> See Appendix 2.

When the realities of mass rape during the Bosnian war were revealed, the United Nations General Assembly adopted a special resolution stating that the “systematic practice of rape was used as a weapon of war and an instrument of ethnic cleansing.”<sup>55</sup> The Statute of the ICTY clearly links ethnicity to the prosecution of sexual violence. Article 5 of the Statute lists “rape” as a crime against humanity.<sup>56</sup> Article 4 explicitly states that genocide, defined as an act “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” included in the lists of specific acts, states: “(d) imposing measures intended to prevent births within the group.”<sup>57</sup> The important question that begs clarification, therefore, is how exactly does rape constitute genocide in the Bosnian case?

The ICTY’s prosecution of rape as genocide stems from the particular cultural constructions of ethnicity. According to Balkan cultural tradition, the biological father solely determines a child’s ethnicity.<sup>58</sup> Therefore, Serbs systematically strategized to create “Chetnik babies” by impregnating Bosniak women, who would eventually grow up to kill Muslims.<sup>59</sup> As previously mentioned, although the number of wartime rapes and pregnancies are difficult to determine, the Bosnian government estimated that thirty-five thousand women,

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<sup>55</sup> Joana Daniel-Wrabetz, “Children Born of War Rape in Bosnia-Herzegovina and the Convention on the Rights of the Child,” in *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, ed. Charli R. Carpenter, 24 (Bloomfield, CT: Kumarian Press Inc, 2007).

<sup>56</sup> See Appendix 2.

<sup>57</sup> International Criminal Tribunal for the former Yugoslavia, “Updated Statute of the International Criminal Tribunal for the former Yugoslavia,” (September 2009), [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) Statute.

<sup>58</sup> Salzman, 364.

<sup>59</sup> Daniel-Wrabetz, 23.

primarily Muslim but also Croat, became pregnant from rapes.<sup>60</sup> Thus, the ICTY recognized the explicit intention of the Bosnian Serb army to rape Bosniak women as a tool of ethnic cleansing, and eventually genocide, and enshrined it in law.<sup>61</sup>

The ethnic framework of the ICTY is so dominant that some Bosnians have criticized it for having an inherent ethnic bias. In the Federation, among Bosniaks in particular, the ICTY has achieved a certain level of trust and legitimacy.<sup>62</sup> In contrast, in the Republika Srpska which is predominately ethnically Serb, public perception is that the ICTY is a biased anti-Serb body.<sup>63</sup> As of 2004, the RS has been the only authority within the former Yugoslavia that has not handed over a single war crimes suspect to the Tribunal.<sup>64</sup>

It is important to understand that despite the reality that ninety percent of rape victims were Bosniaks, and their victimization was the primary focus in the media, there were other survivors of sexual violence. This project is not suggesting that the ICTY focused solely on the plight of Muslim women. Instead, the ethnic framework persisted in each case of sexual violence, regardless of the ethnicity of the victim. The case of the Čelebići camp corroborates the ethnic framework argument, as a Serb woman named Grozdana Cecez describes her

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<sup>60</sup> Daniel-Wrabetz, 24.

<sup>61</sup> The ICTY officially amended its statute to include the prosecution of rape as a crime of genocide in 1998 after Jean Paul Akayesu was charged with sexual violence as a crime of genocide in the International Criminal Tribunal for Rwanda; see Paul J. Magnarella, *Justice in Africa: Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal* (Aldershot: Ashgate Publishing Ltd., 2000).

<sup>62</sup> International Centre for Transitional Justice, "Bosnia and Herzegovina: Selected Developments in Transitional Justice," (October 2004), <http://www.ictj.org/>.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

experiences. At the beginning of the proceedings, the defence council establishes the ethnicity of the witness:

MS McHENRY: Mrs Cecez, what is your ethnic background?

A. I am Serbian.

Q. What is the ethnic background of most of the inhabitants in Donje Selo in 1992?

A. Serbian, mostly Serbian. About 100 Serbian houses.

About 20 Croatian. There were 2 or 3 local Muslims.

They are not really born there but they were living close by.<sup>65</sup>

Similarly, throughout her testimony the witness highlights the ethnic division between her as a Serb victim and her perpetrators as Muslims. Those in charge of the Čelebići camp made continuous reference to the ethnicity of their captives:

"We're bringing in the Cetniks. We're bringing in the Cetniks. Open the gates."<sup>66</sup>

When describing her experiences of sexual violence, she acknowledges the vulgar and distinctly ethnic terminology used by her perpetrator, who asked:

"Do you see how a Turkish cock can fuck?"<sup>67</sup>

This particular comment has deep significance. It symbolizes a shift in power; rather than having a Bosniak woman raped by a Serb male, the Serb woman is victimized by a Bosniak perpetrator. Clearly, the perpetrator was making a conscious reference to his ethnic allegiance. He used rape as a tool to make the victim suffer both as a woman, but more importantly, as a Serb.

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<sup>65</sup> Testimony of Grozdana Cecez, International Criminal Tribunal for the former Yugoslavia, "Case IT-96-12: Prosecutor vs. Mucić et al. ("Čelebići")," (17 & 18 March 1997), <http://www.icty.org/sid/196>.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

Due to the limited number of witnesses who came forth to discuss their experiences at the Tribunal, it is important to look at secondary literature on the subject. Many victims of sexual violence perceived themselves as ethnic survivors. In her ethnographic research, Inger Skjelsbæk interviewed many survivors and discovered that ethnicity was often present in the stories of the interviewees; women often described the war rapes while referring to their Muslim identities.<sup>68</sup> In this sense, these particular victims placed their suffering alongside that of all other Bosniak victims in the war, both male and female.<sup>69</sup>

In a documentary film entitled *Calling the Ghosts*, two survivors of the Omarska concentration camp discuss their experiences as Bosniak women. Nusreta Sivac and Jadranka Cigelj believed that in order for the Serbs to be able to torture and violate their former friends and acquaintances, the soldiers were indoctrinated to believe that all Bosniaks were a threat to the Serbian state and therefore had to be removed.<sup>70</sup> They described how Serbs played their own folk music to intentionally torment their captives. Most disturbingly, the women describe how on a Traditional Orthodox holiday when Serbs typically burn a large fire, they burned wounded and dying captives alive. Sivac reports tearfully: “You could smell the burning throughout the camp. The orgy was heightened when they brought out a [Bosniak] woman.”<sup>71</sup> Thus, it is important to acknowledge that often the victims themselves see the crimes being committed against them as

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<sup>68</sup> Inger Skjelsbæk, “Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina,” *Feminism & Psychology* 16, no. 4 (2006), <http://www.sagepublications.com/>.

<sup>69</sup> *Ibid.*, 385.

<sup>70</sup> *Calling the Ghosts*, VHS, directed by Mandy Jacobson and Karmen Jelinčić (New York: Women Make Movies, 1996).

<sup>71</sup> *Ibid.*

distinctly ethnic. The aim of the project, however, is to indicate that there are some significant problems when the ICTY *retains* this ethnic framework in its prosecutions and sentencing. As the micro-level case study of Foča indicates, women experienced horrific abuses that were both sexual and gendered in nature. Regardless of the ethnic motivations behind the crimes, the distinct nature of women's experiences merit attention in the transitional justice process.

## 2.4 The Case of Foča

*They were all speaking and saying the same things. Always they were saying, "You Muslim women, you Bule, we'll show you," and that's what they said, all of them, the same things.<sup>72</sup>*

- "Witness 50", Bosnia

A micro-level case study of two regions, Foča (Bosnia) and KwaZulu-Natal (South Africa), demonstrates how the experiences of women during ethnic conflicts are comparable across geographical and cultural boundaries. This section describes the case of Foča which is a representative and noteworthy case to study, as it was the first Indictment to deal specifically with sexual offences committed in war.<sup>73</sup> This section closely examines the only two witness testimonies that resulted in the conviction of three Bosnian Serb soldiers, Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, on charges related to

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<sup>72</sup> Testimony of "Witness 50."

<sup>73</sup> Teresa Iacobelli, "The 'Sum of Such Actions': Investigating Mass Rape in Bosnia-Herzegovina through a Case Study of Foča," in *Brutality and Desire: War and Sexuality in Europe's Twentieth Century*, ed. Dagmar Herzog, 266 (New York: Palgrave Macmillan, 2009).

rape and sexual violence committed in Foča between April 1992 and February 1993.<sup>74</sup>

One of the first cities to fall to the Serbs during the war, Foča is a striking and disturbing example of the mass rape that exemplified the rape campaigns undertaken by the Serbs in this period. Although only two women testified at the ICTY trial, three soldiers were indicted on charges committed against at least fourteen victims who were subjected to almost constant rape, sexual abuses, and torture.<sup>75</sup> The Indictment itself is indicative of the horrific experiences of these women:

“The physical and psychological health of many female detainees seriously deteriorated as a result of these sexual assaults. Some of the women endured complete exhaustion, vaginal discharges, bladder problems and irregular menstrual bleedings. The detainees lived in constant fear. Some of the sexually abused women often became suicidal. Others became indifferent as to what would happen to them and suffered from depression ... Many women suffered permanent gynaecological harm due to the sexual assaults. All the women who were sexually assaulted suffered psychological and emotional harm; some remain traumatised.”<sup>76</sup>

Men and women were separately detained; women were kept in houses, apartments, motels, and in detention centres such as Buk Bijela, Foča High School, and Partizan Sports Hall.<sup>77</sup> The project’s detailed discourse analysis of two full witness testimonies from this case indicates that ethnicity was at the forefront of the prosecution of sexual violence. As shown below, “Witness 50”

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<sup>74</sup> Amnesty International, “‘Whose Justice?’: The Women of Bosnia and Herzegovina are Still Waiting”.

