

# **BEYOND FOOT-DRAGGING: A REFLECTION ON THE RELUCTANCE OF SOUTH AFRICA'S NATIONAL PROSECUTION AUTHORITY TO PROSECUTE APARTHEID CRIMES IN POST-TRANSITIONAL JUSTICE**

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## **SUMMARY**

To this day, apartheid is still regarded as one of the most heinous crimes to have affected humankind. The brutality of the apartheid system and its impact not only left devastating effects in the minds of the black majority who were affected by the system, but also drew international attention. This prompted the United Nations Security Council to pass drastic resolutions to try and end the apartheid system. It is important to highlight that apartheid crime was committed at the behest of the then National Party government at the expense of the black majority. The attainment of democratic rule in 1994 also saw the emergence of the need for transitional justice. However, after 25 years of foot-dragging, the National Prosecution Authority in South Africa has still not been fully committed to prosecute apartheid atrocities. This article examines the crime of apartheid and the impact of the transitional justice process in South Africa. The article further reflects on the National Prosecution Authority's reluctance to prosecute crimes of apartheid and examines the final report of the People's Tribunal on Economic Crimes in South Africa.

## **1 INTRODUCTION**

Human rights are inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status.<sup>1</sup> Human rights include the right to life and liberty, freedom from slavery and torture, freedom

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\* The article is based on an LLM mini-dissertation that the author wrote while studying at the University of Pretoria.

<sup>1</sup> United Nations "Human Rights" (undated) <http://www.un.org/en/sections/issues-depth/human-rights/>.

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of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination.<sup>2</sup>

Soon after the end of World War II, the Charter of the United Nations (UN) was adopted with the aim of promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion; and also to be at the centre of harmonising the actions of nations in the attainment of this common end.<sup>3</sup> To further recognise and acknowledge the significance of human rights, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR sets a common standard of achievement for fundamental human rights to be universally protected. Subsequent to the UDHR, various international conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons With Disabilities (2006) were adopted by the UN with a view to the prevention and elimination of gross violations of fundamental human rights. Among these international conventions is the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which the UN adopted following the shooting in 1963 by the apartheid regime's security forces of people marching against pass laws in Sharpeville. The intention of the adoption of this Convention was for the elimination of racial discrimination in all its forms and manifestations. Furthermore, the Convention seeks to prevent and combat racist doctrines and practices in order to promote understanding between races and also to build an international community free from all forms of racial segregation and racial discrimination.

Other prominent international instruments dealing with human rights include the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. Both these conventions were adopted in 1976. This article focuses on the International Covenant on Civil and Political Rights (ICCPR) mainly because it deals with rights such as: freedom of movement; equality before the law; the right to a fair trial and presumption of innocence; freedom of thought, conscience and religion; freedom of opinion and expression; peaceful assembly; freedom of association; participation in public affairs and elections; and protection of minority rights. The ICCPR further prohibits: arbitrary deprivation of life; torture; cruel or degrading treatment or punishment; slavery and forced labour; arbitrary arrest or detention; arbitrary interference with privacy; war propaganda; discrimination; and advocacy of racial or religious hatred. In light of the objectives that the above instruments seek to achieve, it is clear that the apartheid regime worked against the realisation of the fundamental human rights to dignity, equality, and political rights. The apartheid regime was responsible for the forced removal and displacement of black people, the disappearance of political opponents, and disregard of political

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<sup>2</sup> *Ibid.*

<sup>3</sup> Article 3 and 4 of the Charter of the United Nations, 1945.

freedoms, thereby violating the conventions and the UN Security Council resolutions.

The attainment of the new democratic dispensation in 1994 ushered in the prospect of transitional justice for apartheid atrocities. This compromise led South Africa on a path to recovery from the brink of civil unrest and to a reconciliation process established under the Truth and Reconciliation Commission (TRC). Against this background, this article examines apartheid as an international crime under customary international law and also reflects on the concept of transitional justice. Furthermore, this article seeks to explore why the National Prosecuting Authority (NPA) has failed to prosecute perpetrators of apartheid atrocities. Finally, the article investigates why South Africa chose transitional justice over prosecution for apartheid atrocities despite apartheid being classified as an international crime.

