

Restorative Justice and Restitution
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I would like to thank Professor Thuli Madonsela, the Chair in Social Justice at Stellenbosch for inviting me to speak this evening on Restorative Justice and Restitution.

My perspectives are very much my own and are based on my own personal experiences of transitional justice in South Africa and the countries I worked in thereafter.

I touch on the negotiated settlement and the amnesty compromise encapsulated in the interim constitution which facilitated the elections, giving rise to democracy in our country but which also played midwife to the South African Truth and Reconciliation Commission. In this context I touch briefly on the history and genealogy of Transitional Justice, and how it informed our choices; the South African Truth Commission, its restorative justice approach, achievement and weaknesses as well as the critique of our work focusing on the legacy of the socio-economic dimensions of apartheid which we live with today. I touch briefly on the Unfinished Business, which has spanned more than 23 years, as well as the political economy. I venture to make some recommendations.

1. COSAS 4

Forty years ago on 15 February 2022, four student activists, Eustice ‘Bimbo’ Madikela, Ntshingo Mataboge, Fanyana Nhlapo and Zandisile Musi also known as the COSAS 4 were lured into a trap by askaris Joe Mamasela and Tlhomedl Ephraim Mfalapitsa, taken to a pumphouse in the Vaal and locked up, only to be blown up. One of them managed to escape but died last year. Christian Rorich, a security branch officer was responsible for supplying the electronic devices, used to blow them up. Rorich and Mfalapitsa’s amnesty applications established that they and Joe Mamasela were all acting on the instructions of their commanders at the Security Branch. Both Rorich and Mfalapitsa were denied amnesty for the murders of the COSAS 4 by the Truth and Reconciliation Commission, in 1999¹. However, in a historic indictment last year in October they were charged under the international criminal law for murder as a crime against humanity. Unfortunately, despite this historic indictment, the first time in the history of South Africa, the Director General of the South African Police denied Rorich’s bid to have his legal fees paid by the state, contradicting of an earlier decision taken in 2018 by the High Court in Pretoria in a case dealing with the enforced disappearance of Nokuthula Simelane, that security branch operatives acting on the orders of the state should have their legal costs carried by the state². The evidence available confirms that these security branch members were not on a private frolic of their own but acted in pursuit of the objectives of the state. The decision by the police refusing to pay Rorich’s legal fees is likely to delay the matter and once again deals a blow to the families of victims who have been waiting for justice for more than 40 years.

This case is one of approximately 35 cases that is being supported by the Foundation for Human Rights, as part of its Unfinished Business of the South African Truth and Reconciliation Commission Programme, which I will deal with in the course of this lecture.

¹ <https://www.politicsweb.co.za/documents/historic-crimes-against-humanity-indictment-in-cos>

² <https://www.iol.co.za/news/south-africa/gauteng/nokuthula-simelane-murder-saps-ordered-to-pay-ex-cops-legal-costs-15324964>

2. Negotiated Settlement

South Africa's negotiated settlement in 1993, ended an internal armed conflict that had lasted more than 350 years and conclusively ended colonialism and the more than three decades' rule by the Apartheid government³. There were no winners of the conflict, posing critical questions to the negotiators on how to deal with the crimes of the past and heal a highly unequal nation with deep racial, socio-economic, legal and political divides⁴. Given that Apartheid had been declared a Crime Against Humanity by the United Nations in 1966, I like many others, anticipated that we would have Nuremberg style trials. To the surprise of many, this was not to be.

At midnight before the signing of the Interim Constitution on the 27 April 1994, the liberation movements capitulated and agreed to an amnesty deal, which is encapsulated in the Interim constitution and is reputed to be written by Andre Brink, like poetry.