<sup>75</sup> International Criminal Tribunal for the former Yugoslavia, “Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY’S First Indictment Dealing Specifically with Sexual Offences,” (27 June 1996), <http://www.icty.org/>.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

and “Witness 87” testified anonymously and independently, but their testimonies highlight the ruthless and inhumane torture that women faced during their detention.

The ICTY makes a clear attempt to establish the ethnicity of both the victims and perpetrators immediately into the hearings. One of the first facts that the court establishes before hearing “Witness 50”’s testimony is her ethnicity and the ethnicity of her perpetrators. The prosecution asks:

“And just to clarify, all the other soldiers who took you out, were they Serbs as well?” and the witness responds: “Invariably. Serbs, and only Serbs.”<sup>78</sup>

Similarly, before commencing her testimony, “Witness 87” had to identify her ethnicity, and answer whether she believed she was directly targeted because she was Muslim, which she affirmed was the case.<sup>79</sup> In the cross-examination, she was questioned about the ethnic composition of her community. She explains that her rural community of Trosanj had a “Muslim population”<sup>80</sup> while another neighbouring community had a “mixed Serb/Muslim population.”<sup>81</sup>

Interestingly, despite only being asked to present the ethnic demographics of her town, she decidedly elaborates on the question by saying: “I don’t know what to say about the relationships between the two ethnicities. I never noticed there was any difference in them than what was the case previously.”<sup>82</sup> This suggests

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<sup>78</sup> Testimony of “Witness 50”.

<sup>79</sup> Testimony of “Witness 87”, International Criminal Tribunal for the former Yugoslavia, “Case IT-96-23-T and IT-96 23/1: Prosecutor vs. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković” (4 April 2000), <http://www.icty.org/sid/10117>.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.



that ethnicity was not a pertinent or significant factor for a young Bosnian girl before the war, but became an issue by the conflict and continued to be the focus of the transitional justice process.

In addition, “Witness 50” describes the moment when she met her former neighbour, a Serb, who reassured her and her family that they were “good neighbours” and that they were “not to blame for anything... because we were just women and children” and that “everything would be all right.”<sup>83</sup> Again, while the Tribunal focused on establishing an ethnic identity and a particular ethnic relationship between victim and perpetrators, victims themselves took several opportunities to point out that this ethnic stereotype was complicated and multifaceted.

The witness testimonies of the Foča case indicate that sexual violence was viewed through a distinctly ethnic framework, and the prosecution was continually trying to establish the guilt of the perpetrators by labelling the experiences of women in ethnic terms. Both witnesses shared intimate and humiliating experiences that demonstrate how ethnicity permeated the crimes committed against them. For example, “Witness 50” describes being detained by a Serb and how he forced her to introduce herself as a Serb to his mother.<sup>84</sup> She explains the difficulty of being forced to consent to sexual abuses, but also the psychological trauma of having to behave under false pretences:

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<sup>83</sup> Testimony of “Witness 50”.

<sup>84</sup> Ibid.

He took me to his mother's apartment, and he asked me to introduce myself as a Serb, to say that my name was (redacted), to say that I was from Ustikolina, that -- I don't know -- that my mother and father were also Serbs... They even brought me some brandy to drink. I never drank alcohol, especially at that time, when I wasn't even 17 years old. They knew that very well, that Muslim women did not drink alcohol, for the most part. And he changed my name. He wanted me to be his Serb girl that night.<sup>85</sup>

“Witness 87” suffered equal humiliation at the hands of her Serb captors. She describes how she performed a strip tease while a pistol was pointed at her, forced to climb on a table and dance to Bosnian folk music.<sup>86</sup> She felt “frightened” and “ashamed” and thought that she had no control. Thus, as the witness testimonies reveal, women suffered sexual violence, including psychological trauma, largely based on their ethnicity.

As mentioned in the introduction, retributive models of transitional justice processes often fail to reconcile the majority of a nation’s citizens after conflict. The majority of the literature on the ICTY argues that it failed to establish women’s reconciliation. For example, the Tribunal did not break old patterns of gender crimes considered “secondary” to other crimes against humanity.<sup>87</sup> The ICTY process had no gender sensitivity training, women were not represented at all levels of the court, and several women who were called to testify multiple times suffered from re-traumatization.<sup>88</sup> Furthermore, the Tribunal is located geographically far from the communities it claims to represent, and the credibility

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<sup>85</sup> Testimony of “Witness 50”.

<sup>86</sup> Testimony of “Witness 87”.

<sup>87</sup> Anne Llewellyn Barstow, “The United Nations’ Role in Defining War Crimes,” in *War’s Dirty Secret: Rape, Prostitution, and Other Crimes Against Women*, ed. Anne Llewellyn Barstow, 234-243 (Cleveland: The Pilgrim Press, 2000).

<sup>88</sup> *Ibid*, 242.

of female witnesses is often questioned, ironically due to the trauma they suffered.<sup>89</sup> In light of such criticism, many scholars have argued that the retributive model could benefit from the inclusion of various other mechanisms, such as a truth and reconciliation commission in which victims are encouraged to speak out and discuss their experiences.<sup>90</sup> While the restorative model of transitional justice was thus expected to produce a better outcome for women's reconciliation, the next chapter argues that the South African Truth and Reconciliation Commission's restorative model did *not* achieve reconciliation for female survivors because it also prioritized the ethnic aspects of women's experiences over their gendered components.

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<sup>89</sup> Nikolic-Ristanovic, 287-289.

<sup>90</sup> *Ibid*, 291.

## CHAPTER 3: SOUTH AFRICA

*What I know, is that I have sat for years, I have build an armour around that pain. I have nursed that pain, I have owned that pain. I seem to refuse to move away from that pain. I seem to gain strength from the fact that it is my pain.<sup>91</sup>*

- Thenjiwe Mtintso, South Africa

South African women experienced sexual violence on an extraordinary scale during the apartheid regime. As previously explained in the Bosnian case, wartime violence in South Africa also witnessed an explosion of ethnic hostilities that framed the experiences of women in ethnic terms. While the historical and cultural contexts of both countries are very different, these cases are comparable because ethnicity framed the legal treatment of sexual violence in both post-conflict transitions. As previously demonstrated in Chapter Two, Bosnia saw an *explicit* ethnic framework in the ICTY, labelling crimes against humanity in ethnic terms. This chapter argues that South Africa used a more *implicit* ethnic framework in its TRC. On one hand, the official rhetoric of the TRC advocated for a multi-ethnic framework under the rhetoric of a “rainbow nation”. However, in order to be eligible for amnesty, perpetrators had to demonstrate a political motive,<sup>92</sup> and because political affiliations during apartheid ran along ethnic lines, “political” motives were highly ethnicized. Thus, a discourse analysis of the TRC

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<sup>91</sup> Testimony of Thenjiwe Mtintso, Truth and Reconciliation Commission, “Sheila Masote: Case Number JB04279/01 GTSOW,” *Human Rights Violations: Women’s Hearings* (28 July 1996), <http://www.justice.gov.za/trc/special/women/masote.htm>.

<sup>92</sup> See Appendix 5.

hearings suggests that the deeply intertwined ethno-political aspects of the human rights violations occurring in South Africa during the apartheid era continued to trump the significant gendered implications.

This chapter is divided into four sections; the first two will first give a brief historical review of the ethnic components of the conflict, including the apartheid regime and the ethnic debate facing South Africa's transition to democracy. The third section will analyze the Truth and Reconciliation Commission (TRC), highlighting its different approach from that of the International Criminal Tribunal for the former Yugoslavia (ICTY). Finally, the last section will present the micro-level case study of the KwaZulu-Natal region in which women were detained and suffered tremendous violence in the same way as women in Foča. Like the Foča case, the KwaZulu-Natal region exemplifies how women's experiences were framed primarily in ethnic terms to the neglect of their gendered experiences. Both the Bosnian and South African case are demonstrative of the paradoxical reality that appalling levels of gendered violence against women are frequently treated as ethnic crimes.

### **3.1 South African Apartheid**

*Death is a master from Africa- his eyes are blue.*<sup>93</sup>

An obvious distinction between the case of Bosnia and South Africa is the latter's longer period of ethnic conflict. While Bosnia witnessed an intense three

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<sup>93</sup> Antjie Krog, *Country of My Skull: Guilt, Sorrow, and the Limits of Forgiveness in the New South Africa* (New York: Three Rivers Press, 1998), 311.

years of ethnic civil war, South Africa's ethnic tensions simmered for almost fifty years. It is important to note that the nation's *de facto* and eventual *de jure* ethnic hierarchy included many different groups. According to a 2001 census, South Africa has eleven official languages and is classified as predominately black (79%), followed by white (9.6%), coloured (8.9%), and Asian (2.5%).<sup>94</sup> In terms of ethnic discrimination, it was mostly the black ethnic group who suffered the majority of human rights abuses. Adam and Moodley argue that although early South African society was ethnically mixed, it was historically more "colour blind" than the legalized race classifications of apartheid of the twentieth century.<sup>95</sup> Ethnic distinctions that were previously inconsequential became the foundation of an infamous era of legalized racism, interethnic violence, and violence against women.