## 2 APARTHEID AS AN INTERNATIONAL CRIME

The impact that the apartheid system had on the majority of South Africans drew international attention to the extent that the United Nations General Assembly decided in 1973 to adopt the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA). The main objectives of this convention were to criminalise and suppress all forms of apartheid. To achieve these objectives, the convention is binding on all signatories. Furthermore, state parties ought, in terms of article 4, to adopt any legislative or other measures necessary to suppress as well as prevent any encouragement of the crime of apartheid; and also to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish perpetrators of apartheid. This international crime was recognised for the first time in the convention, which was principally aimed at suppressing the violation of human rights under the guise of apartheid.<sup>4</sup> Article I of ICSPCA makes provision for the declaration of apartheid as a crime against humanity and further states that inhuman acts resulting from the policies and practices of apartheid violate the principles of international law.

In paragraph 1 of article I, apartheid was for the first time declared a crime against humanity; the article goes on to highlight the attendant individual criminal liability. Individual criminal liability comes in many forms and, according to article III (a) and (b) of ICSPCA, this applies, irrespective of the motive involved, to individuals, members of organisations and institutions and representatives of the State. Article III (a) and (b) of ICSPCA further stipulates that liability applies to perpetrators, wherever in the world they may reside.

Dugard argued that the principal features of apartheid, as was evident in South Africa, range from murder, torture and arbitrary arrest of members of a racial group to legislative measures calculated to prevent a racial group from participating in the political, social, economic and cultural life to the advantage of another domineering racial group.<sup>5</sup>

<sup>4</sup> Dugard *International Law: A South African Perspective* (2014) 157.

<sup>5</sup> Dugard *International Law* 158 159.

The classification of apartheid as a crime against humanity was further confirmed in article 7 of the Rome Statute of the International Criminal Court, 1998. In this instance, a crime against humanity is defined to include the crime of apartheid when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>6</sup> Article 7(1)(j) should be read together with article 7(2)(h), which provides that the crime of apartheid means inhumane acts committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. Lingaas points out that it has been argued that the inclusion of the crime of apartheid in the Rome Statute has led to an increased harmonisation of international criminal law.<sup>7</sup> The expansion of the status and classification of apartheid as a crime under customary international law, although not precisely certain, is also evident in the 1977 Additional Protocol 1 to the Geneva Conventions, 1949. Article 85(4)(c) of the 1977 Additional Protocol I provides that “practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination” are grave breaches of the Protocol and shall, in terms of article 84(5) of the same Additional Protocol, be regarded as war crimes.

### 3 THE CONCEPT OF TRANSITIONAL JUSTICE

Under international humanitarian law, conflict is considered international when hostilities are taking place across national borders and the primary actors are sovereign states.<sup>8</sup> International armed conflicts have a destabilising impact on regional blocs and at times pose a risk to the maintenance of international peace and security. During such conflict, world leaders would be tempted to intervene in an effort to find peaceful solutions to the conflict. On the other hand, the International Committee of the Red Cross (ICRC) defines non-international armed conflicts (commonly known as civil wars) as those conflicts that are restricted to the territory of a single state, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other.<sup>9</sup> The end of such conflict may signal the beginning of a process of transitional justice that represents a transformation of the relationship between the warring parties.<sup>10</sup> However, despite an enormous amount of effort and investment, many ceasefires and

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<sup>6</sup> Article 7(1)(j) of the Rome Statute of the International Criminal Court, 1998.

<sup>7</sup> Lingaas “The Crime Against Humanity of Apartheid in a Post-Apartheid World” 2015 2 *Oslo Law Review* 93.

<sup>8</sup> Babbit “The Evolution of International Conflict Resolution: From Cold War to Peacebuilding” 2009 *Negotiation Journal* 539.

<sup>9</sup> The International Committee of the Red Cross “What is International Humanitarian Law?” 2004 07 *Advisory Service on International Humanitarian Law* 1.

<sup>10</sup> Kelman “Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict between Identity groups” 2010 1 *Landscapes of Violence* 2.

peace agreements in civil wars may be unsuccessful or give way to renewed and often escalated violence.<sup>11</sup>

The process of transitional justice goes beyond a realistic view of national interests. Transitional justice gained currency towards the end of the Cold War; with the eruption of civil wars in eastern and southern Europe, and increased attention on conflicts in Africa, scholars and analysts were stimulated to explain the changing nature of war and how to end it.<sup>12</sup> Significantly, the concept of transitional justice, as observed by Mugagga Muwanguzi, has expanded to include several mechanisms or processes that embrace both retributive and restorative justice; it has also embraced measures that include not just peace building, but also concrete measures to address the root causes of conflicts.<sup>13</sup> McEnvoy agreed with Mugagga Muwanguzi's view of peace building and further asserted that developing the state's institutional capacity to deliver justice is a core element in the process of rebuilding structures of governance more generally.<sup>14</sup>