In the human rights movement, we were deeply disappointed to learn that the liberations movements had agreed to an amnesty for the crimes of the past, and thought that they had sold us out. I recall phoning the late Dullah Omar (my mentor) who became the first minister of justice appointed by President Mandela under the democratic government, arguing that victims' rights had been compromised. Dullah, needless to say was very angry with me, but in his calm inimitable manner retorted that we in civil society needed to understand 'realpolitik'. He said that we would need to decide whether we scream and shout outside or assist the new government to ensure that the amnesty deal did not become a bureaucratic administrative process before an amnesty tribunal, but would bring about some form of accountability and ensure that the new government was able to secure the rights of victims. He explained that the Apartheid generals were placing pressure on the late President FW de Klerk to negotiate a blanket amnesty for them, and that this was being resisted. There were many in the liberation movement who argued that 'we should do to them what they had done to us, lock them up and throw the keys away'. Naively, looking back now there was also a group of military people on both sides who argued that that both sides had fought a war with collateral damage in the form of civilian casualties and that we should move on and allow the blanket amnesty. This view is probably what has given rise to the 23-year delay in prosecutions.

Dullah also said that the human rights lawyers, Kader Asmal, Albie Sachs and himself who were opposing the blanket amnesty and should be credited with ensuring the conditional amnesty, in which South Africa avoided complete impunity.

3. Amnesties under International law

Amnesties for serious international crimes such as War crimes, Crimes Against Humanity and Genocide are controversial and usually prohibited under international law⁵. The Nuremberg tribunal noted that "the attribution of responsibility to individual perpetrators is a fundamental

³ <https://www.sahistory.org.za/article/negotiations-and-transition>

⁴ See Yasmin Sooka, "E Pluribus Unum? Race and Reconciliation", in Adekeye Adebajo, Adebayo Adedeji and Chris Landsberg (eds.), *South Africa in Africa: The Post-Apartheid Decade* (Scottsville: University of KwaZulu-Natal Press, 2007), pp.78-91, Alex Boraine, "Truth and Reconciliation in South Africa: Amnesty – The Price for Peace", in Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (Cambridge, New York: Cambridge University Press, 2006); Nomfundo Walaza, "Insufficient Healing and Reparation", in Charles Villa-Vicencio and W. Verwoerd (eds.), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000)

⁵ Mallinder, Louise, *Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa* (February 1, 2009). Transitional Justice Institute Research, Available at SSRN: <https://ssrn.com/abstract=1375046> or <http://dx.doi.org/10.2139/ssrn.1375046>

task of justice after mass atrocity crimes’ and that “even the most extensive crimes are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the . . . law be enforced”⁶. During the years of apartheid, successive governments used national laws to legitimize their repressive policies. Indeed, Professor John Dugard argues that ‘the apartheid order was a legal order’⁷. As part of procedural, but not substantive legalism, indemnity laws⁸ were repeatedly enacted to shield state agents from liability for the crimes they committed against civilians, including the massacres at Sharpeville in 1960 and Soweto in 1976⁹. Indemnities in South Africa had traditionally been used to support the apartheid system and shield its operatives from prosecution. Indemnity and amnesty discussions were highly contested political issues, during the ‘behind the scenes’ discussions, and then more openly during the negotiation process initiated from 1990¹⁰. The debate initially centered on indemnity for anti-apartheid political prisoners and exiles to enable them to participate in negotiations, which would have been in accordance with the Geneva Convention. It’s clear now that during the negotiations, amnesty became a ‘bargaining chip’ used by both sides to pursue their political goals. While many commentators have argued that the talks could not have occurred without the initial indemnity for members of the ANC who were in prison or in exile, and that the final constitution could not have been agreed to without the post amble committing the Government of National Unity to enacting an amnesty, this is not entirely correct as the Geneva Conventions provide an amnesty to allow combatants to return home to participate in peace talks.