The history of apartheid began with the Afrikaners' quest for 'survival' to protect their language and culture against both indigenous black South Africans and English colonizers in the nineteenth century.<sup>96</sup> Afrikaans for 'separateness,' apartheid emerged in the English language in 1948 when South Africa's National Party began its forty-six year regime of legalized racism.<sup>97</sup> For the purposes of this project, women's experiences of violence are analyzed during the height of the armed conflict, which occurred between the National Party's security forces

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<sup>94</sup> CIA- The World Factbook, "South Africa,"

<https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>.

<sup>95</sup> Heribert Adam and Kogila Moodley, *Seeking Mandela: Peacemaking Between Israelis and Palestinians* (London: Cavendish Publishing, 2005), 49.

<sup>96</sup> Heribert Adam, *Peace-Making in Divided Societies: The Israel-South Africa Analogy* (Cape Town: Human Sciences Research Council Publishers, 2002), 16.

<sup>97</sup> Terry Bell with Dumisa Buhle Ntsebeza, *Unfinished Business: South Africa, Apartheid, and Truth*, (London: Verso, 2003), 19.

and armed members of the African National Congress (ANC), the Pan African Congress (PAC) and the Inkatha Freedom Party beginning in the 1960s until the abolition of apartheid in 1994.

During this time, both men *and* women experienced unlawful detention and acts of violence including kidnapping, torture, and rape. However, women were particularly vulnerable to white security officers because of a lifetime of gender inequality, oppression, humiliation, and abuse at the hands of a white-minority state and its officials.<sup>98</sup> Apartheid affected rural women in particular, who were considered a “surplus population” and were prohibited to move outside of designated rural areas.<sup>99</sup> Thus, many rural women were only able to participate in the informal economy, and became street vendors, beer makers, sex workers and domestic labourers.<sup>100</sup> South African women, particularly black women, suffered from a variety of abuses both as direct and indirect victims of apartheid policies.

While South African state policy lacked an explicit strategy to conduct systematic rape campaigns like in Bosnia, rape and sexual assault were commonly employed weapons of oppression in the apartheid era. The prevalence of present-day sexual violence is often attributed to the poverty and oppression institutionalized in the apartheid regime. Mbuyiselo Botha, a South African rights activist, argues that apartheid made violence an “instrument of control” and pushed men to take out their frustrations on the weakest victims:

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<sup>98</sup> For more information, see Nahla Valji, “Gender Justice and Reconciliation”.

<sup>99</sup> Farr, 3.

<sup>100</sup> Ibid, 4.

women and children.<sup>101</sup> Like Bosnia, few cases of sexual violence were reported to the authorities or to the TRC, and fewer cases have been prosecuted.<sup>102</sup>

Thus, it is evident that the legalized racist policies of the apartheid regime exacerbated societal ethnic divisions. Unlike the Dayton Peace Accords which polarized the fighting ethnic groups after the Bosnian war, South African leaders were in disagreement of how to overcome the ethnic hostilities of the past in the new democratic South Africa.

### **3.2 Post-Conflict Transition: Rainbow Nation?**

According to scholar Mahmood Mamdani, the main dilemma facing South Africa's post-conflict transition was that there were few perpetrators of human rights atrocities, but immeasurable beneficiaries of the apartheid regime.<sup>103</sup>

Whereas the internationally-led transitional justice process in Bosnia relieved the nation of much of the financial burden, South Africa's recovery was entirely domestically-led and thus more limited in terms of financial resources and manpower. Compounded by this reality, the biggest obstacle to the new African National Congress (ANC) government headed by Nelson Mandela was how to best achieve reconciliation among a nation plagued by deeply rooted ethnic inequalities.

The three prominent and influential leaders at the time of democratic transition, President Nelson Mandela, Thabo Mbeki, and Archbishop Desmond

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<sup>101</sup> Colean Jacobson, "Sexual violence linked to manhood in SAfrica, where report says 1 in 4 men admit to rape," *The Canadian Press* (Toronto: July 9, 2009).

<sup>102</sup> Statistics on violence against women in South Africa from Fiona Ross' *Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa*.

<sup>103</sup> Krog, 147.



Tutu, had different opinions concerning the future of the nation. Antjie Krog, an Afrikaner journalist who chronicled the TRC process, argues that Mandela created a “culture of guilt” among his fellow black South Africans whereas Thabo Mbeki created a “culture of shame.”<sup>104</sup> Namely, she argues that Mandela mobilized morality by playing on the guilt of the Western world and with white South Africans.<sup>105</sup> Mbeki, in contrast, shamed his fellow blacks into pursuing the rightful course of action.<sup>106</sup> In his famous “two nation” speech, Mbeki speaks of the great gulf between the two main ethnic groups. He argues that reconciliation can only be achieved when the focus is not between the perpetrators and victims of all colours, but rather between the beneficiaries (whites) and the exploited (blacks).<sup>107</sup> Mbeki’s speech highlights the deep bitterness and vengefulness many blacks felt towards their former white oppressors. The acknowledgment of ethnic divisions between black and white South Africans is apparent in both Mandela’s and Mbeki’s perspectives. For many South Africans, fifty years of ingrained ethnic divisions would not easily dissipate and should be addressed in order to achieve lasting reconciliation.

In contrast, some South Africans felt that ethnic reintegration was both desirable and achievable. Swayed by the influence of Chairman Archbishop Desmond Tutu, the priority of the TRC was to promote a “rainbow nation.”<sup>108</sup> Privileging racial harmony, the “rainbow nation” rhetoric believes that

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<sup>104</sup> Krog, 343.

<sup>105</sup> Ibid, 343.

<sup>106</sup> Ibid, 343.

<sup>107</sup> Ibid, 375.

<sup>108</sup> Nthabiseng Motsemme, “The Mute Always Speak: On Women’s Silences at the Truth and Reconciliation Commission,” *Current Sociology* 52, no. 5 (2004) <http://www.sagepublications.com>.

reconciliation must be between people of all colours.<sup>109</sup> Based on the African philosophy of *ubuntu*, Tutu advocated that black people take pride in their ethnic and cultural heritage based on their exemplary qualities that the rest of the world lacks.<sup>110</sup> He appealed to his kinsmen to actively take part in the creation of a new South Africa. Tutu's multi-ethnic view won the ideological battle. According to the newly ratified Constitution, the future of the nation rested on the principles of the "rainbow nation":

The Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex.<sup>111</sup>

Thus, ethnic divisions framed the politics of South Africa's conflict and post-conflict transition. However, unlike Bosnia's Dayton Accords, the "rainbow nation" rhetoric advocated for a multi-ethnic South African society. This project argues that despite this rhetoric an ethnic framework still prevailed, although implicitly, as the transitional justice process continued to stress the importance of ethnicized political ties.

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<sup>109</sup> Krog, 145.

<sup>110</sup> Ibid, 145.

<sup>111</sup> Truth and Reconciliation Commission, *Promotion of National Unity and Reconciliation Act 34 of 1995*, <http://www.justice.gov.za/legislation/acts/1995-034.pdf>.

### 3.3 TRC: Addressing Violence against Women in an Ethnic Framework

*It will sometimes be necessary to choose between truth and justice. We should choose truth. Truth does not bring back the dead, but releases them from silence.*<sup>112</sup>

- Chilean philosopher and activist José Zalaquett

A form of retributive justice, the South African Truth and Reconciliation Commission began the nation's healing process in December 1995. As mentioned in the previous sections of this chapter, ethnic divisions characterized the apartheid era and framed many of the atrocities that were committed. Contrary to the ICTY, which explicitly tied crimes of sexual violence to the ethnic components of crime, the TRC eventually addressed the gendered perspectives of women. Whereas the retributive model of the ICTY advanced the jurisprudence of violence against women in international law, the restorative model of the TRC was even more gender-sensitive, conducting a "Special Hearing" designed solely for female victims. Ironically, despite an attempt to include a gendered perspective, the TRC did not classify sexual violence as a "political crime" and therefore, according to its mandate, could not compel perpetrators of sexual violence to attend the hearings or apply for amnesty.<sup>113</sup> Consequently, just as the ICTY did not ensure women's reconciliation despite its acknowledgement of rape as a crime against humanity; neither did the TRC's

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<sup>112</sup> Chilean philosopher and activist José Zalaquett, in Krog.

<sup>113</sup> Dorothy Driver, "Truth, Reconciliation, Gender: The South African Truth and Reconciliation Commission and Black Women's Intellectual History," *Australian Feminist Studies* 20, no. 47 (2005).

inclusion of its “Special Hearings” guarantee that women would reconcile their experiences.