Teitel has defined transitional justice as being associated with periods of political change and characterised by legal responses to confronting the wrongdoings of repressive predecessors.<sup>15</sup> In the South African context, both the African National Congress (ANC) and the repressive National Party (NP) apartheid government had to come up with a transitional justice solution to deal with the atrocities and gross human rights violations committed during the apartheid era. Gross argued that options for solving this dilemma included an amnesty process, which implies that both the ANC and NP should leave the past behind, or rather, prosecute prior offenders strictly according to the law.<sup>16</sup> According to Gross, this is to create a truth and reconciliation commission (TRC), which does not ignore the past, but instead grants amnesty selectively.<sup>17</sup> Soon after the ANC assumed political power in 1994, it decided to establish a TRC to help deal with what happened under the apartheid system and to prevent future resurrection of apartheid. Prevention, according to Laplante, motivates the constantly evolving transitional justice movement.<sup>18</sup>

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<sup>11</sup> Newman and Richmond "Peace Building and Spoilers" 2006 6 *Conflict, Security & Development* 102.

<sup>12</sup> Carayannis, Bojicic-Dzelilovic, Olin, Rigterink, and Schomerus "Practice Without Evidence: Interrogating Conflict Resolution Approaches and Assumptions" 2014 11 *Justice and Security Research Programme* 2.

<sup>13</sup> Muwanguzi *Examining the Use of Transitional Justice Mechanisms to Redress Gross Violations of Human Rights and International Crimes in the Northern Uganda Conflict* (LLD thesis, University of the Western Cape) 2016 49.

<sup>14</sup> McEnvoy "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice" 2007 34 *Journal of Law and Society* 423. See also Brinkerhoff "Rebuilding Governance in Failed States and Post-Conflict Societies: Concepts and Cross Cutting Themes" 2005 25 *Public Administration and Development* 3 14.

<sup>15</sup> Teitel "Transitional Justice Genealogy" 2003 16 *Harvard Human Rights Journal* 68.

<sup>16</sup> Gross "The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel" 2004 40 *Stanford Journal of International Law* 49.

<sup>17</sup> *Ibid.*

<sup>18</sup> Laplante "Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework" 2008 2 *International Journal of Transitional Justice* 331 355.

#### 4 AN OVERVIEW OF TRANSITIONAL JUSTICE IN SOUTH AFRICA

The period between 1989 and 1994 marked a transitional phase in South Africa from the brutal apartheid era to a democratic state. This transitional period was founded on four pillars – namely, disarmament, a new constitutional dispensation, the recognition and protection of human rights, and amnesty. All four pillars constitute transitional justice from the South African perspective and it is important to now examine each of them.<sup>19</sup>

Muggah defines disarmament as the collection, control and the disposal and destruction of small arms and light weapons, explosives and ammunition held by civilians and the organs of regular and irregular combatants and civilians.<sup>20</sup> In the light of this definition, he further highlights two ways in which disarmament can be implemented the process can be administered coercively by the army, police or a peacekeeping force; or carried out voluntarily through amnesty initiatives and public collection campaigns administered by the army, police, peacekeeping forces or another designated actor and weapons can be exchanged for other goods – either cash or other incentives such as development projects.<sup>21</sup>

Following the unbanning of political parties and their armed wings in 1990 by the then-president of South Africa, Frederik Willem de Klerk, voluntary disarmament was effected with the assistance of the ANC, Pan Africanist Congress (PAC), Azanian People's Organization (AZAPO) and the Inkatha Freedom Party (IFP). All these political parties had military wings that had been involved in attacks against the former apartheid government interests, both people and infrastructure, inside South Africa and abroad. The ANC's *uMkhonto we Sizwe* (MK) was formed in 1961 and was later declared a terrorist organisation by the apartheid government as well as the United States of America. The MK unleashed a series of bombings in South Africa, targeting government interests; this included the bombing on Church Street in the capital city, Pretoria, resulting in the deaths of 19 people and many injured in 1983.<sup>22</sup> Two years later, in 1985, the MK operative Andrew Zondo detonated a bomb on the Natal South Coast, which resulted in five deaths and almost 40 injured people.<sup>23</sup> The following year, another MK operative, Robert McBride, detonated a bomb in 1986 at the Durban beach-front, killing three people and injuring scores. Further notable bombings were at the Johannesburg magistrates' court and the military command centre in Johannesburg, which together resulted in the deaths of four people.<sup>24</sup>

<sup>19</sup> Inman and Rubinfeld "Understanding the Democratic Transition in South Africa" 2013 *American Law and Economics Review* 2 2.