Even as we were discussing the amnesty linked to a law to establish the South African Truth and Reconciliation Commission, the discourse around amnesties was influenced by a debate that had unfolded internationally in the mid- to late-1980s. The debate was around whether fledgling democracies should undertake prosecutions in accordance with their international legal obligations¹¹. The debate had mainly been shaped by the experiences of Latin America, where military forces continued to exercise power even after ceding formal authority to democratically elected governments. While human rights professionals conceded the obligation, they were divided over whether it was necessary to develop further international obligations regarding punishment.

This debate took place between Carl Nino, the advisor to Argentinean President Alfonsín and Diane Orentlicher, an American war crimes lawyer, and was titled ‘Settling Accounts’. Carl Nino had witnessed President Alfonsín having to resign when he attempted to put the military on

⁶ Nuremberg IMT: Judgment and Sentence’ (1947) 41 American Journal of International Law 172 at 221 (with reference to international crimes)

⁷ John Dugard, ‘Retrospective Justice: International Law and the South African Model’ in A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame, Notre Dame 1997) 270. However, according to the TRC Report, from the mid-1980s, ‘a climate of “state lawlessness” prevailed and the pretence of adherence to the rule of law was abandoned by the Botha regime, see Truth and Reconciliation Commission of South Africa Report Vol 4, ch 4, para 32 (‘TRC Report’)

⁸ The Oxford English Dictionary (OED) defines an indemnity law as ‘a legal exemption from the penalties or liabilities incurred by any course of action’. Indemnity laws can apply to both to *past or future* actions, but in South Africa they apply to acts that have already been committed. The OED defines an amnesty law as ‘an act of oblivion, a general overlooking or pardon of *past* offences, by the ruling authority’. In practice, as will be discussed below, in South Africa both indemnities and the amnesty were applied to individuals who had already been convicted, as well as those who had not yet been investigated or prosecuted. During the South African transition, amnesty and indemnity were used in conjunction with pre-existing powers of pardon and sentence remission.

⁹ Mallinder, Louise, *Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa* (February 1, 2009). Transitional Justice Institute Research, Available at SSRN: <https://ssrn.com/abstract=1375046> or <http://dx.doi.org/10.2139/ssrn.1375046>

¹⁰ Andre Du Toit -FW

¹¹ Orentlicher, Diane. “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency.” *The International Journal of Transitional Justice* 1, no.1 (2007): 10-22.

trial, and argued that there was a need to take account of the political context, and the reality of having to protect human rights in the future¹².

Supporting this view, the late Kader Asmal in a book, he co-authored noted, that the practice of states in dealing with atrocious pasts amidst democratic transitions, notably in Latin America confirms that there is no established practice of pursuing prosecutions, given that there was some concern that prosecutions could destroy the country¹³. He went on to say that “In South Africa, the interim constitution, under which the historic 1994 elections were held, contained an explicit coda (known as the post amble) warning the country against the risks of pursuing strategies of vengeance or victimization at the expense of the new country flourishing (captured in the constitution by the African word ‘ubuntu’ implying both ‘compassion’ and ‘recognition’ of the humanity of the other¹⁴).

While this question is more or less settled following the Lomé Peace Agreement in Sierra Leone, it remains a controversial issue seen as promoting impunity.

4. Restorative Justice

There were a number of compromises made during the negotiations on the basis that these were necessary for a peaceful transition to democracy, adopting a restorative justice approach. The compromises included a government of national unity, no nationalization of land, an amnesty deal for those responsible for the crimes of apartheid. It is worth recalling that like the Latin American examples, the South African transition was negotiated, rather than the former regime being overthrown. The amnesty was justified as a necessary compromise to ensure peace and reconciliation and was a broad amnesty covering serious human rights violations. The South African amnesty differed from other amnesty processes, however, as it was intrinsically linked to the truth-recovery project and was accompanied by measures to acknowledge The Explanatory Memorandum to Parliament accompanying TRC Bill, confirmed this perspective with the amnesty deal framed as a bridge between the past and the future, and a necessary prerequisite to achieving reconciliation, becoming the post-script to the Interim Constitution and the Preamble to the new Constitution. the victims’ suffering and to provide reparations for the harm they endured¹⁵.