A restorative model of transitional justice, the TRC had a dramatically different approach than the prototypical criminal tribunal models of Nuremberg, Yugoslavia, and Rwanda. Staffed by sixty investigators, the Commission’s three committees (Human Rights Violations, Reparations and Rehabilitation, and Amnesty) took more than twenty thousand statements, and held more than fifty hearings in over two hundred days.<sup>114</sup> According to South African law, President Mandela and his Cabinet chose from a short-list of potential candidates for the Commission.<sup>115</sup> The ethnic composition of the Commissioners reflects the rainbow nation rhetoric, including two Afrikaners, four English, two Indians, and five blacks responsible for granting amnesty.<sup>116</sup> As previously mentioned, in order to grant amnesty, applicants had to demonstrate a *political motive* behind their crimes.<sup>117</sup> As the very nature of apartheid suggests, political affiliations ran along distinct ethnic lines. A prime example of the closely interwoven nature of ethnicity and politics in South Africa, the province of KwaZulu-Natal experienced a *de facto* civil war between two different “black” ethnicities: the African National Congress (ANC) whose leadership was predominately Xhosa-speaking, against the Inkatha which was overwhelmingly Zulu.<sup>118</sup> Thus, the official rhetoric of the Commission prioritized the political perspective of crimes, and given the

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<sup>114</sup> Krog, 21.

<sup>115</sup> Ibid, 22.

<sup>116</sup> Ibid, 28.

<sup>117</sup> See Appendix 5.

<sup>118</sup> Truth and Reconciliation Commission, *Volume Three: Truth and Reconciliation Commission of South Africa Report* (29 October 1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%203.pdf>.

politicization of ethnicity during apartheid, the TRC followed an implicit ethnic framework.

From its very inception, gender was excluded from the basic composition of the Commission. Antjie Krog poignantly points out:

“All the women are asked whether they feel there should be women on the commission. No man is asked whether he feels there should be women on the commission. Nobody is asked whether they feel there should be men on the commission.”<sup>119</sup>

The issue of gender was finally (and likely only) raised after a report on the initial proceedings of the TRC was published by Beth Goldblatt and Sheila Meintjes. The report argued that women’s voices were largely ignored, and that the women who did speak tended to use the TRC hearings to emphasize the experiences of their male loved ones rather than their own experiences of violence.<sup>120</sup> This is corroborated by the ethnographic research conducted by Fiona Ross who established that women accounted for fifty-four percent of testifiers, yet seventy-nine percent of whom spoke only about men.<sup>121</sup> Therefore, where the retributive justice model in the ICTY expected women to be no more than witnesses in the prosecution of war criminals, the restorative justice model of the TRC decided to create a forum in which women were encouraged to discuss their own experiences openly and on their own accord.

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<sup>119</sup> Krog, 23.

<sup>120</sup> Beth Goldblatt and Sheila Meintjes, *Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission* (Wits, South Africa: University of the Witwatersrand, 1996), 5.

<sup>121</sup> Ross, 17.

The TRC's Special Hearings addressed the particular nature of women's apartheid experiences. The Hearings are commendable because they eventually included a public and official acknowledgment of the gendered experience of apartheid. Entitled the "Special Hearings on Women", they became a component of the commission in which women came forward to discuss any crimes committed against them in what was intended to be a cathartic process. There were women-only hearings held over two days in three cities: Cape Town, Durban, and Johannesburg.<sup>122</sup> Chairperson of the Commission on Gender Equality, Thenjiwe Mtintso, called upon women to "speak as actors, as active participants and direct survivors of the violation of human rights. Not as relatives, not as spouses, not as wives, but as themselves, those that directly suffered."<sup>123</sup> For example, women were encouraged to discuss their experiences of sexual violence but also affronts such as being degraded during their menstruation periods, being subjected to vaginal searches, and pregnant women being threatened with miscarriage.<sup>124</sup> Therefore, the TRC's "Special Hearings" enabled women to take advantage of an open and comfortable forum in which they were not only able to describe their personal experiences, but able to identify their lingering needs and particular obstacles to their reconciliation.

Survivors themselves often frame their experiences in ethnic terms, as was the case at the ICTY. The Goldblatt and Meintjes report discusses women

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<sup>122</sup> Lyn Graybill, "The Contribution of the Truth and Reconciliation Commission Toward the Promotion of Women's Rights in South Africa," *Women's Studies International Forum* 24, no. 1 (2001), 5-6.

<sup>123</sup> Analisa Oboe, "The TRC Women's Hearings as Performance and Protest in the New South Africa," *Research in African Literatures* 38, no. 3 (2007), 62.

<sup>124</sup> Graybill, 7.

who distinctly acknowledge the role their ethnicity played in their experiences. After using false identities to qualify to work in an urban centre, Lydia Kompe was “tortured by the guilt” associated with her new identity as a coloured woman because it gave her advantages over her black co-workers.<sup>125</sup> Furthermore, apartheid divisions structured prison life, in particular food, clothing and accommodation were qualitatively different for Asian, coloured, and African women.<sup>126</sup> Moreover, white prisoner Jenny Schreiner described that she felt an advantage being a white woman in detention although she felt that her sheltered life made it more difficult for her to deal with torture and the conditions of detention.<sup>127</sup> In terms of sexual violence, Yvonne Khutwane was the first woman to include a detailed description of sexual violation in her testimony at the TRC.<sup>128</sup> Ross argues that Khutwane directly links political activism with the oppressive policies of apartheid including pass laws, police violence, and the failure of whites to denounce the system.<sup>129</sup> Her testimony shows an emphasis on ethnically-based power dynamics:

“My shirt was in tatters and then one of them said are you fighting back you *kaffer* and then they kept on insulting me ... I could think maybe they thought that I was just a black person who is out of his mind.”<sup>130</sup>

The TRC testimonies suggest that the ethnic divisions created by apartheid had resonating effects for many survivors and defined many of their experiences.

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<sup>125</sup> Goldblatt and Meintjes, 25.

<sup>126</sup> Ibid, 39.

<sup>127</sup> Ibid, 39.

<sup>128</sup> Ross, 81.

<sup>129</sup> Ibid, 150.

<sup>130</sup> Testimony of Yvonne Khutwane, Truth and Reconciliation Commission, “Yvonne Khutwane: Case Number CT/00530.” (24 June 1996), <http://www.justice.gov.za/trc/hrvtrans/worcest/ct00530.htm>

However, Chapter Four will elaborate on how not all victims framed their experiences in ethnic terms. Therefore, while it is important to reiterate that ethnicity played a crucial role in the apartheid era, this project maintains that the TRC's retention of an ethnic framework in its restorative justice process excludes many women from the reconciliation process.

Despite its attempts to include women's specific experiences of violence in conflict, a discourse analysis of the hearings reveal that the TRC still prioritized the ethno-political aspects over the gendered aspects. Similar to the questions asked to the Bosnian victims of violence, the Commissioners at the Women's Hearings also labelled perpetrators and victims in ethnic terms:

“Chairperson: You have mentioned that there were in fact four men who raped you. Now, were all of these men White or were there some Black policemen amongst them?

Ms Shezi: They were all White males and they were speaking Afrikaans.”<sup>131</sup>

Again, the National Unity and Reconciliation Act (1995) required an applicant to demonstrate a political motive in order to be eligible for amnesty. While the TRC's mandate considered sexual violence an apolitical act, in reality many women were targeted by perpetrators based on their ethno-political affiliations. For example, Ms Marubini attributed her victimization to her ethnicity; her captors wanted her to help them find Nelson Mandela, “because Mandela is Xhosa.”<sup>132</sup> Even though the TRC made an admirable attempt to address

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<sup>131</sup> Testimony of Thandi Shezi.

<sup>132</sup> Testimony of Joyce Marubini, Truth and Reconciliation Commission, “Joyce Marubini: Case Number JB03389/02/NPLTM,” *Human Rights Violations: Women's Hearings* (28 July 1997), <http://www.justice.gov.za/trc/special/women/marubini.htm>



women's specific gendered experiences of sexual violence, this project argues that violence against women was obscured within a larger ethnic framework.

Although women were able to identify the obstacles to their reconciliation and clarify areas of grave concern in the TRC's "Special Hearings on Women", the reality that sexual violence was not considered a "political crime" and its perpetrators were thus not eligible for amnesty, limited the probability of the TRC to adequately address women's explicit needs. The next section explores the micro-case study of KwaZulu-Natal to exemplify the multifaceted and universal nature of women's experiences during ethnic conflict. As will be discussed in the next chapter, an ethnic framework did not equitably address women's distinct experiences of violence in either Bosnia or South Africa.

### **3.4 The Case of KwaZulu-Natal**

*What is worse is that I was only sixteen years, and I was still a virgin, and I had told myself that I wanted to be like my mother... They raped me, the three guys. That was the end of my story. I got pregnant there. And when I came back home, I was pregnant and now I have a child whose father I don't know.*<sup>133</sup>

- Bajabulile Nzama, South Africa

This section presents the second micro-level case study of the project, illustrating the similarities between the South African case and the Bosnian case. Specifically, both the Foča and KwaZulu-Natal cases illustrate how women spoke of their experiences of sexual abuse, verbal and physical assault, and humiliation

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<sup>133</sup> Testimony of Bajabulile Nzama in *Volume Three: Truth and Reconciliation Commission of South Africa Report*.

in detention. The survivors from both cases also identify themselves and their experiences of sexual violence in ethnic terms.