<sup>20</sup> Muggah "The Anatomy of Disarmament, Demobilisation and Reintegration in the Republic of Congo" 2004 4 *Conflict, Security & Development* 30.

<sup>21</sup> Muggah 2004 *Conflict, Security & Development* 30; see also Jensen and Stepputat "Demobilising Armed Civilians" 2001 *Centre for Development Research Policy Paper*.

<sup>22</sup> Cameron-Dow *A Newspaper History of South Africa* (2007) 34.

<sup>23</sup> Johnson "South Africa, Black, 19, Guilty of Shopping Bombing' (1986-04-02) *The New York Times*.

<sup>24</sup> Weekly Mail Reporters "Blast May Be In Retaliation" (1987-07-31) *The Mail and Guardian*.

Against this backdrop, multilateral arms limitation and disarmament are seen, by Akashi and others, to offer a gateway to a more peaceful and secure country.<sup>25</sup> Fisher argues that arms control and disarmament are relatively effective in resolving the age-old problem of maintaining peace – by subordinating force to a rule of law.<sup>26</sup> Therefore, there was a commitment at the Convention for a Democratic South Africa (CODESA)<sup>27</sup> between both the government and political parties to avoid reigniting hostilities. Perhaps the cessation of hostilities itself was a component of transitional justice. This is arguably so because those who were held responsible in the hostilities were not going to be prosecuted once granted amnesty.

The second pillar of South Africa's transitional phase – a new constitutional dispensation – was founded on the 34 principles of the Interim Constitution.<sup>28</sup> These principles contain the commitment that certain features of the Interim Constitution needed to be entrenched in order to place them safely beyond the realm of ordinary politics.<sup>29</sup> Principle II provides:

“Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.”<sup>30</sup>

Thirdly, a commitment to human rights formed part of South Africa's transitional phase. Literature on apartheid indicates that the former NP government committed gross human rights violations, which led the UN to declare it an international crime. Human rights then later formed part and parcel of the transitional justice sought during the CODESA talks. Article 5(6) of the CODESA 1 Declaration of Intent makes provision for the universal enjoyment of human rights, freedoms and civil liberties, including freedom of religion, speech and assembly. It goes without saying that these rights were to be protected by an entrenched and justiciable bill of rights and a legal system that guarantees equality of all before the law. This Declaration of Intent was signed by the majority of parties, with the exception of the IFP and the AWB, among a few others. Human rights were also acknowledged in the preamble of the Interim Constitution, which states that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.

<sup>25</sup> Akashi “Lessons and Prospects” in Dhanapala (ed) *The United Nations, Disarmament and Security: Evolution and Prospects* (United Nations Institute for Disarmament Research, Geneva) UNIDIR/91/46.

<sup>26</sup> Fisher “Arms Control and Disarmament in International Law” 1964 50 *Virginia Law Review* 1200.

<sup>27</sup> This was the convention that paved the way for negotiations between the former NP government, ANC and other political parties towards a democratic transitional period between 1990 and 1993.

<sup>28</sup> The Interim Constitution (the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)), was a product of the CODESA negotiations settlement between the former NP government, ANC and other political parties. The Interim Constitution contains 34 constitutional principles, found in Schedule 4 and aimed at providing procedures to transition towards a democratic period from the apartheid one.

<sup>29</sup> Issacharoff “The Democratic Risk to Democratic Transitions” 2014 *Constitutional Court Review* 12.

<sup>30</sup> Schedule 4 of the Interim Constitution: Constitutional Principles.

These rights are now contained in the Bill of Rights under the Final Constitution and are regarded as the cornerstone of South Africa's democracy.

The fourth and final pillar of transitional justice in the South African context was amnesty. According to Ntoubandi, the word amnesty is derived from the Greek word *amnestia* or *amnesis*, which means forgetfulness, oblivion, or lost memory.<sup>31</sup> However, Villa-Vicencio and Doxtader contended that in this old definition, amnesty is less an outright forgetting than a foreclosing on the ability of individuals to use a past event as grounds for a certain behaviour.<sup>32</sup> Presenting a conciliatory examination of the concept of amnesty is Krapp, who argues that amnesty is neither suspension of a duty to punish, nor abolition; in fact it is the limits of amnesty that draw the implication that the past and present cases end with its declaration.<sup>33</sup> Therefore, the exclusion of remorse and repentance as argued by Baron are a core element in the granting of amnesty.<sup>34</sup>