The establishment of the South African Truth and Reconciliation Commission cemented the notion of a restorative justice approach, which is often defined as a contrast to retributive justice. Restorative justice suggests that rather than viewing crime as a violation of the law with the state being the victim, restorative justice views crime as “a violation to people and relationships”¹⁶. The aim of restorative justice is not to establish guilt and punish perpetrators of crimes, but to “identify obligations” as well as to meet the needs of everyone involved and promote healing¹⁷.

¹² The duty to punish past abuses in context, <https://www.umass.edu/legal/Benavides/Fall2005/397U/Readings%20Legal%20397U/10%20Carlos%20Santiago%20Nino.pdf>

¹³ Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance, Kader Asmal, Louise Asmal, Ronald Suresh Roberts

¹⁴ Ibid

¹⁵ Explanatory Memorandum to Parliament accompanying TRC Bill, <https://www.justice.gov.za/trc/legal/bill.htm>

¹⁶ Zehr, H. (1990). *Changing Lenses: A New Focus for Crime and Justice*. Scottsdale, PA: Herald Press.

¹⁷ Ibid, p. 81

Restorative justice is also perceived to be a process of involving all stakeholders in a conflict – including the larger community.

According to the former Chairperson of South Africa’s Truth and Reconciliation Commission, the late Archbishop Emeritus Desmond Tutu, this emphasis on reconciliation rather than retribution, is more consistent with indigenous African conceptions of justice and who said: “Retributive justice is largely western, an African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew”¹⁸.

The South African Truth and Reconciliation Commission

The South African Truth Commission was the first commission whose goals were linked to building national unity and reconciliation, and was premised on the belief that if perpetrators came forward and told the truth, then the families of victims would be able to begin closure on the violations they had suffered. It was also a recognition that the evidence about the crimes of the past was within the hands of the perpetrators and so the truth commission provided a middle way to learn about the past and ensure that South Africa could move on and begin to build new relationships between those who had been victims of the past and the perpetrators.

The amnesty law did not require an apology or even expression of regret to secure an amnesty, but provided that, in return for a full disclosure of the crimes they had perpetrated, individual perpetrators who were granted amnesty escaped prosecution and any claim for damages, and if they had been convicted and were in prison, they would be released and their conviction and sentence expunged.

The Human Rights Violations Committee provided for the documentation of gross human rights violations perpetrated during the apartheid years and also provided a forum for victims to testify to their suffering. Together with the Reparations and Rehabilitation Committee, these Committees facilitated the restoration of human dignity and recognition as South African citizens. The TRC took testimony from approximately 22,000 victims and witnesses, 2,000 of whom appeared at public hearings: it received over 7,000 applications for amnesty, most of which were ultimately turned down¹⁹.

Achievements

Despite the imperfections in the process, the Commission achieved a number of successes:

- Uncovered many hidden aspects of the country’s past under apartheid, including the widespread and systematic state policy of torture, murder, rape and the sinister enforced disappearances;
- Identified institutional weaknesses in state bodies, including the country’s armed forces;
- Developed a holistic and comprehensive policy on reparation and rehabilitation as well as institutional reform; and
- Produced a well-regarded five-volume report.

The South African TRC, also subsequently established a number of innovative international norms and standards:

¹⁸ Quoted in Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998), p.81.

¹⁹ *ibid*

- The importance of public participation in both the decision-making and the process leading up to the establishment of a truth commission;
- The importance of public hearings;
- The right to reparations and rehabilitation; and
- The right to reconciliation premised on the recovery of the truth, the acknowledgement of violations and harm done to victims, accompanied by reparations including restitution, and the recognition that victims are citizens entitled to have the state work for them irrespective of different ethnic, religious, racial, gender, sexual or tribal identity or political affiliation, able to live side by side without fear and in mutual respect.