KwaZulu-Natal is a province in South Africa which lies on the eastern seaboard of the country, covering a total area of 100 000 square kilometres.<sup>134</sup> Accounting for approximately one-fifth of South Africa's total population, the province consists of ninety percent Zulu, with a sizeable Asian presence, and a small coloured and white population.<sup>135</sup> As mentioned in the previous section, this region experienced intense ethnic violence between the National Party (Afrikaner government), the ANC (Xhosa) and the Inkatha Freedom Party (Zulu). Goldblatt and Meintjies report that both groups punished women of the opposing side by gang rape, and the refugee centres on the South Coast saw widespread sexual violence reminiscent of Bosnia.<sup>136</sup> The *Truth and Reconciliation Final Report* reveals that close to half of all statements reporting gross human rights abuses were from the KwaZulu-Natal region, meaning the proportion of submissions in this region are four times higher than the rest of the country.<sup>137</sup> Also, sixty-three percent of the deponents were women, over fifty percent of whom spoke of themselves as victims, representing a significantly higher proportion than other regions.<sup>138</sup> Thus, KwaZulu-Natal represents the most extreme example of the violence women suffered during the apartheid regime and is an important region to study.

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<sup>134</sup> *Volume Three: Truth and Reconciliation Commission of South Africa Report.*

<sup>135</sup> *Ibid.*

<sup>136</sup> Goldblatt and Meintjies, 47.

<sup>137</sup> *Volume Three: Truth and Reconciliation Commission of South Africa Report.*

<sup>138</sup> *Ibid.*, 3.

While the national security force (ANP) perpetrated gross human rights violations during apartheid, *both* the Inkatha party and the ANC were guilty of committing similar crimes in KwaZulu-Natal. By the early 1990s, the rural and urban areas of the province were a jigsaw puzzle of political party strongholds that became known as ‘no-go zones’.<sup>139</sup> Violence intensified after the majority of township residents joined the ANC in February 1990, resulting with the Inkatha holding hostel residents hostage, and killing strangers who entered or exited the hostels without permission.<sup>140</sup> Similarly, hostel residents travelling through the townships ran the risk of being caught and punished by the ANC.<sup>141</sup> The testimony of Winnie Makhubela illustrates the ruthlessness of the violence between township and hostel residents. Winnie was just a young girl when her mother sent her into town to buy some meat for the family. She was caught, captured, raped, and almost killed in the township of Thokoza. Disturbingly, her testimony indicates that she was victimized by men *and* women:

Ms Seroke [Commissioner]: And you also say in your statement; when you got into the hall, you found that it was full of men and women. Now, what did the women do when you were gang-raped by these men? What did the women in that group, in that crowd - did they try to save you or did they just watch you being gang-raped?

Ms Makhubela: These women started applauding and they were very happy when they saw this happening to us.

Ms Seroke: Did you at any time try to beg them to help you and asked for their protection, your protection?

Ms Makhubela: They slapped us when we tried to plead to them to help us, they started slapping us and beating us up.<sup>142</sup>

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<sup>139</sup> Volume Three: Truth and Reconciliation Commission of South Africa Report, 285.

<sup>140</sup> Ibid, 285.

<sup>141</sup> Ibid, 285.

<sup>142</sup> Testimony of Winnie Makhubela, Truth and Reconciliation Commission, “Gloria Ella Mahlopho and Winnie Makhubela: Case Number JB03425/01 ERKAT,” Human Rights Violations: Women’s Hearings (28 July 1997), <http://www.justice.gov.za/trc/special/women/mahlopho.htm>.

Winnie's testimony is indicative of the complicated and perhaps surprising realities of ethnic conflict. Clearly, the fact that women both encouraged and perpetrated acts of brutality against other women suggests that their allegiance to their ethno-political group trumped any gender-based solidarity. This example reiterates the complexities of ethnic conflict and the dangers of retaining an ethnic framework in a nation's post-conflict recovery. The transitional justice process in South Africa focused on these ethno-political divisions at the risk of perpetuating ethnic divisions, not to mention overlooking important gendered divisions.

The intensification of hostility in KwaZulu-Natal made it necessary for all citizens to ally themselves to one of the fighting parties. Women, in particular, were often caught in the crossfire, massacred in their homes during household raids, and specifically targeted for their political activism or their relationships to male activists.<sup>143</sup> Although the actual numbers are difficult to determine, a significant number of women told the Commission that they had been sexually abused in the name of politics.<sup>144</sup> Introduced in this section's opening epigraph, sixteen year old Bajabulile Nzama described her abduction by the ANC in 1990. Echoing the experiences of the women in Foča, Nzama was detained for a month by her captors. Despite being non-partisan, she was accused of being an Inkatha sympathizer and was raped repeatedly.<sup>145</sup> Another example is the testimony of Kedeboni Dube who describes her experiences of being raped by a

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<sup>143</sup> *Volume Three: Truth and Reconciliation Commission of South Africa Report.*

<sup>144</sup> *Ibid*, 411.

<sup>145</sup> *Ibid*, 412.

man with Inkatha affiliations. She claims that she was apolitical, but was targeted because of her boyfriend's political activism and affiliation to the ANC:

“He said ‘I will take you to the Xhosa people and the Xhosa are going to kill you.’ And he beat me up the whole night until he raped me. He raped me in different positions. I tried to fight him at that stage until in the morning and he was raping me.”<sup>146</sup>

A resounding theme stemming from the testimonies of violence against women in KwaZulu-Natal is one of an ethno-political conflict. The deeply ingrained ethnic divisions created by apartheid manifested in a multi-ethnic political struggle among regions and neighbourhoods. While the TRC's official “rainbow nation” rhetoric intended to prioritize gross human rights violations over ethnically based crimes, the experiences of survivors was intensely ethnic and political. Thus, it is no surprise that female survivors of sexual violence also framed their truth-telling in ethnic terms.

The South African case provides an interesting comparison to the Bosnian case. As Chapter Two highlighted the criticism of the retributive process in the Bosnian case, there was much hope for the restorative process in South Africa. For instance, the TRC's amnesty process was believed to constitute a delicate balance between the “carrot” of absolving perpetrators from criminal liability and the “stick” of prosecuting perpetrators in criminal courts.<sup>147</sup> Furthermore, the South African TRC has been labelled as the closest transitional justice process to

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<sup>146</sup> Testimony of Kedeboni Dube, Truth and Reconciliation Commission, “Kedeboni Dube,” *Human Rights Violations: Women's Hearings*, (28 July 1997), <http://www.justice.gov.za/trc/special/women/dube.htm>

<sup>147</sup> Dumisa B. Ntsebeza, “The Uses of Truth Commissions: Lessons for the World,” in *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I Rotberg and Dennis Thompson, 165 (Princeton: Princeton University Press, 2000).

achieving the goals of both legal accountability and historical understanding.<sup>148</sup>

However, the prioritization of an implicit ethnic framework based on the ethno-political motives in amnesty applications, and the exclusion of sexual violence as a “political crime”, denied the survivors of sexual violence the opportunity to reconcile their experiences or see their aggressors publicly acknowledge their guilt.

After analyzing and explaining how an ethnic framework persisted in both the Bosnian and South African cases, this project has argued that the transitional justice processes’ continual focus on ethnic divisions and ethnic crimes disregard the important gender inequalities from which women still suffer. As the next chapter demonstrates, there were significant limits to an ethnic framework when dealing with sexual violence in conflict. The most promising way to rectify the limitations of prioritizing ethnicity over gender is to use the two frameworks mutually inclusively.

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<sup>148</sup> Ronald C. Slye, “Amnesty, Truth, and Reconciliation: Reflections on the South African Amnesty Process,” in *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, 179 (Princeton: Princeton University Press, 2000).

## CHAPTER 4: THE LIMITS OF ETHNIC FRAMEWORKS

*The world watches coldly while everything passes through women's bodies. Destroying a woman is destroying the essence of a nation. When they were killing and raping older women they were killing and raping living history. When they were raping younger women they were destroying future generations.*<sup>149</sup>

- Jadranka Cigelj, Bosnia

Using a discourse analysis of trial testimonies, this project has argued that the transitional justice processes in Bosnia-Herzegovina and South Africa framed violence against women in ethnic terms. This is a significant discovery because it implies that as a result, this ethnic framework trumped the important gendered implications of both conflicts because of its narrow focus. The International Centre for Transitional Justice argues that transitional justice processes often neglect women's experience of political violence. Moreover, neither the ICTY nor the TRC have taken the opportunity to use their forums to enhance gender justice, have not contributed to the understanding of gendered legacies of inequality, and have not explored the complex relationship between "extraordinary" (wartime) versus "ordinary" (daily) violence.<sup>150</sup> Another criticism of the transitional justice process is that it is "designed to protect men from the superior power of the state but not to protect women or children from the superior

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<sup>149</sup> Testimony of Jadranka Cigelj in *Calling the Ghosts*.

<sup>150</sup> International Centre for Transitional Justice, "Gender Justice" (2008), <http://www.ictj.org/en/tj/786.html>.

power of men.”<sup>151</sup> This project has argued that the failure to reconcile women is due to the transitional justice processes’ emphasis on ethnicity. This chapter argues that if the transitional justice processes place violence against women into a *gendered* framework, it would highlight important issues that might have otherwise been ignored and thus rectify important issues that an ethnic framework excludes.