On 19 July 1995, the first democratically elected president of South Africa, Nelson Mandela, signed the Promotion of National Unity and Reconciliation Act 34 of 1995, to provide for the investigation of, and also to establish the possible nature, causes and extent of, gross violations of human rights committed between 1 March 1960 and 27 April 1994.<sup>35</sup> This law also provided for the establishment of the TRC and, significantly, was adopted on 1 December 1995 as part of the amnesty and reconciliation process. The former Archbishop of the Anglican Church, Desmond Tutu, chaired the TRC and he was deputised by Dr Alex Boraine, with Dumisa Ntsebeza as the head of the TRC Investigative Unit.<sup>36</sup>

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<sup>31</sup> Ntoubandi *Amnesty for Crimes Against Humanity Under International Law* (2007) 8.

<sup>32</sup> Villa-Vicencio and Doxtader *The Provocations of Amnesty: Memory, Justice and Impunity* (2003) 127.

<sup>33</sup> Krapp "Amnesty: Between an Ethics of Forgiveness and the Politics of Forgetting" 2005 6 *German Law Journal* 192.

<sup>34</sup> Baron "Remorse and Repentance Stripped of its Validity: Amnesty Granted by the Truth and Reconciliation Commission of South Africa" 2015 41 *Studia Historiae Ecclesiasticae* 170.

<sup>35</sup> Preamble of the Promotion of National Unity and Reconciliation Act 34 of 1995 states that it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future. Furthermore, the Constitution states that 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. See Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* (1998). See Van Zyl "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission" 1999 52 *Journal of International Affairs* 647 667. See also Boraine *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (2000) 281.

<sup>36</sup> Graybill "Assessing South Africa's Truth and Reconciliation Commission" 2002 36 *Canadian Journal of African Studies* 356 358.



## 5 HURDLES AND PROSPECTS OF THE TRC

According to Balia, the TRC is regarded highly, having set an international standard in the modern paradigm of restorative justice in a transitional democracy.<sup>37</sup> This is so because it embedded a unique combination of criminal accountability and amnesty proceedings.<sup>38</sup>

On the international front, the South African model of the TRC was also used in Sierra Leone and in Kenya. Soon after the ceasefire of the raging civil war between Sierra Leonean government forces and the Revolutionary United Front, the warring parties instituted a TRC to investigate the atrocities committed during the war and to grant amnesty. Many people implicated in war crimes came forward, those who told the commission the truth about the atrocities were granted amnesty, and those who either lied or neglected to participate in the commission were to be prosecuted. The same goes for the Kenyan Truth, Justice and Reconciliation Commission, which was instituted following the devastating post-election violence of 2007. Many people died and scores were injured in the violence that spread across the country.

Looking back at the South African TRC, the work of the commission was to be carried out in three committees focussing on human rights violations, amnesty, and rehabilitation and reparation respectively. All these committees were specifically tasked with functions that would enable the TRC to fulfil its mandate.<sup>39</sup> While the TRC has served as a good exemplar of transitional justice on the global front, its reconciliation and amnesty processes left much to be desired in two fields.

### 5.1 Prosecution of apartheid atrocities

The most genuinely controversial point for transitional justice in South Africa was the failure of the NPA to prosecute the perpetrators of gross human rights violations committed under the apartheid regime. The former National Director of Public Prosecutions, Advocate Pikoli, aggravated the controversy when, in 2015, he blamed political interference for the NPA's failure to prosecute apartheid-era political murders, torture and disappearances.<sup>40</sup> This is despite the fact that apartheid was declared a crime against humanity under international law.<sup>41</sup> The TRC, in its Final Report, acknowledged the impact of apartheid and that its recognition as a crime against humanity remained a fundamental starting point for reconciliation in South Africa.<sup>42</sup> At the same time, the TRC also acknowledged that there are those who

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<sup>37</sup> Balia "Truth and Reconciliation Commission" 2004 *Encyclopedia of Public Administration and Public Policy* 297.

<sup>38</sup> Muwanguzi *Examining the Use of Transitional Justice Mechanisms* 40.

<sup>39</sup> Balia 2004 *Encyclopedia of Public Administration and Public Policy*.

<sup>40</sup> Rabkin "Political Interference Blocked TRC Prosecutions" (2015-05-22) *Business Day*.

<sup>41</sup> Article 1(1) of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.

