

The Domestic Impact of the ICERD on TRC-Related Prosecutions in South Africa: A Story of Lost Opportunities for Post-Apartheid Justice

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Abstract

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD/the Convention) is a response to apartheid in pre-democratic South Africa. Article 6 obliges states to provide reparations to victims of discrimination. However, 31 years into its democracy, South Africa is haunted by a poor record of prosecuting apartheid. While popular discussions focus on the failure of the government to prosecute, this article focuses on the extent of the Convention's domestic impact on the prosecutions. This contribution uses a working definition of domestic impact, which emphasises the efforts of all stakeholders in the state's reporting process. The contribution relies on data collected through desktop research and semi-structured interviews with people working on race-related issues, to assess the extent to which article 6 of the Convention has been realised. Arguing that the Convention has made a delayed and limited impact on prosecutions, the article discusses factors that have hindered impact and provides recommendations towards the realisation of article 6 of the Convention.

Keywords: Apartheid, TRC, ICERD, South Africa, transitional justice

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1. Introduction

The Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (UNGA, 1965) is a response to apartheid in pre-democratic South Africa. During the treaty negotiations, the conflict in South Africa (RSA) was repeatedly referenced, and the Convention was promoted as part of the solution (Jensen, 2016:106–110). Article 6 obliges states to provide effective reparations to victims of racial discrimination, which includes apartheid practices. This entails “access to competent and fair tribunals, prompt investigations and prosecutions followed by just and adequate reparations” (McDougall, 2021:3).

The post-apartheid government had to unify the country while addressing apartheid legacies. To accomplish this, the RSA combined aspects of reconciliation, amnesty and prosecution. Through section 3 of the Promotion of National Unity and Reconciliation Act (PNURA) (RSA, 1995), the Truth and Reconciliation Commission (TRC) was established to uncover apartheid violations and grant amnesty under certain conditions, through section 20 of the Act.

Although the political transition was peaceful, there was dissent regarding amnesty. In the case of the *Azanian People's Organisation (AZAPO) v the President of the Republic of South Africa*, the applicants challenged the inconsistency of the application of amnesty in relation to the Interim Constitution (RSA, 1993), arguing that this violated victims' right of access to court, guaranteed in section 22 of the constitution. The Constitutional Court stated that violations perpetrated during apartheid were clouded in secrecy, and the amnesty process was vital in incentivising full disclosures to enable collective national healing. The court ruled (in paragraphs 17–19 and 32–38 of its judgment) that there would be no blanket amnesty, and only those who met the conditions would be eligible for amnesty.

There was widespread expectation that the court's ruling would trigger prosecutions after the conclusion of the TRC processes. Upon conclusion, the TRC handed 300 names of persons who did not receive amnesty to the National Prosecuting Authority (NPA), for investigation and prosecution (Mallinder, 2009:115). However, after three decades, only a handful of cases have reached the courts. Academics call this a “significant accountability deficit” (Kemp and Nortje, 2023:406), and those representing civil society call it a “callous disregard [of] those who have sacrificed for democracy” (Ntsebeza and Kazee, 2023:39). Moreover, it blatantly violates ICERD article 6.

Debates on prosecutions focus on government failure to bring perpetrators to justice. However, this contribution spotlights the role of ICERD. The RSA ratified ICERD in 1998, while the TRC was underway. This presented an opportunity for an international mechanism, the United Nations Committee on the Elimination of Racial Discrimination (CERD), to influence the transition and prosecutions. As the principal treaty addressing racial issues (McDougall, 2021:1), ICERD should have been central in the transition, making it necessary to assess the degree to which it has influenced TRC-related prosecutions.

This contribution answers the question whether ICERD has had any impact on TRC-related prosecutions in the RSA. In answering this question, it considers whether the full potential of ICERD has been exploited, assesses the extent of the Convention's impact, suggests reasons behind the extent of impact, and proposes measures to enhance impact. This article¹ recognises that measuring the exact impact of ICERD should be done cautiously, as the Convention operates within a system wherein multiple treaties address the prosecution of international crimes. Furthermore, it adopts a working definition of 'domestic impact', drawing from other studies. A 2002 study by Heyns and Viljoen and its recent follow-up publication regard domestic impact as the influence that treaties have in ensuring that the norms they espouse are realized in individual countries, and as the "overall domestic effect, influence, or repercussions" of treaties (Heyns and Viljoen, 2002:1; Heyns, Viljoen and Murray, 2024:3). De Búrca adds that impact cannot be measured as a matter of strict cumulative linearity but should be considered an outcome of continuous engagement between all stakeholders (2021:11–14).

Drawing from these authors, this contribution defines domestic impact as the Convention's ability, through the engagements of all stakeholders in the state-reporting process, to ensure the realization of ICERD norms in law and practice in the RSA. This definition acknowledges that impact can come from actors outside the state-reporting process, including the Charter-based mechanisms of the United Nations (UN) (Heyns, Viljoen and Murray, 2024:8–10). However, this analysis is limited to the state-reporting process. In its application, this definition focuses on the extent to which all actors engage concerning the implementation

1 This article is adapted from a mini-dissertation written during LLM studies in Human Rights and Democratisation in Africa.

and realisation of ICERD norms, specifically article 6, such that the more actors engage, the more impact the Convention makes.