Agreeing with the feminist theory of intersectionality as explained in the introduction, this chapter argues that the best way to rectify the limitations of an ethnic framework is to include a gendered perspective. The intersectionality theory offers a way to understand how gender and race are interconnected, therefore positioning individuals and groups in particular ways that cannot be understood without seeing gender in relation to race and vice versa.<sup>152</sup> Therefore, intersectionality is an extremely relevant theory to include in this project, as it helps explain the multifaceted aspects of women’s experience of gendered sexual violence during ethnic conflict. As suggested in the previous chapters, gender and ethnicity proved to be a potent mixture for women in both Bosnia and South Africa. Excluding one or the other from the transitional justice process would neglect a significant aspect of the experiences of women, and thus the transitional justice processes would be unable to meet all their pledge of reconciliation and justice for every citizen. Thus, while an ethnic framework focuses on one aspect of the problem, there is also a need to move beyond focusing on sexual violence in conflict to address the larger context of inequality

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<sup>151</sup> Nikolic-Ristanovic, 286.

<sup>152</sup> “Sexual Violence, Ethnicity, and Intersectionality in International Criminal Law”, 109.



that facilitates and continues to legitimize these violations. This chapter explores three important issues that the ICTY and the TRC's ethnic framework excluded: victimization, patriarchy, stigma and discrimination.

The limited scope of an ethnic framework suggests that women in both Bosnia and South Africa deserve a more comprehensive and gendered approach in dealing with sexual violence. In honour of International Women's Day in South Africa, the TRC released a statement acknowledging the complex and distinct experiences that women faced during apartheid. Arguing that women suffered as both direct and indirect victims, they carried a "triple burden": victims of apartheid, of domestic violence, and of discrimination in the workforce.<sup>153</sup> The statement also acknowledges that the post-conflict recovery process marginalized women's experiences to those of men.<sup>154</sup> In the Bosnian case, women also experienced discrimination and oppression on multiple levels. After surviving sexual abuses in the Čelebići concentration camp, Grozdana Cecez testifies of the traumatic experience of witnessing her fellow captives murdered, and the horror of identifying the mutilated corpse of her murdered husband.<sup>155</sup> Similarly, Nusreta Sivac reiterated the multiple traumas she suffered during her captivity in the Omarska camp: "You see rows of corpses, people you knew, people who worked with you, your friends. I call that mental rape, and it was going on twenty-four hours a day."<sup>156</sup> While men undoubtedly experienced many layers of trauma and

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<sup>153</sup> Truth and Reconciliation Commission, "Statement on Woman's Day and Violation," (7 August 1996). <http://www.justice.gov.za/trc/hrvtrans/helder/opening.htm>

<sup>154</sup> Ibid.

<sup>155</sup> Testimony of Grozdana Cecez.

<sup>156</sup> *Calling the Ghosts*.

oppression in both cases, the intersectionality theory argues that the multiple challenges facing women are unique. The emphasis of both transitional justice processes on ethnicity have a divisive rather than reconciliatory effect by simplifying women's statuses to victimhood and disregarding larger problems facing female inequality.

#### **4.1 Victim or Survivor?**

A significant challenge facing the transitional justice process is whether to label women as "victims" or "survivors." This section will demonstrate the different connotations of both terms. How a woman is labelled is also extremely significant because it often has particular legal implications. As Elizabeth Philipps argues, because the wars in the former Yugoslavia were defined as ethnic, an act of sexual violence committed by a Serbian soldier against a Serbian civilian woman would not be a justifiable crime to prosecute at the tribunal, no matter how brutal the violence.<sup>157</sup> Moreover, classifying women in a particular way can affect her personal identity. For example, Nusreta Sivac argues that the label of a "raped woman" is hurtful because it denies a woman any other personal or individual attributes.<sup>158</sup> Thus, an ethnic framework simplifies a woman's identity, which can be a barrier to her reconciliation.

Transitional justice processes often simplify women's status to that of "victim" while disregarding larger problems facing female inequality.

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<sup>157</sup> Elizabeth Philipps, "Feminism, International Law, and the Spectacular Violence of the 'Other': Decolonizing the Laws of War," in *Theorizing Sexual Violence*, eds. Heberle, Renee J. and Victoria Grace (New York: Routledge, 2009).

<sup>158</sup> *Calling the Ghosts*.

Furthermore, the strong association of women to their sexuality reinforces women's victimization. Namely, women are often considered property that exists because of, and for, the use of men. Mtintso reminds the TRC that women also acted as perpetrators of violence that challenges the "tendency to project women as passive observers."<sup>159</sup> Furthermore, Thandi Shezi of South Africa explains: "I do want people to empathise with me and share the pain with me, but I do not want them to reduce me to an object and see me as just nothing."<sup>160</sup> Clearly, associating a woman's identity solely with her wartime experiences objectifies her as nothing more than her physical being.

Despite the pejorative connotation of a "victim" status, some women may choose to label themselves as victims of wartime atrocities. Although sexual violence occurs across geographical boundaries, Inger Skjelsbæk argues that the assumption that sexual violence has the same effect on all women is an incorrect generalization.<sup>161</sup> Some women position themselves as ethnic victims of war, as has been discussed in the previous sections. Others perceive themselves to be gendered victims of war. In Bosnia, for example, women were clearly targeted because of their ethnicity but also because of their gender. Many interviewed victims relate how their experiences destroyed the core of their female identities, particularly their sexual and procreative abilities.<sup>162</sup> It is clear that even a "victim" label has many implications.

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<sup>159</sup> Testimony of Thenjiwe Mtintso.

<sup>160</sup> "Thandi Shezi."

<sup>161</sup> Skjelsbæk, 398.

<sup>162</sup> Ibid, 392.

On the other hand, some women see themselves as survivors. In South Africa, for example, there were countless female activists who worked tirelessly against the apartheid regime. Fiona Ross argues that the TRC undervalued the experiences of female activists. Not seeing themselves as victims, female activists tended to associate themselves with their role as opponents to the state.<sup>163</sup> Furthermore, although activists experienced similar sexual abuses during the regime, they were “treated like men” as they were often interrogated and tortured for up to 180 days in detention during the “State of Emergency.”<sup>164</sup> Furthermore, labelling women as rape “victims” and not “survivors” perpetuates the stereotype of women being weak and lacking agency. Women who endured the three-year civil war in Bosnia were not all passive victims of sexual violence. For instance, many women served in the militias and national armies throughout the former Yugoslavia. In particular, the “Maidens of Kosovo” formed in Bosnia in 1993.<sup>165</sup> There were also all-women units in the Croatian and the Muslim-dominated Bosnian armies.<sup>166</sup> Clearly, women identify themselves in a variety of ways. Thus, women do not all adhere to the simplistic labels enshrined in transitional justice processes.

The construction of an “ethnic victim” label polarizes women along ethnic lines rather than promoting gendered solidarity. This defeats the intended

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<sup>163</sup> Ross, 52-53.

<sup>164</sup> Ibid, 59. \*South Africa’s “State of Emergency” was enacted by the National Party government in 1960 after the Sharpeville Massacre.

<sup>165</sup> Obrad Kesić, “Women and Gender Imagery in Bosnia: Amazons, Sluts, Victims, Witches, and Wombs” in *Gender Politics in the Western Balkans: Women and Society in Yugoslavia and the Yugoslav Successor States*, ed. Sabrina P. Ramet, 189 (University Park, Pennsylvania: The Pennsylvania State University Press, 1999).

<sup>166</sup> Ibid, 189.

purpose of *both* transitional justice processes, as they have the common goal of creating a collective and fully reintegrated society. Chairperson of the Commission on Gender Equality, Thenjiwe Mtintso advocates for women to ally together in solidarity. She argues that violence against women in conflict is an attack on a country and its collective masculinity, using the bodies of women and children as men's battleground.<sup>167</sup> She draws on the experiences of women in Yugoslavia, Rwanda, and Burundi saying:

I think in the overall, many a time when stories are being told about struggling, the stories of the women's struggles are forgotten. They are hidden. Even when they are told, they're told as a postscript; incidentally there were women. But the essence of this history, is a history of men. It is not her story, as other people would say; it is the story of the man.<sup>168</sup>

Mtintso's testimony reveals two important factors: one, the inherent differences between the experiences of males and females during conflict; and two, the universal comparability of violence against women. Reiterating this project's thesis, an ethnic framework obscures a gendered perspective to the detriment of all females struggling for equality and empowerment. Furthermore, Jadranka Cigelj confesses that after experiencing sexual violence during the Bosnian civil war, she feels guilty for having overlooked the suffering of women elsewhere in the world.<sup>169</sup> Many women who survived wartime violence advocate that uniting women together against gendered oppression is the first step to true reconciliation. Thus, the inclusion of a gendered framework would better address the fundamental problem of the "helpless female victim" stereotype.

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<sup>167</sup> Testimony of Thenjiwe Mtintso.

<sup>168</sup> Ibid.

<sup>169</sup> *Calling the Ghosts*.