<sup>42</sup> Truth & Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report: Volume 1* (1998) Appendix to Chapter 4 par 1.

sincerely believed differently and those, too, who were blinded by their fear of a Communist total onslaught.<sup>43</sup>

The then-apartheid government carried the greatest responsibility for the gross human rights violations against those who were opposed to the apartheid system. However, the MK, APLA, and AZANLA armed activities also resulted in human rights violations. The TRC observed that justice of war evaluates the justifiability of the decision to go to war.<sup>44</sup> The two basic criteria guiding this evaluation are: first, the justness of the cause (the underlying principles for which a group is fighting), and secondly, whether the decision to take up arms was a matter of last resort.<sup>45</sup> The doctrine of justice in war states that there are limits to how much force may be used in a particular context, and it places restrictions on who or what may be targeted.<sup>46</sup>

Although the TRC was guided by the just war theory criteria, both the apartheid government and the armed liberation forces ought to have had respect and consideration for human rights. In 1996, the constitutionality of the TRC legislation was challenged in the case of *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa*<sup>47</sup> on the ground that the granting of amnesty to members of the apartheid security forces for killing anti-apartheid activists violated norms of international law that required prosecution.<sup>48</sup> Briefly, the facts of the case related to applicants who applied for direct access to the Constitutional Court and for an order declaring section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 to be unconstitutional. Section 20 permits the Committee on Amnesty to grant amnesty to a perpetrator of an unlawful act, associated with a political objective, committed prior to 6 December 1993.<sup>49</sup> Upon the grant of amnesty, a perpetrator cannot be held criminally or civilly liable in respect of that act. Equally, the state or any other body, organisation or person who would ordinarily have been vicariously liable for such act, cannot be liable in law.<sup>50</sup>

The Constitutional Court concluded that the epilogue to the Constitution authorised and contemplated an amnesty in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.<sup>51</sup>

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<sup>43</sup> *Ibid.*

<sup>44</sup> TRC *Final Report: Volume 1* Chapter 4 par 66–67.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> 1996 (4) SA 672 (CC).

<sup>48</sup> Dugard *International Law: A South African Perspective* 22.

<sup>49</sup> S 20(1) and (2).

<sup>50</sup> S 20(7)(a) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>51</sup> Par 50.

## 5 2 Amnesty and reconciliation

In the context of amnesty and reconciliation, Balia believes that a fundamental principle of the TRC process was that honest and open testimony by perpetrators could be exchanged for amnesty.<sup>52</sup> However, Balia also cautioned against this exchange because it sacrifices justice at the altar of truth to the detriment of apartheid's victims.<sup>53</sup> The TRC Final Report observed that not everyone who came before the Commission experienced healing and reconciliation.<sup>54</sup> However, the Final Report went further to state that extracts from testimonies before the Commission illustrate the varying ways and degrees to which people have been helped by the Commission to restore their human dignity and to make peace with their troubled past.<sup>55</sup> In other words, they included cases where an astonishing willingness to forgive was displayed, where those responsible for violations apologised and committed themselves to a process of restitution, and where the building or rebuilding of relationships was initiated.<sup>56</sup>

In light of the above observation, it is clear that reconciliation and amnesty superseded justice at the TRC. While the TRC had the obligation to pursue justice from the apartheid government, it is important to note that the former armed liberation forces were also to be held responsible for their atrocities committed during apartheid, although these were not of the same magnitude as those of the apartheid government.

The atrocities of neither the then-apartheid government actors nor the former liberation forces were justified under international law. However, it is significant to note that there have been only a handful of prosecutions for the gross violations of human rights committed under apartheid; these include the arrest and prosecution of the perpetrators of the Vlakplaas murders and the trial of Dr Wouter Basson. The case of *S v De Kock*<sup>57</sup> relates to the murders and other atrocities committed in the Vlakplaas area during the apartheid era. This case involved Eugene de Kock, the former colonel of the apartheid government. De Kock was found to have instructed and carried out these atrocities between the early 1980s and the early 1990s.<sup>58</sup> However, he was eventually arrested and convicted of 89 charges connected with apartheid atrocities and was sentenced to 212 years imprisonment, to run concurrently.<sup>59</sup> The other case relates to Dr Wouter Basson, who was the head of South Africa's chemical and bacterial weapons programme during the apartheid era. In *S v Basson*,<sup>60</sup> the accused was charged in the Pretoria High Court in 1999 on 67 counts, including

<sup>52</sup> Balia 2004 *Encyclopedia of Public Administration and Public Policy* 296.

<sup>53</sup> *Ibid.*

<sup>54</sup> TRC *Final Report: Volume 5* Chapter 9 par 3

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *S v De Kock* 1997 (2) SACR 171 (T).