With this definition chosen as a criterion to evaluate the realisation of ICERD, the remaining sections explain the methodology, analyse stakeholder engagements, compare various actors to establish whether the full scope of ICERD is exploited and discuss reasons for the extent of the impact. It concludes with recommendations for each stakeholder, which can potentially enhance the future impact of ICERD.

2. Methodology and context

This article uses the qualitative method to analyse data obtained through desktop research and semi-structured interviews. The desktop research component involves analysing information from documents in the ICERD state-reporting process including state reports, concluding observations, shadow reports, and national human rights institution reports from the South African Human Rights Commission (SAHRC). This analysis aims to determine the consistency with which stakeholders discuss TRC-related prosecutions, and the extent to which relevant recommendations are implemented.

Desktop research is also used in the comparative analysis, which compares CERD engagements with Namibia and compares CERD's recommendations to South Africa with those provided by the UN Human Rights Committee (CCPR). The CCPR has been included in the analysis because it has made an explicit recommendation relating to TRC-related prosecutions, and the strength of its recommendations is compared to CERD.

Namibia is included for comparison, because the RSA occupied Namibia illegally during apartheid and imposed apartheid policies there, similar to how they were applied in the RSA. During the liberation struggle, both sides held political prisoners and allegedly tortured and disappeared many detainees (Conway, 2003:67–68). When a ceasefire was declared, political prisoners were released, and they reported the violations committed by the South African actors and the South West Africa People's Organisation (SWAPO).

Nevertheless, the new SWAPO-led government adopted a constitution allowing former apartheid officials to retain government employment. There was no criminal accountability for perpetrators, at least not those in Namibia.

Further, there was what Conway calls the “detainee issue”, a struggle for accountability for those who disappeared during the struggle (2003: 67–69).

Instead of devising a mechanism to investigate atrocities and resolve the detainee issue, Namibia invited the International Committee of the Red Cross (ICRC) to carry out investigations on missing persons. The ICRC undertook this as a tracing activity, inviting community members to supply names of loved ones they wanted to trace. Most of the cases concerned SWAPO members (ICRC, 1992:35). In 1993, the ICRC finalised a report on Namibians who had disappeared during the liberation struggle (ICRC, 1993:68), although this report does not appear to be publicly available.

After the ICRC investigation, no steps were taken to ensure accountability for perpetrators of the disappearances or other violations during apartheid. Conway argues that the ICRC’s mandate was limited, as it was allowed to consider only the information that the Namibian and neighbouring states’ governments were willing to avail, and it was not empowered to address issues of accountability. Despite this, government officials claimed publicly that reconciliation had already happened (2003:60–69).

The issue of apartheid-related prosecutions has consequently not been ventilated in Namibia, save for the ICRC investigation. This involvement of the ICRC creates potential evidentiary problems in future prosecutions because international law protects ICRC personnel from being called to testify in criminal proceedings concerning information they discovered while conducting humanitarian work (*Prosecutor v Simic et al.*, 1999:44–59). These developments have a tangible effect on the realisation of article 6 in Namibia. It falls within CERD’s mandate to inquire about steps Namibia has taken domestically and through international cooperation to prosecute the crime of apartheid and guarantee justice for Namibian victims.

It is noteworthy that despite taking different measures, both the RSA and Namibia have low rates of prosecution, making it relevant to assess the consistency with which CERD approaches prosecutions in both states.

The interview component incorporates perspectives obtained from semi-structured interviews with four participants from non-governmental institutions, three academics and a former UN Special Rapporteur on contemporary forms of racism. Participant interviews assessed impact through themes of land rights,

TRC-related prosecutions and racial equality. Participants were selected based on their work on the study themes and on race-related issues, and this contribution highlights their opinions where relevant to prosecutions. The full dataset becomes relevant in the fifth section, which considers limitations in the broader engagement of civil society actors with ICERD.

The semi-structured interviews sought to understand perspectives of civil society actors on the progress of TRC-related prosecutions and the extent of their use of ICERD. The 2002 study assessed the awareness of and use of ICERD among non-governmental actors, revealing that the Convention was neither known nor utilised in the work of this group of persons (Heyns and Viljoen, 2002:550), which is a factor hindering potential impact. Where non-governmental actors carry out work on racial issues without referring to ICERD or engaging with CERD, this limits the domestic impact of the treaty. Therefore, this study comments on improvements from the findings of the 2002 study.

Interviews were conducted virtually during August and September 2023, after the author obtained ethical clearance from the University of Pretoria (UP) and after each participant signed a consent form. The interviews were recorded and transcribed, and an anonymised dataset is accessible on the UP data repository.² To ensure anonymity, participant names are not disclosed, rather, a letter of the alphabet is allocated to each participant in the order of interviews, starting from A.

This article covers developments up to 31 July 2024. Additionally, the study covered only the government, civil society and other non-government actors, SAHRC, and CERD – the views of ordinary people were not obtained due to capacity limitations. A further limitation is that only eight participants were interviewed, most of whom worked in the specific context of the RSA, and thus, the findings of the study should not be generalised, but tested before application to other contexts.