## 4.2 Patriarchy

Another barrier to achieving full reconciliation in post-conflict societies is the reality that an ethnic framework overlooks the very important and often deeply ingrained realities of gender inequality. Women's victimization is reinforced by the strong association of women to their sexuality in patriarchal societies such as both Bosnia and South Africa. Namely, the traditional patriarchal view on warfare is that it is men's role to fight and die, while women's responsibility is to maintain the home-front, to bear children, and to boost morale through satisfying men's sexual desires.<sup>170</sup> The inherent patriarchy in both cases is a contributing factor in the rise of nationalism, militarism, and the legitimization of violence against women.<sup>171</sup> This view helps to explain the predominance of sexual violence in the majority of conflicts. An important element of the intersectionality argument is that women have to face wartime violence and sexual abuse, but also the challenges that are associated with being unequal citizens.

Both Bosnia and South Africa have taken steps towards incorporating women as equal partners in their respective societies. However, Cynthia Cockburn argues that the countries' official recognition and promotion of gender equality has yet to take hold in reality.<sup>172</sup> For instance, the ICTY's perspective that rape is a crime against a collective rather than an individual reinforces the

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<sup>170</sup> Kesić, 189.

<sup>171</sup> Cynthia Cockburn, "Women's Organization in the Rebuilding of Bosnia-Herzegovina," in *The Postwar Moment: Militaries, Masculinities, and International Peacekeeping Bosnia and the Netherlands*, eds. Cynthia Cockburn and Dubravka Zarkov, 192 (London: Lawrence & Wishart, 2002).

<sup>172</sup> *Ibid*, 69.

traditional and patriarchal role of women in society.<sup>173</sup> As discussed in the chapter on Bosnia, rape was framed as a crime committed against an ethnic group. A decidedly ethnic, but also a deeply patriarchal, rape campaign resulted in the Serbs forcibly impregnating Bosniak women with ‘Serb’ babies. Thus, an ethnic framework not only ignores the gendered aspects of these particular crimes, but also perpetuates gender inequalities and sexism. Looking again at the case of Foča, detained women were often forced to act as both sexual and domestic slaves. These women, as revealed in the testimony of “Witness 87” and “Witness 50”, were forced to cook, clean, and wash the uniforms of their captors.<sup>174</sup> Therefore, while women were targeted for their ethnic affiliations, the crimes committed against them were also fundamentally gendered.

South Africa has also been an intensely patriarchal society since before apartheid. In her analysis of the TRC, Analisa Oboe argues that the only way that the position and power of South African women can be reconfigured is if sexism and patriarchy are removed.<sup>175</sup> For example, in the 1980s, women who suffered from sexual violations were considered “sell outs” by the liberation movements and suffered repercussions as “traitors.”<sup>176</sup> This stigma was based on the patriarchal myth that rape is something that women secretly desire.<sup>177</sup> Dorothy Driver argues that patriarchy contributes to the victimization of women,

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<sup>173</sup> Amnesty International, “Whose Justice?: The Women of Bosnia and Herzegovina are Still Waiting.”

<sup>174</sup> “Gang Rape, Torture and Enslavement of Muslim Women Charged in ICTY’S First Indictment Dealing Specifically With Sexual Offences.”

<sup>175</sup> Oboe, 66.

<sup>176</sup> Farr, 1.

<sup>177</sup> Ibid, 1.

and shaming women into silence disguises the realities of male abuse.<sup>178</sup>

Mtintso acknowledges the realities of gender inequalities, which she argues have rendered women the worst victims of apartheid because of the “intersection of patriarchy and apartheid.”<sup>179</sup> Here, the issue of intersectionality is explicitly addressed. Mtintso discusses how the physical and psychological torture that women endured was deeply gendered, and activists were often accused of being a “failure” as a woman, which framed their choice to join the freedom movement.<sup>180</sup> Furthermore, she argues that the experiences of black women were particularly difficult. When men were tortured by the police, there still existed a sense of respect, whereas if a woman refused to comply with her interrogators she was subjected to more intense sexual torture.<sup>181</sup>

Both the ICTY and the TRC faced deeply ingrained challenges to reconcile women due to the patriarchal nature of their societies. Nevertheless, these gender roles are significant because there is an inherent danger that patriarchy can be used to justify acts of sexual violence against women. Ethnographic research suggests that the sexual abuse of women in war usually occurs in connection with other forms of violence or abuse against women or their families.<sup>182</sup> Thus, acknowledging the role of rape as a war crime only scratches the surface behind an often larger, more deeply rooted, and highly unequal social

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<sup>178</sup> Driver, 224.

<sup>179</sup> Testimony of Thenjiwe Mtintso.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Dorothy Q. Thomas and Regan E. Ralph, “Rape in War: The Case of Bosnia” in *Gender Politics in the Western Balkans: Women and Society in Yugoslavia and the Yugoslav Successor States*, ed. Sabrina P. Ramet, 205 (University Park, Pennsylvania: The Pennsylvania State University Press, 1999).



structure. A gendered perspective could expose the realities of patriarchy as an impediment to overall post-conflict recovery and could work towards addressing the problem in an official capacity.

### **4.3 Stigma and Discrimination**

Another important factor that made women's experience of wartime violence unique is the stigma and discrimination they often faced in their respective societies. One reason both the Bosnian and South African cases highlight the precariousness of women discussing their experiences is because for many victims of sexual violence, telling the truth may be undesirable. Although sexual violence is acknowledged as a crime, a tribunal or hearing can often ignore the particular societal context of stigma and discrimination in which women are required to come forward. In Bosnia, the effects of rape include fertility problems, raising children resulting from rape or forced impregnation, and stigmatization, all of which influence a victim's value to her family and to her society.<sup>183</sup> Similarly, in South Africa, stigma renders sexual assault a crime against the dignity and honour of the family, the tribe, and the nation of the women violated.<sup>184</sup> The threat of ostracism and the exclusion of women's unique challenges limit the effectiveness of both the TRC and the ICTY from fostering women's reconciliation.

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<sup>183</sup> Kelli Muddell, "ICTJ Briefing: Limitations and Opportunities of Reparations for Women's Empowerment," *International Centre for Transitional Justice* (The Hague: Fighting Impunity in Peacebuilding Contexts, 2009).

<sup>184</sup> Farr, 3.

There are logistical challenges in encouraging women to discuss their experiences in a comfortable environment. Bosniak women were particularly uncomfortable and unwilling to be involved in the truth-telling process. A woman's purity in Islam and the Muslim culture is not only held sacred, but is seen as an essential element to ensure the stability of the society and culture.<sup>185</sup> Essentially, the deeply rooted stigmatization and normative construct of rape in Bosnia makes it an extremely complicated and sensitive subject to address. While the ICTY respected the anonymity of rape victims who chose to come forward, the risk of ostracism deterred many women from admitting their victimhood. Sexual abuse in South Africa is also highly stigmatized, thus many women did not see the TRC as an appropriate forum to describe their intimate and traumatic experiences.<sup>186</sup> Furthermore, the TRC has been criticized for its inability to effectively challenge the normative attitudes that discriminate against women and their sexuality.<sup>187</sup>

The stain of stigma was so profound that women could not even reveal their experiences to their loved ones. Speaking of their rape experiences, both “Witness 50” and “Witness 87” did not tell their own mothers because they did not want their families to know the details of their abuses.<sup>188</sup> “Witness 87” describes her shame as follows:

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<sup>185</sup> Salzman, 366.

<sup>186</sup> Sideris, 157.

<sup>187</sup> Ibid, 157.

<sup>188</sup> “Case IT-96-23-T & 23/1-T: Prosecutor vs. Kunarac et al. (“Foča”).

I think that at that time I didn't have the strength to, to even look [my own mother] in the eyes. Not only her, but anybody, to look anybody in the eyes ... It's very difficult to describe that. I know that I was terribly frightened, I felt ashamed in a way, and in a way I felt very, very dirty, soiled.<sup>189</sup>

The testimonies from South Africa echo the same sentiments of shame and humiliation. In her testimony before the TRC, Thandi Shezi acknowledges that this was the first time her mother heard of her experiences because she felt she had brought her violation upon herself.<sup>190</sup> She describes feeling “humiliated” “worthless” and “guilty.”<sup>191</sup>

Sadly, many women who experienced sexual violence continue to face heavy burdens even after the conflicts had ended. Reintegrating themselves back into their families and communities often proved impossible. Kedeboni Dube explains that after she was raped, her husband did not allow her to go to the doctor to get treatment.<sup>192</sup> After discovering she had syphilis, she continued to “feel very ashamed and very disgraced” because she felt that “other guys will run away from me.”<sup>193</sup> Perhaps most disturbingly, Kedeboni describes the feeling of shame of receiving professional medical treatment:

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<sup>189</sup> “Case IT-96-23-T and IT-96 23/1: Prosecutor vs. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković.”

<sup>190</sup> “Thandi Shezi.”

<sup>191</sup> Ibid.

<sup>192</sup> “Kedeboni Dube.”

<sup>193</sup> Ibid.

When I go to the clinic, they ask me in the room. They call me to private rooms. They ask me, when did this thing start? When they ask me if I'm not naughty; why am I getting this illness? Is it because I'm naughty? They said I must take the pills. I must take the full course of the treatment. If this thing doesn't stop, I'll end up being HIV and virtually getting AIDS. Most of the time I feel so sad. I feel like taking a rope and hanging myself, but sometimes I feel maybe this thing will come to an end.<sup>194</sup>

The despair and disgrace Kedeboni feels as a result of her experiences indicate that she feels a sense of blame for the actions that were thrust upon her. While women obviously did not choose their victimhood, they were often made to feel guilty due to the societal stigma placed upon the sexual violence they were forced to endure.