<sup>58</sup> *S v De Kock supra* par 4.

<sup>59</sup> *S v De Kock supra* par 6. See also Ballard "The Discourse and Policies Around Sentencing and Punishment in South Africa: 1994–2014" <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Ballard.pdf> (accessed 2019-10-16).

<sup>60</sup> *S v Basson* 2007 (3) SA 582 (CC).

murder, conspiracy to commit a variety of crimes, fraud and drug offences. Six of the charges related to conspiracy to commit murder in countries other than South Africa; these were quashed by the High Court upon application by counsel for Basson, and were therefore not prosecuted.<sup>61</sup> The application was dismissed and the trial proceeded. Basson was acquitted on all remaining charges in April 2002.

Significantly, there has been no prosecution following the murders of the Cradock Four. These murders occurred in 1985 and involved the killing of Matthew Goniwe, Fort Calata, Sparrow Mkhonto and Sicelo Mhlauli at the behest of the apartheid police. Former apartheid police officer Gerhard Lotz admitted at the TRC that he had carried out the murders. Unfortunately, he committed suicide in 2016.<sup>62</sup> Despite the death of Lotz, this contribution argues that an inquest should be opened to investigate the circumstances leading to the murders of the Cradock Four, and further that the former apartheid officials who masterminded these killings should be prosecuted.

## 6 THE PEOPLE'S TRIBUNAL ON ECONOMIC CRIMES FINAL REPORT: WHERE TO NOW?

On 2018 September 2018, the People's Tribunal on Economic Crimes (the People's Tribunal) released its final report to the public.<sup>63</sup> This followed a series of hearings between 3 and 7 February 2018 on economic crimes committed during the apartheid era. The terms of reference of the investigation were three-fold: alleged breaches of international and South African law by actors who facilitated the illegal supply of weapons to apartheid South Africa between 1977 and 1994, alleged breaches of South African and international law by corporations and individuals in the process of the 1999 Arms Deal, and alleged breaches of South African and international law in relation to current allegations of "state capture" as they relate to Denel.

Soon after issuing its interim findings, the tribunal remarked that all affected parties were given an opportunity to respond; unsurprisingly, the NPA, the ANC, and the office of the Presidency of South Africa did not respond to the allegations levelled against them.<sup>64</sup> At the time of the

<sup>61</sup> *S v Basson supra* par 1E.

<sup>62</sup> Marais, Ndamase and Kimberley "Cop Who killed Cradock 4 Commits Suicide" (2016-03-26) *Rand Daily Mail*.

<sup>63</sup> The People's Tribunal on Economic Crime <https://corruptiontribunal.org.za/about/> (accessed 2019-10-16). The People's Tribunal was organised by citizens and not by the state. Members of the public were given the opportunity to submit evidence. After hearing evidence over five days, the panel made preliminary findings and committed to writing a final report to be presented to the public. The tribunal was intended to investigate: (a) extensive violations of United Nations sanctions that amounted to serious breaches of international criminal law during the apartheid era, and in particular, in the period 1977–1994; (b) allegations of serious and punishable economic crimes in the process of the conceptualisation and the implementation of the Arms Procurement Package (Arms Deal) and the issue of the rationality of the Arms Deal itself; and (c) allegations of state capture involving Denel and its associated companies in the acquisition, distribution and manufacture of arms and ammunition.

<sup>64</sup> The People's Tribunal *Final Report* par 1.

People's Tribunal hearings, former president Jacob Zuma was still the president of South Africa. It should be recalled that during his last years in office, he was a proponent of the prosecution of apartheid crimes.<sup>65</sup> However, despite his prerogative to institute an inquiry into the allegations of gross violations of fundamental human rights and crimes against humanity during the apartheid era, he did not show the bureaucratic and political will to seek accountability. It was the foot-dragging of the bureaucratic will to investigate apartheid crimes that prompted The People's Tribunal to institute its own independent inquiry.