3. Engagements in the reporting cycles

The TRC is celebrated for setting international standards for restorative justice, and its model was used in other post-conflict situations including Kenya and Sierra

2 The research dataset is accessible at https://researchdata.up.ac.za/articles/dataset/The_domestic_impact_of_convention_on_the_elimination_of_racial_discrimination_CERD_in_South_Africa/24999926/1?file=44051765

Leone (Raliglia, 2020:71–76). The expectation of prosecutions was a vital part of the transition, preceded by the amnesty process that aimed to foster national healing. As the *AZAPO* case notes, the provision for amnesty was important for the country to transition from the shameful history of apartheid. However, as Raliglia (2020:75–76) argues, those who refused to participate honestly cannot be considered to have contributed to nation-building and should have been prosecuted.

Three decades into South Africa's democracy, the expectation of prosecutions remains unfulfilled. This not only affects the countries that followed South Africa's TRC template, but it negatively affects the seriousness with which racial crimes are handled globally. One participant commented:

All these other countries who followed the South African model, in every situation the victims are the losers. Everything is done at their cost, and they don't get the relief and remedies that are needed. ... how do you address the fact that victims forever are the losers? (Participant A, 17 August 2023).

There is a deep sense of disappointment for victims of apartheid. Through a chronological analysis of engagements, this section assesses where various stakeholders fell short in granting justice to apartheid victims. Table 1 summarises the engagements between 2004 and 2024. Shaded blocks indicate that there was no engagement on prosecutions by the relevant actor during a specific cycle.

Table 1: Engagements on TRC-related prosecutions

	2004–2006 cycle	2014–2016 cycle	2017–2018 follow-up cycle	2021–2023 cycle
<i>State reports</i>	Constitutional Court in the AZAPO case found that legislation providing for amnesty complied with the constitution	Department of Justice and Constitutional Development established a TRC unit to implement TRC recommendations		Lack of progress in prosecuting TRC-related cases is due to exceptional circumstances, and cases are now receiving attention from the NPA. An inquest has been reopened in the case of Dr Neil Aggett
<i>Concluding observations</i>		RSA should investigate apartheid crimes and punish perpetrators		RSA should complete the prosecution of remaining perpetrators
<i>Shadow reports</i>				
<i>National Human Rights Institution reports</i>				
<i>Summary of proceedings (UN OHCHR and UN Web TV)</i>				CERD asked for the reasons behind the delay in TRC-related prosecutions. RSA said prosecutions were ongoing with several matters already finalised

Table 1 shows that there were limited engagements. There were no submissions from civil society organisations (CSOs) and SAHRC, and engagements between the RSA and CERD are inconsistent. After more than a decade of unexplained silence on prosecutions, it is interesting to observe how the consequences of the silence may be rectified by consistent engagement since the second reporting cycle. Below, each reporting cycle is discussed in depth.

3.1 The 2006 recommendations

CERD was completely silent on prosecutions during the first cycle. The RSA's first state report referred to the *AZAPO* case, noting that there was a "problematic exception" to constitutional guarantees that took the form of amnesty, but that the Constitutional Court had found that PNURA was consistent with the constitution (CERD, 2005:34). Despite the reference to the *AZAPO* case, prosecutions do not appear on the summary of records of CERD's 1766th and 1767th meetings, wherein the RSA's report was considered. While the SAHRC made a presentation before the Committee and cited the *AZAPO* case, its alternative report did not address prosecutions. Shadow reports also did not discuss prosecutions, and neither did CERD in its 2006 recommendations.

This limited engagement becomes intriguing, considering domestic developments before 2006. The first report was submitted several years after the *AZAPO* case and the conclusion of the TRC; however, no prosecutions policy had been adopted. Earlier during the transition, there seemed to be interest in prosecutions, with prominent actors including Eugene de Kock and Janusz Walus convicted for apartheid-era crimes (TRC, 2003:51–70, 182–183). However, those higher in the apartheid administration such as Magnus Malan, were acquitted (TRC, 2003:680).

Another case was that of Wouter Basson, head of the apartheid chemical and biological warfare project. This was the first TRC-related prosecution case to reach the Constitutional Court, concerning charges for conspiracies to commit violations beyond the RSA (Swart, 2008:209–211). The High Court had acquitted Basson and quashed the charges. However, the Constitutional Court in *S v Basson* found that the charges disclosed offences under the Riotous Assemblies Act and should not have been quashed, and that the state could prosecute. However, no prosecution ensued, and Basson continued his medical practice. According to Swart (2008:210, 225), the Malan and Basson trials presented a strong indication that the appetite to prosecute was waning.

Another indication of withering appetite to prosecute was that former President Thabo Mbeki announced that although there was no blanket amnesty, the NPA would be open to enter into agreements with persons wanting to disclose apartheid-era violations, with the aim of finishing the business of the TRC (Mallinder, 2009:113). This began the allegations of political interference in prosecutions, which has been publicised recently. In *Nkadimeng v National Director of Public Prosecutions*, the sister of Nokuthula Simelane challenged the decision to allow these agreements, arguing that they constitute an impermissible extension of the amnesty process. The court declared the decision unconstitutional and a contradiction of the RSA's duty to prosecute.³ During litigation, Advocate Vusi Pikoli – a former National Director of Public Prosecutions – filed an affidavit discussing the political interference and his removal from office, which he believed stemmed from his insistence on prosecutions.⁴

With this context, it becomes clear how vital the 2006 recommendations were in reminding the RSA of its obligations and to hold the state accountable for its failure to prosecute. Ultimately, the first reporting cycle reflects a missed opportunity to ensure prosecutions soon after the TRC was concluded.