Weaknesses and Limitations

Despite the successes, there were clear weaknesses in the law establishing the South African TRC. At the outset, the notion that the Truth Commission would develop a reparations policy which the government would accept and implement; bearing in mind that reparations are measures taken by states to redress gross and systematic violations of human rights law or humanitarian law through the administration of some form of compensation or restitution to the victims. In the South African case, AZAPO and many prominent families challenged the legitimacy of the amnesty deal on the basis that it compromised their rights. In addition, many saw the removal of their right to civil compensation as a complete violation of their rights. The Constitutional Court in the AZAPO case confirmed the validity of the amnesty deal, with the majority judgement finding that amnesty for criminal liability was permitted by the epilogue because without it there would be no incentive for offenders to disclose the truth about past atrocities. ... The Court said that Parliament was entitled to adopt a wide concept of reparations, and Judge Didcott explained that reparations would be an appropriate way of dealing with harm and consequences as the country which could be crippled by paying out civil claims. The democratic government also argued that every Black South Africa is a victim who would benefit from government programmes of development. Unfortunately, when the RDP programme was scrapped, that did not materialize.

The democratic state delayed the delivery of reparations to victims, not honouring the commission's recommendations and also failed to implement the recommendations on institutional reform. The biggest failure related to the implementation of the Commission's recommendations in regard to a robust prosecution policy, in line with the TRC law which was intended to ensure that there would be further investigations and prosecution of cases handed over the NPA for those who had not applied for amnesty or who had been refused amnesty dealt most victims and their families a massive blow²⁰.

The distinction between truth recovery and full disclosure

As the amnesty process unfolded, a notable distinction emerged between truth recovery and satisfying the criteria for full disclosure, which the amnesty law required, as many perpetrators who came before the Amnesty Committee were able to obtain amnesty without necessarily

²⁰ Azapo and Others vs The President and Others [1996] ZACC 16 at paragraph 62

disclosing the full truth. The case of the enforced disappearance of Nokuthula Simelane is an illustration of how the rights of victims and their families to the truth have been prejudiced. Nokuthula Aurelia Simelane was abducted, tortured, and forcibly disappeared by members of the Security Branch of the South African Police (SAP) in 1983. In 2001, the Truth and Reconciliation Commission's (TRC's) Amnesty Committee granted some of the perpetrators' amnesty for Nokuthula's abduction, while none had applied for amnesty for her murder. The Amnesty Committee failed to make the link with the international crime of an enforced disappearance²¹. Furthermore, the perpetrators were not put on terms by the Amnesty Committee to disclose her final whereabouts and confirm that they were responsible for her murder, as would be required under the legal obligations relating to an enforced disappearance²².

The members of the 'Soweto death squad'²³ responsible for Nokuthula Simelane's enforced disappearance were finally indicted in 2016 with the trial scheduled to begin on May 2022, more than 39 years after she had been disappeared²⁴. The NPA has consistently refused to prosecute her killers under the crime of apartheid instead using the ordinary crime of murder, which does not acknowledge that this is a political or systems crime. The death squad was indicted only after the family litigated against the the NPA and the state to compel them make a decision on whether they intended to prosecute or not. The trial of the accused will begin in May this year. Sadly, the NPA has declined to indict for the international crime of an enforced disappearance and has also refused to grant the family a *nolle prosequi* certificate to pursue these charges. The Simelane case exemplifies the complexity of the search for the truth when it is separated from justice.

Juan Mendez, an Argentinean lawyer, noted that truth is not always easy to establish and it does not necessarily emerge from a commission or an exercise in truth telling²⁵. Mendez argued that it was misguided to separate truth and justice, because prosecutions provide a measure of truth that is more complete and more undeniable than that which is achievable through a truth commission²⁶. This was certainly true for the numerous cases involving enforced disappearances under the apartheid period.