On the economic front, The People's Tribunal stated that the UN Security Council sanctions resolutions aimed at setting back the brutality of apartheid; as such any sanctions-busting by the apartheid government and other actors equated to aiding and abetting the commission of the crime against humanity.<sup>66</sup> Against this backdrop, The Peoples Tribunal found that there was an abysmal failure to investigate and prosecute these crimes.<sup>67</sup> This failure also included the grossly negligent or deliberate lack of investigation of the role and contribution of powerful private actors as well as foreign governments in the process of propping up, helping to develop and strengthen the apartheid regime.<sup>68</sup>

The reluctance to investigate and prosecute continues despite overwhelming evidence of the gross violations of the crimes against humanity. There seems to be no justification for the NPA and government not to pursue those living perpetrators of apartheid crimes who did not apply for or were not granted amnesty. However, it is significant that the NPA reopened an investigation into the death of the apartheid struggle activist Ahmed Timol in 2017.<sup>69</sup> It was previously believed that Timol had committed suicide<sup>70</sup> but the inquest found instead that Timol had been killed by the security forces: the last remaining living suspect in the case, Joao Jan Rodrigues, is now to be prosecuted.<sup>71</sup> This may serve as the beginning of a commitment to prosecute apartheid crimes. However, the longer it takes to prosecute these crimes, the less likely it is that justice will be brought to the victims of apartheid crimes.

In the final analysis, it must be acknowledged that prosecution of the perpetrators of crimes against humanity goes to the heart of accountability and restoration of justice. Furthermore, commitment by the NPA to prosecute these crimes would also serve to restore the public's trust and confidence in the administration of justice. Whereas the establishment of the

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<sup>65</sup> Gerber "Zuma Warns Those Who Want State Capture Investigated" (2017-11-02) *News24* <https://www.news24.com/SouthAfrica/News/zuma-warns-those-who-want-state-capture-investigated-20171102> (accessed 2018-12-08).

<sup>66</sup> The People's Tribunal *Final Report* par 5(a) and (b).

<sup>67</sup> The People's Tribunal *Final Report* par 5(d).

<sup>68</sup> *Ibid.*

<sup>69</sup> Pather "Ahmed Timol Inquest Unravels Apartheid Cover Ups That Protected Security Police" (2017-07-24) *Mail and Guardian*.

<sup>70</sup> Lange "Judge Finds Ahmed Timol Was Pushed to Death, Did Not Commit Suicide" (2017-10-12) *The Citizen*.

<sup>71</sup> Nicolson "Timol Inquest: He Was Murdered but Culprits Are Dead, Court Rules" (2017-10-12) *Daily Maverick*.

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specialised task team dedicated to investigating and prosecuting these crimes is pivotal, there is also a need to capacitate the current criminal justice system with competent, efficient, and dedicated individuals.<sup>72</sup> Eventually, this would ensure a true realisation of post-apartheid transitional justice for the victims of the brutal apartheid system.

## 7 CONCLUSION

One clear lesson from the South African experience is that transitional justice serves as a fundamental tool in the transfer of power to a new dispensation. This article has examined the concept of transitional justice and further analysed the impact that this concept had during transition. The contribution has also examined the crime of apartheid from the customary international law perspective and analysed relevant international instruments in relation to this crime. Furthermore, it has also reflected on the overview of transitional justice from the South African perspective. In this regard, the contribution also examined The People's Tribunal's encouraging commitment towards the prosecution of apartheid crimes, and the NPA's reluctance to prosecute the perpetrators of apartheid atrocities was also examined.

Against this background, it is recommended that the State should promote a culture of accountability irrespective of the era and the politically charged indictments in respect of which apartheid crimes were committed. The NPA has a constitutional mandate to prosecute without fear, favour or prejudice.<sup>73</sup> Unfortunately, the current reluctance to prosecute these crimes gives the impression that there is fear or favour in relation to prosecuting the perpetrators.

This contribution also recognises challenges in the practicality of securing the availability of witnesses. Therefore, it is recommended that the NPA and other law enforcement agencies need to trace potential witnesses for the purposes of assisting the court with evidence. However, courts are not only reliant on *viva voce* evidence, but also on documents. Evidence may also exceptionally be admitted as hearsay, provided that this would be in the interests of justice. In light of the above, it is submitted that the TRC would not have recommended that prosecution should be undertaken against perpetrators of apartheid atrocities unless there was enough evidence to prosecute successfully.

Lastly, this article weighs the possible impact of renewed prosecution on the idea of nation-building post-1994. It is submitted that nation-building forms part of the foundation of transitional justice. However, nation-building should not include uniting society with unrepentant and incorrigible perpetrators. This is so because the TRC terms of reference provided for the perpetrator or participant to receive amnesty upon making full disclosure. It

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<sup>72</sup> The People's Tribunal *Final Report* par 12.

<sup>73</sup> S 179(4) of the Constitution of the Republic of South Africa provides that "national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice."

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is submitted that those who either did not participate or did not make full disclosure should not be seen as contributors to nation-building. In conclusion, it is safe for this contribution to highlight the fact that they did not comply and further recommend that they should be investigated and prosecuted.