3.2 The 2016 recommendations

In August 2016, the RSA presented its report to the Committee, and the concluding observations were published in October 2016. The RSA reported that a TRC unit had been created and mandated to implement the TRC recommendations. However, only recommendations concerning reparations, missing persons and social benefits are reported (CERD, 2016a:24). There was no mention of prosecutions in the SAHRC report or shadow reports. The summaries of proceedings for the 2460th and 2461st meetings wherein the RSA was reviewed, also do not reflect prosecutions. However, CERD expressed concern in the concluding observations that the TRC recommendations were not fully implemented and recommended that the RSA investigate and prosecute perpetrators and end impunity (CERD, 2016b:3).

3 Refer to paragraphs 9–18 of the judgment, and appendix A. Nokuthula Simelane was an anti-apartheid activist who disappeared in 1983 and was later officially declared dead in 2019. See FHR (2020).

4 This affidavit is accessible only through a scanned document on the internet. See SALC (2015).

CERD made this recommendation with limited information from reports and the dialogue. This reflects treaty bodies' ability to consider issues and make recommendations without receiving comprehensive information. However, this makes the earlier silence of CERD in the context of references to the *AZAPO* case incomprehensible. However, the recommendations reflect that CERD had limited knowledge about the allegations concerning political interference and thus did not incorporate this nuance into its recommendations. Nonetheless, political interference stains the legacy of the TRC considerably, contributing to distrust in the justice system and the TRC process.

One participant opined that there was suspicion that the apartheid and democratic governments concluded some agreement not to prosecute, reflected in how the government has dragged prosecutions (Participant B, 18 August 2023). Another said:

Our sense is that all these things have been deliberately stalled. You know, beyond the lifespan of most of the perpetrators. So, and I think that, our sense is that that was very deliberate, you know. I wasn't there, so I can't say, but I think it was strategically that people get so old that they pass away and then ... hope there will be no case any longer ... that's one way of denying victims the truth (Participant A, 17 August 2023).

Had CERD been aware of these political developments, its recommendations might have been targeted to specify that the intentional meddling with prosecutions violates ICERD article 6.

Following the 2016 recommendations, investigations gained momentum, and inquests concerning the deaths of anti-apartheid activists were reopened. Most victims were killed in detention, and the apartheid courts declared that they had died by suicide. The reopened inquests now declare that the activists had been murdered. Below is a chronological summary of the litigation of the most publicised cases.

Ahmed Essop Timol

Timol died in 1971 during detention, and the 1972 inquest concluded that he had died by suicide by jumping out of a 10th floor window at John Vorster Square Police Station in Johannesburg. During the TRC, Timol's case was revisited, and seven apartheid Security Branch members were declared responsible for Timol's death. After the TRC, Timol's family undertook private investigations and obtained new

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evidence, which was placed before the NPA to reopen the inquest (*Joao Rodrigues v The National Director of Public Prosecutions*, 2019:6–10). The 2017 inquest found that Timol was tortured and pushed out of the window, and that Rodrigues, the only perpetrator still alive, was an accessory to the murder (*The reopened inquest into the death of Ahmed Essop Timol*, 2017:125–126).

Rodrigues alleged that the 47-year delay in prosecutions was due to political interference and not himself, and that his fair trial rights would be violated if prosecution continued. However, the Supreme Court of Appeal rejected this argument, as there was no delay in charging him upon the conclusion of the reopened inquest (*Joao Rodrigues v The National Director of Public Prosecutions*, 2021:6–7, 11–15). Notably, in *Rodrigues*, the High Court strongly remarked that instead of a “bold prosecution policy”, there had been a “timid retreat” due to executive political interference with the NPA (*Joao Rodrigues v The National Director of Public Prosecutions*, 2019:10–12).

Dr Neil Aggett

Aggett also died in detention, and the police announced that he had died by suicide, which was corroborated by a 1982 inquest. However, at the turn of democracy, private investigators and lawyers were hired to gather evidence, which was presented to the NPA to reopen the inquest. Some evidence had been lost, and some witnesses involved in Aggett’s detention had already died.

Despite obstacles, the inquest was reopened. The court found that Aggett had been murdered, and a cover-up story had been fabricated by the security forces (*Reopened inquest into the death of Dr Neil Hudson Aggett*, 2022:1–16, 286–295). The court found that Lieutenant Stephan Whitehead and Major Arthur “Benoni” Cronwright had murdered Aggett, assisted by their colleagues. However, the perpetrators died before the inquest was concluded. There is also evidence that Whitehead owned a counter-intelligence company that offered surveillance services to the post-apartheid South African government (Espionage Research Institute International, 2019).