Furthermore, while the investigation of war crimes through the ICTY successfully publicized the issue of rape surrounding all types of warfare, this recognition was not linked to any form of physical compensation. Similarly, one of the most serious legacies of apartheid is poverty, which especially affects women because they often work from or near the home and do not receive legal support.<sup>195</sup> The International Centre for Transitional Justice argues that truth and reparation must be linked, for any attempt to reconcile the past will be impossible without satisfying victims' legitimate expectations of justice.<sup>196</sup> An article published by Amnesty International argues that the government of Bosnia has failed to ensure justice and reparation for thousands of women who were raped

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<sup>194</sup> "Kedeboni Dube."

<sup>195</sup> Goldblatt and Meintjes, 48.

<sup>196</sup> "Gender Justice."

during the civil war.<sup>197</sup> In Bosnia, there is discrimination against female survivors of sexual violence in terms of their eligibility for social benefits compared to war veterans.<sup>198</sup> Even if reparations were made more readily accessible, both South African and Bosnian women still face numerous challenges in accessing reparations such as illiteracy, lack of transportation, absence of bank accounts, and the inability to spend time accessing programs because of responsibility at home.<sup>199</sup> These real problems facing women make reconciliation impossible without addressing gender inequality.

This chapter demonstrated how an ethnic framework often fails to take into account the specific impact war has on women's lives beyond what human rights abuses they may suffer. When there is a lack of access to basic services, women are forced to take on the roles of missing or killed family members in a context of systematic discrimination, such as laws which prohibit women from inheriting land and property.<sup>200</sup> There is a highly gendered impact on most outcomes of war including forced displacement, killing, and destruction of infrastructure that are often beyond the scope of the transitional justice process. This chapter suggests that a gendered perspective must be included in the transitional justice process to help ensure that marginalized groups are successfully incorporated into a nation's reconstruction.

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<sup>197</sup> Amnesty International, "Whose Justice?: The Women of Bosnia and Herzegovina are Still Waiting."

<sup>198</sup> Ibid.

<sup>199</sup> Muddell.

<sup>200</sup> Nahla Valji, "Gender Justice and Reconciliation" in *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (The Nuremberg Declaration on Peace and Justice) eds., Kai Ambos, Judith Large and Marieke Wierda, 226 (Verlag Berlin Heidelberg: Springer, 2009).

## CHAPTER 5: CONCLUSION

*We must unite. Violence against women cannot be tolerated, in any form, in any context, in any circumstance, by any political leader or by any government.*<sup>201</sup>

- United Nations Secretary General Ban Ki-Moon, United Nations

Recent literature identifies women's equality as a fundamental goal of development. It is therefore important to examine the way in which transitional justice processes have addressed women's experiences in conflict as well as their direct experiences in overall post-conflict recovery. In particular, one of the Millennium Development Goals (MDGs) outlined by the United Nations is the promotion of gender equality and the empowerment of women.<sup>202</sup> The United Nations Secretary General Ban Ki-Moon has launched the "UNiTE" campaign to end violence against women, in which one of the key goals is to address sexual violence.<sup>203</sup> In light of this international attention, this project has attempted to contribute a nuanced and comparative perspective of two specific transitional justice processes and their implications to the larger field of literature regarding gender equality and development.

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<sup>201</sup> United Nations Secretary General Ban Ki-Moon, UNiTE To End Violence Against Women campaign, <http://www.un.org/en/women/endviolence/goals.shtml#goal5>

<sup>202</sup> For further information, see United Nations 2008 Millennium Development Goals Report <http://www.arab-hdr.org/publications/other/undp/mdgr/global/mdg-global-08e.pdf>

<sup>203</sup> For further information, see UNiTE To End Violence Against Women <http://www.un.org/en/women/endviolence/goals.shtml#goal5>

This project has argued that ethnic divisions have characterized Bosnia-Herzegovina and South Africa during both their respective conflicts and their transitional justice processes. A detailed analysis of women's testimonies in both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Truth and Reconciliation Commission (TRC) suggest that ethnicity trumped gender. The micro-level case studies of Foča in Bosnia and KwaZulu-Natal in South Africa not only demonstrated the similarities in women's experiences during ethnic conflict, but contextualized how the ethnic divisions present during the conflict were exacerbated by the transitional justice processes. By viewing women's experiences of sexual violence, rape, and other gendered abuses through an ethnic lens, both the ICTY and the TRC failed to acknowledge important challenges that continue to face female survivors. Therefore, both the retributive and restorative justice models' use of an ethnic framework impeded both countries' democratization and reconciliation objectives because it did not adequately address women's experiences.

Advocating that violence against women should be addressed in a universal, comparable, and gendered perspective, this project agrees with the feminist theory of intersectionality that states women face significant challenges due to the unique combination of their race and gender. Using this theory in the context of Bosnia and South Africa, the project argues that transitional justice processes could better prioritize women's reconciliation by expanding their framework to include a gendered perspective so that issues like victimization, patriarchy, stigma and discrimination are addressed in the post-conflict recovery

process. It is important to reiterate that using a more comprehensive gendered perspective should not *replace* an ethnic framework, rather that the two could be used mutually inclusively. This project acknowledges that the transitional justice processes did make advancements in dealing with sexual violence, such as the gender-sensitive “Special Hearings on Women” in the South African TRC and the improvements in international jurisprudence regarding addressing sexual violence in conflict in the ICTY. However, women’s issues should not be only addressed at an official level, but included as an equal priority of the nation’s post-conflict recovery on all levels.

This project used a discourse analysis of trial testimonies to explore the challenges facing Bosnian and South African women. It would benefit from the inclusion of interview material of female survivors from both cases, detailing their reconciliatory experiences spanning the temporal period of the transitional justice processes to present-day. This would further ensure that Bosnian and South African women’s attitudes and feelings are not misrepresented or misinterpreted. Furthermore, an area of investigation for future scholars could be the connections between the experiences of women during the transitional justice processes in both cases and the status of women today. Have women successfully achieved reconciliation and justice in any other case? If so, why were these cases successful? What lessons can be drawn from the Bosnian and South African cases that could be applied to future transitional justice processes?

As long as the international community upholds its endorsement for universal human rights, the incidents of mass rape currently occurring in places



such as the Congo and Darfur requires, at the very least, more international attention and condemnation if not direct intervention. Sexual violence should be acknowledged regardless of whether 'ethnically-based' atrocities such as genocide or mass killings are occurring. Considering that gender inequality is still a serious problem facing women globally, it is time to stop feeding into an exclusively ethnic paradigm that could have the counter-productive effect of fuelling and legitimizing ethnic differences. Instead, it is time to also carefully address another age-old division in many nations: gender.

# APPENDICES

## Appendix 1

### Discourse Analysis

For the purposes of this paper, a “discourse analysis” is defined as involving the systematic study of texts to find evidence of their meaning and how this meaning translates into a social reality. For a more complete definition, see Cynthia Hardy, Bill Harley, and Nelson Phillips, “Discourse Analysis and Content Analysis: Two Solitudes?” in “Symposium: Discourse and Content Analysis,” *Qualitative Methods: Newsletter of the American Political Science Association Organized Section on Qualitative Methods*.

A notable example of this technique is Christopher Mullins’s use of discourse analysis to explore the dynamics of sexual violence in the Rwandan genocide. His analysis of transcripts from the International Criminal Tribunal of Rwanda (ICTR) coded major themes from testimonies of both witnesses and offenders and through his research, identified three forms of sexual violence including opportunistic rapes, sexual enslavement, and genocidal rapes (Mullins, 724.)

## Appendix 2

### **Updated Statute of the International Criminal Tribunal for the former Yugoslavia (2009)**

#### **Article 1**

##### **Competence of the International Tribunal**

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

#### **Article 2**

##### **Grave breaches of the Geneva Conventions of 1949**

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

#### **Article 4**

##### **Genocide**

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
  - (a) killing members of the group;
  - (b) causing serious bodily or mental harm to members of the group;
  - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) imposing measures intended to prevent births within the group;
  - (e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
  - (a) genocide;
  - (b) conspiracy to commit genocide;

- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.,

**Article 5**  
**Crimes against humanity**

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

## Appendix 3

### **RESOLUTION 827 (1993)**

Adopted by the Security Council at its 3217th meeting,  
on 25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”, including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,  
(emphasis added)

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of

international humanitarian law would **enable this aim to be achieved and would contribute to the restoration and maintenance of peace**, (emphasis added)

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law **will contribute to ensuring that such violations are halted and effectively redressed**, (emphasis added)

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;
2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the

former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;

5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;

8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective functioning of the International Tribunal at the earliest time and to report periodically to the Council;

9. Decides to remain actively seized of the matter.

## Appendix 4

### Interim Constitution - National Unity and Reconciliation (1993)

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and **a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex** (emphasis added).

The pursuit of national unity, the **well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society** (emphasis added). The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. 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.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

*Nkosi sikelel' iAfrika. God seen Suid-Afrika*

*Morena boloka sechaba sa heso. May God bless our country*

*Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika*

## Appendix 5

### Promotion of National Unity and Reconciliation Act 34 of 1995

To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a **political objective** (emphasis added) committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith.

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