Ernest Moabi Dipale

Dipale died at John Vorster Square Police Station, and the cause of death was declared to be suicide. The inquest was reopened, declaring that Dipale had been murdered by apartheid security forces. Joe Mamasela and Nicholas Johannes

Deetleef, who testified in the proceedings, were identified as possible suspects (*The reopened inquest into the death of Ernest Moabi Dipale*, 2019:2–3, 27–28).

Dipale's inquest represented significant developments in TRC-related cases, as this was the first matter that was not privately investigated but entirely handled by the NPA.⁵ This is significant to ensure justice for all victims, and not only those whose families can afford private investigation. One participant found it vital that the case was handled by the NPA because earlier, private lawyers were hired at a great cost. This participant indicated concerns that private investigation might give rise to lawyers who take on TRC-related cases merely for accolades and remuneration and not from a place of wanting truth and justice for victims. Therefore, the participant saw it as important that the victims' movement support the NPA's efforts to prosecute (Participant A, 17 August 2023).

Another participant said that the government should have the monopoly over prosecutions to avoid the justice system being politicised, causing a situation where the rich use their resources unfairly in proceedings against the poor (Participant B, 18 August 2023).

A third participant opined that the history of prosecutions is heavily politicised, and that "even in the instances where we had one or two prosecutions, it has really been because of the activism of the victims' families, who have refused to let the matter go". The participant continued:

And it's not many families who have the means, who really can push, I mean, it calls for money, right? You also must know perhaps organisations that can help you to push. It can really be disheartening. To be sent from one pillar to the other ... So, I was saying that really you can see that justice, particularly when it comes to prosecutions, means those who are better connected and have got the fortitude to persevere when they are being taken from pillar to post, and those who can actually mobilise some form of support from civil society and other stakeholders, are the ones who really end up getting justice (Participant E, 28 August 2023).

Many families do not have the means to pay for private investigations and would have perpetually been denied justice. While some victims' families were funded by CSOs, it is often only the popular cases that receive priority, leaving the less

5 Refer to the appearances section of the judgment.

popular cases in the shadows. In this regard, the NPA's funding of the Dipale inquest, presents hope for many victims' families.

Dr Hoosen Mia Haffejee

Haffejee was also declared to have died by suicide while detained in Durban. However, the reopened inquest found that he likely suffered from a cardiac arrest during torture and urged the NPA to investigate the possible perpetrators, although some had died or were untraceable (*The reopened inquest into the death of Dr Hoosen Mia Haffejee*, 2023:89–91). Many perpetrators who were traced, had died between 2008 and 2019. Had there been a vigorous pursuit of prosecutions, these perpetrators could have stood trial.

Imam Abdullah Haron

Haron died in detention in 1969, and the inquest declared that he had sustained injuries from falling. However, the reopened inquest found that he had been tortured and put under stress, which was exacerbated by a pre-existing artery disease. Six torturers were declared guilty, but all had died (*The reopened inquest: Late Abdullah Haron*, 2023:10–11, 100–103).

These were the publicised inquests finalised by October 2023. However, there were other ongoing cases. The NPA Annual Report for 2022/3 revealed that 135 matters were under investigation, with 12 cases before the courts (NPA, 2023:58–61).

Furthermore, the NPA commissioned a legal opinion on its measures regarding TRC-related prosecutions (Ntsebeza opinion), which was released mid-2023. The opinion indicates that in 2021, the NPA created a 'TRC component' for prosecutions (Ntsebeza and Kazee, 2023:4), although it is not clear how this differs from the 'TRC unit' referred to earlier. The opinion noted that the TRC component structures were adequate, but it noted a concern that the component could not account for the 300 cases handed to the NPA and could not provide reasons for why "215 cases are no longer being pursued". The opinion further expressed a concern regarding the lack of transparency around how the TRC component decided on which cases would be fast-tracked while others would no longer be investigated (2023:58–62).

The Ntsebeza opinion also found that after two years of prioritised investigations, most cases remained at the evidence-gathering stage, and the component had not succeeded in compelling actors, including the Missing Persons Task Team (MPTT)

to share information in their possession to aid investigations. The opinion additionally noted the concern that despite judicial reference to political interference with prosecutions, other government organs had not come forth to support the NPA's work (Ntsebeza and Kazee, 2023:62–67). Due to the lack of an investigative mandate, the opinion did not make findings concerning the alleged political interference, and it instead recommended that a commission of inquiry be carried out to investigate the extent of and the reasoning behind political interference with TRC-related prosecutions (2023:72).

The opinion also recommended that relevant state mechanisms, including the MPTT be called to account for their work and provide information in their possession to aid prosecutions. The Ntsebeza opinion recommended that the NPA should adopt a position on whether it is prepared to pursue charges for crimes against humanity regarding apartheid violations. Furthermore, it recommended that the information gathered should be digitalised and placed in a database that tracks all users who access the data. Finally, it recommended that the NPA establish a digital repository, accessible to the public, to provide updates on investigations that have been closed or referred for prosecution, on finalised matters, successfully identified human remains by the MPTT, and also publicise the contact details of the TRC component (Ntsebeza and Kazee, 2023:70–72).

From the foregoing, stakeholders took more steps regarding prosecutions in the second reporting cycle, from CERD issuing a recommendation, to the NPA reopening inquests. CSOs also played a role in local advocacy, which is detailed in the Ntsebeza opinion. However, the delay in engagement resulted in difficulties finding evidence. It is also concerning to note that after three decades, most of the perpetrators identified had either been apartheid police or former askaris, and most had died. High-level actors behind apartheid, on the other hand, have not faced justice.

3.3 The 2023 recommendations

In December 2023, the RSA presented its report to CERD, and the latter issued concluding observations in the same month. The RSA reported that the lack of progress regarding prosecutions was due to “exceptional circumstances” and that cases were receiving attention (CERD, 2022:24). More shadow reports were submitted, although none of them mention prosecutions. The SAHRC report also does not mention prosecutions. However, the summary of proceedings indicates

that TRC-related prosecutions were discussed during the dialogue, wherein the RSA noted that 137 cases were under investigation, with 18 finalised, 13 in court, and one having resulted in a murder conviction in November 2023(CERD, 2023a:2).⁶

CERD repeatedly enquired what the “exceptional circumstances” delaying the prosecutions were, and the RSA responded that the cases were challenging, as they dated far back, and evidence had been destroyed (CERD, 2023b:3–4, 10). CERD thus recommended that the RSA complete the prosecution of the remaining perpetrators (CERD, 2023c:3).

This article covers developments until July 2024, which is less than a year since the last CERD recommendation. It is thus too soon to conclude on whether the RSA implemented the recommendation; follow-up research within a few years will be beneficial in this regard. However, developments that occurred in 2024 will have implications on the RSA’s ability to implement the CERD recommendation.

On 14 May 2024, the RSA acceded to the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) (UNGA, 1973). The preamble to the Apartheid Convention indicates that it was created out of a conviction that an instrument on apartheid would enable its effective punishment. Article 3 applies international criminal responsibility to all who perpetrate apartheid, and article 4 obliges State Parties to adopt legislation to suppress the crime of apartheid and to prosecute perpetrators.

The RSA has no domestic frameworks explicitly regulating TRC-related prosecutions, and the NPA is considering a draft “TRC-specific prosecution policy” (Ntsebeza and Kazee, 2023:17). This lack of legislation arguably opened the door to the political manoeuvring that has characterised post-apartheid South Africa. The accession to the Apartheid Convention therefore presents an opportunity to develop comprehensive legislation to guide prosecutions and punish contemporary apartheid practices.

There may be clues as to why the RSA had delayed accession to the Apartheid Convention. During a parliamentary briefing, the Deputy Minister of Justice explained that the department felt that apartheid was over, and there was a political decision not to ratify the convention (PMG, 2022). Other briefing participants

6 *S v Wesley Madonsela*. The details of the case can be found on the Department of Justice and Constitutional Development’s website (2024).

added that the ratification would not add much value, as the RSA already has relevant domestic legislation. Further, the government felt that enough has been done to address apartheid, but it was now important to accede, based on the RSA's work internationally. This would allow it to lead the fight against racial discrimination worldwide (PMG, 2022).

This suggests that the accession is outward-based, and if so, another disappointment will arise from the failure to use the Apartheid Convention in pursuing justice for South African victims. The global fight against discrimination is crucial and the RSA has significantly contributed, declaring before CERD that "South Africa's foreign policy is predicated on human rights and, inter alia, ... to end apartheid practices wherever these still occur" (UN Web TV, 2023). However, this outward-focused policy, while South African victims wait for justice, constitutes a problematic precedent reflecting policy double standards.

One participant commented that this is how most countries respond to racial issues:

You know, and this is the thing ... states, I think are all about fighting for racial equality and racial justice again, as long as it's for elsewhere. Many, if not most of them, are denying that it's a problem internally (Participant G, 7 September 2023).

In 2024, the RSA also acceded to the International Convention for the Protection of All Persons from Enforced Disappearance (CED) (UNGA, 2006). However, the accession to CED was discussed in the same parliamentary briefing as the Apartheid Convention, which suggests that the accession is for foreign policy purposes.

In addition to the accessions, investigations and prosecutions have been continuing with more cases publicised. Of note is the ongoing litigation in the case of Nokuthula Simelane, wherein two of the accused are alive and will stand trial (FHR, 2024a). The ongoing 'COSAS 4' case is also noteworthy, concerning the murder of four anti-apartheid activists. Two of the surviving accused, Christiaan Rorich and Tlhomedi Mfalapitsa, are standing trial (FHR, 2024b).

Although the recommendations are being implemented, years of delay have created complexities in gathering evidence and locating perpetrators. It is doubtful whether the RSA will be able to attend to all remaining cases satisfactorily, as CERD recommended.

4. The scope of recommendations

This section compares how CERD engaged the RSA compared to Namibia on prosecutions, to explore how the Committee engages two countries that share a history of race-based oppression. A discussion then follows of how CERD as the main mechanism on racial issues has engaged the RSA in comparison with CCPR.

Namibia

Namibia did not have a transitional justice mechanism that pursued accountability for apartheid perpetrators and facilitated truth-telling for the benefit of victims, and the involvement of the ICRC might hinder future prosecutions in that certain evidence may be inadmissible. With these domestic developments, CERD should have enquired how Namibia fulfilled article 6 and provided justice to Namibian victims of apartheid and the liberation struggle.

Surprisingly, the engagements with Namibia do not mention prosecutions for apartheid crimes. There are no references to missing persons, closure for victims' families, and even social benefits to dependants of victims. This silence is unexplainable because in 2008, a shadow report to CERD noted that the government rejected calls to establish a 'home-grown' transitional justice mechanism, considering that there were unresolved disappearances, and mass graves were discovered. The shadow report requested a process to address missing persons and establish the extent of crimes and to ensure prosecutions (National Society for Human Rights, 2008:96–97). However, this request is not ventilated during the dialogue or CERD's recommendations. The closest CERD came to accountability is a recommendation in 2023 concerning Indigenous groups' participation in redress negotiations for the German genocide (CERD, 2023d:8–9). Therefore, although CERD delayed engaging the RSA, article 6 is almost entirely under-utilised concerning Namibia. In both countries, the potential of ICERD to ensure criminal accountability was minimally explored.

CCPR

The RSA first reported to CCPR in 2014, without mentioning TRC-related prosecutions. Nevertheless, a CSO reported that a list of 300 names to be investigated for apartheid crimes was submitted to the NPA and enquired about what happened to the cases (Centre for Civil and Political Rights, 2015:20–21). In the dialogue, the NPA's decision in 2016 to charge the perpetrators in Simelane's

case was raised, and CCPR asked why it took so long to prosecute (HRC, 2016a:7). In April 2016, CCPR recommended that the RSA investigate and prosecute TRC-related cases and submit a follow-up report within one year (HRC, 2016b:3,9). This was the first treaty body recommendation concerning prosecutions, and it was followed months later by the CERD recommendation discussed above. It is thus probable that CERD took inspiration from CCPR. In 2017, the RSA submitted the follow-up report to CCPR, noting that court proceedings were taking place and that the Priority Crime Litigation Unit was investigating. However, evidentiary challenges due to the delays were reported (HRC, 2017:4). Accordingly, CCPR engaged more actively on prosecutions. Just like CERD that made brief reference to the *AZAPO* case in the first reporting cycle, CCPR also had only a question in a shadow report to work with. CCPR, however, raised the issue during the dialogue, made a recommendation and invoked its follow-up mandate. Had CERD done similarly a decade earlier, timely justice may have been given to victims.

5. Explaining impact

Treaties constitute undertakings regarding how states will act; however, most treaties do not achieve their purpose (Hoffman et al., 2022:1–3). ICERD intended to end apartheid and also to continuously address its legacies (CERD, 2006:6). The engagements between stakeholders should have detected the legacy of impunity for racist crimes committed during apartheid. However, stakeholders were inconsistent and uncritical. Much of the information relevant to prosecutions was neither requested nor provided. There was poor transparency, and the Ntsebeza opinion is arguably the only comprehensive source detailing the inner workings of the NPA concerning prosecutions. Consequently, this article finds that ICERD made a delayed and severely limited impact on TRC-related prosecutions. This is due primarily to poor engagement by stakeholders, caused by several factors delineated in this section by discussion of the relevant limitations of each actor.

CERD

In 2014, the UN General Assembly (UNGA) adopted resolution 68/268 to assess and strengthen the treaty body system. The latest assessment highlighted limitations in the resources that treaty bodies are allocated and recommended that more funding be allocated to treaty bodies and that their work be coordinated through a predictable review calendar (UNGA, 2022:43–83). This means that CERD has limited resources, thus affecting its ability to devote more attention to

one country and to every issue. As one participant indicated, treaty bodies' ability to fully ventilate reports and follow-up on matters is limited because they work on a part-time basis. Moreover, states fund the UN and where they put their money is telling of their attitude to human rights (Participant G, 7 September 2023).

Another factor affecting CERD is the lack of reports specific to prosecutions. The shadow reports focused on affirmative action, but prosecutions were ignored. The information provided by the SAHRC and the state reports was not detailed, leaving CERD with scant information on which it would be difficult to make solid recommendations. A third limitation is that CERD does not fully exploit article 6 and the reports submitted to it. This is evidenced in CERD's silence in 2006. Additionally, while CERD requested follow-up reports, it never requested a follow-up report specifically regarding prosecutions. In the end, CERD missed an opportunity to hold RSA to its obligations under article 6 of ICERD.

South Africa

The court in the *Rodrigues* case reveals a factor behind why prosecutions were not vigorously pursued. The government's attitude significantly determines treaty impact, and this seems to have been the main reason why the government has delayed justice to South African victims. With the Department of Justice believing, according to the PMG's report, that apartheid is over, there would be no urgency for bureaucrats to act. The RSA's focus is on apartheid in other countries, hindering engagements on apartheid legacies at home.

SAHRC and civil society

Using treaties in advocacy grounds actors' claims in law, shaping how they see themselves and define their interests (Simmons, 2009:138–140). Of all participants interviewed in the original study, only two used ICERD in their work. There is no improvement from the 2002 study that found that ICERD was not widely used by CSOs (Heyns and Viljoen, 2002:550). One participant wished they would have used ICERD earlier, as they could have achieved more (Participant A, 17 August 2023). Another stated how communities are aware that they have rights, but their access to laws remains barred by the lack of vernacularisation of laws (Participant B, 18 August 2023).

Consequently, a limitation of CSOs is that they are not engaging ICERD. Fewer shadow reports were submitted compared to other treaties – confirming the lack

of knowledge about ICERD. There has been limited engagement with the CERD communications procedures, although this can be attributed to confidence in domestic courts (Heyns, Viljoen and Murray, 2024:1095).

6. Conclusion and recommendations

This study sought to determine whether ICERD has impacted TRC-related prosecutions, and whether the full potential of the treaty was exploited. The research investigated the reasons behind the extent of its impact. Through document analysis and interviews, the study found that there has been a delayed and severely limited impact of ICERD concerning TRC-related prosecutions.

Engagements were initially not rigorous, and although actors have recently been consistent in discussing prosecutions, challenges have crept in, as witnesses have forgotten details, evidence is lost, and perpetrators are old or have died. Despite the NPA establishing the TRC component, investigations have not progressed. The result is that victims' families have not experienced justice. While the TRC had a noble objective of national healing, its legacy has left widespread feelings of discontentment, and closure has not happened (Ntsebeza and Kazee, 2023:9–10).

A positive development is that the NPA now funds prosecutions, which might constitute a bona fide attempt to ensure that as many victims as possible get justice as far as possible. Engagements have begun in a good direction, and maintaining momentum is vital to ensure justice. In conclusion, this article proposes steps that stakeholders can take to realize ICERD article 6 domestically.

CERD has limited resources, like other TBs, and thus a recommendation that the UN may consider, is allocating more resources to enable treaty bodies to fulfil their mandates. Treaty body secretariats should have enough researchers, enabling them to investigate each country fully and develop quality recommendations. CERD should also ensure consistency in its recommendations and track RSA's progress through follow-up reports. CERD should also request disaggregated statistics reflecting the number and details of finalised cases, information on ongoing and abandoned investigations, including reasons behind why investigations have been stopped. To further support the civil society demands for clarity on the extent of political interference with TRC-related prosecutions, CERD should recommend that the RSA ensure full investigation of allegations of political interference and ensure that those responsible are punished.

South Africa

The RSA's engagements lacked transparency on the challenges that the country faces in fulfilling ICERD obligations. The first recommendation is for government to treat reporting processes as an opportunity for constructive dialogue and reflection on progress regarding prosecutions. The RSA needs to invest in sensitisation of public officials on the lived realities of apartheid victims' families who are still waiting to find closure and dispel bureaucratic sentiments that hinder prosecutions. Additionally, the RSA should take the allegations of political interference seriously and consider appointing a commission of inquiry into the issue, as recommended in the Ntsebeza opinion.

The argument that apartheid is over is untenable when most cases have not been investigated. The focus on apartheid beyond the RSA is unsavoury to local victims, who need the government's protection. Thus, a rigorous, inward-looking approach to apartheid practices should become visible throughout government organs. RSA should ensure the domestication of the Apartheid Convention and CERD, and adopt comprehensive legislation on TRC-related prosecutions, and also on contemporary apartheid practices. The RSA should develop a formal prosecutions policy that fosters transparency, establishes accountability systems for prosecutions personnel who underperform, facilitates cooperation with other state organs, and provides clear responsibilities and timelines for stakeholders.


Implementing community-led public education measures on apartheid violations, the TRC and measures to implement its recommendations, is necessary to foster an ethos of criminal accountability across society. The RSA may consider this as an investment in continuous healing and shared understanding of the pain felt by different groups. Moreover, it could provide space for victims who could not appear before the TRC, to be heard.

SAHRC and civil society

Civil society and the SAHRC have not used ICERD and may consider using it to mobilise their demands and advocate for change. CSOs should submit shadow reports incorporating TRC-related issues, to make the discussion more vigorous and enrich the proposed recommendations. No communications have been brought to CERD about the delay in prosecutions, and thus organisations should consider this avenue in the future. CSOs and academics should promote literacy on ICERD and other human rights treaties to empower people to know and act on

their rights. Further, they should work with communities and victims to gather evidence to support the NPA's work on TRC-related prosecutions.

The RSA's record of ensuring justice for apartheid victims has been mired in secrecy and distrust, which the TRC aimed at avoiding. Moreover, the country breached its obligations under ICERD article 6. To address this breach, it is incumbent on all stakeholders to make accountability the ethos of this next decade.

The prosecutions project has an impact not only on the RSA, but all other territories where apartheid practices still occur. As the country where apartheid originated, the RSA had the opportunity to lead the jurisprudence regarding the prosecution of apartheid (Ntsebeza and Kazee, 2023: 21). Instead, the RSA (and Namibia) currently risks setting the bad example of jurisdictions in which perpetrators get away without facing the consequences for atrocities committed. It is therefore critical to act without delay, as the number of available perpetrators to prosecute is progressively dwindling. Failure to act might also discredit the country's global efforts against apartheid and encourage perpetrators elsewhere in their endeavours. However, the verdict is still out, and the efforts in the coming decade are crucial in resolving and eliminating the stubborn remnants of the crime of apartheid in South Africa. 

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