The Colombian Special Jurisdiction for Peace (JEP) noted this distinction between victims wanting a recognition of the truth and a factual account of an event or incident by a perpetrator, which angered victims as it did not constitute an acknowledgment of the crime that had been perpetrated.²⁷ The JEP, responding to the challenge that this created, worked incredibly hard to ensure that perpetrators would not just provide a factual account, but would own and acknowledge that they had perpetrated serious international crimes amounting to both war crimes and crimes against humanity²⁸.

The the conditional amnesty deal offered by the South African truth commission in exchange for full disclosure by perpetrators of their involvement in past atrocities, has been criticized as

²¹ <https://www.ictj.org/news/justice-south-africa-anti-apartheid-activist-disappearance>

²² *ibid*

²³ Willem Coetzee, Anton Pretorius, Frederick Mong, and Msebenzi Radebe

²⁴ <https://www.fhr.org.za/the-unfinished-business-of-the-trc-programme/>

²⁵ Alex Boraine, "South Africa's TRC in a Global Perspective", Paper prepared for the CCR seminar, Peace vs Justice: Truth and Reconciliation Commissions and War Crimes Tribunals in Africa, Cape Town, 17 and 18 May 2007

²⁶ *Ibid*

²⁷ Special Jurisdiction for Peace & Foundation for Human Rights Dialogue, 2021, 'Building a Community of Practice', Confidential Virtual Consultation, 7 May 2021.

²⁸ Special Jurisdiction for Peace & Foundation for Human Rights Dialogue, 2021, 'Building a Community of Practice', Confidential Virtual Consultation, 7 May 2021.

perpetuating impunity. The deliberate suppression of the investigation and prosecution of apartheid era cases, by the state and the National Prosecutorial Authority has deepened impunity in our country and led to the criticism of the Truth Commission as a sham.

Narrow Interpretation of its Mandate

The mandate of the Truth Commission in South Africa, focused primarily on civil and political violations (a legacy of the Latin American experience). The Commission's interpretation of its mandate was also too narrowly construed, consequently obscuring the structural and pervasive legacy of systemic violations, failing to recognise that the South African conflict was intrinsically about the systemic crimes of apartheid as set out under the Apartheid Convention. The United Nations had in 1966 declared 'Apartheid' a crime against humanity²⁹. There is no doubt that the laws and structural policies underpinning apartheid in South Africa went far beyond civil and political rights violations to encompass the structural violations, which remain the most bitter legacy that the country continues to live with today. The failure to examine the effect and impact of apartheid's policies allowed those who benefitted from apartheid to escape responsibility, obscuring the link between racialized power and racialized privilege, the legacy of which we live with today.

This shortcoming is reflected in the way in which the TRC law was constructed and how it went about its business: the crimes were defined in terms of domestic language (i.e., torture, abduction, and killings). Apartheid in effect was 'a system of minority domination over black people based on territorial, residential, political, social and economic basis'.⁷ This domination was implemented through racially discriminatory laws in effect social engineering and included:

- Population Registration Act 1950
- Group Areas Act 1950
- Prohibition of Mixed Marriages Act 1949 and Immorality Amendment Act 1950
- Suppression of Communism Act 1950
- Separate Amenities Act 1953
- Bantu Education Act 1953
- Extension of University Education Act 1959

Internally within the Commission, we debated how to deal with the violations emanating from the policies of Apartheid, including the land question given that land dispossession belonging to Black people was complete by 1913³⁰. The debate also focused on persecution, and exclusion from the economy, education and job reservation on the basis of race and color creating slavery conditions and dispossessing Black people of citizenship rights in their own land. We had numerous submissions from human rights groups across the country, requesting that we hold hearings on land, apartheid education policies, exclusion from the economy and job reservation to name but a few. The narrow focus on 'civil and political crimes', did not take account of the fact, that those who rose up against the state, and who were detained, tortured and killed were because they opposed the unjust racist system and discriminatory laws of the criminal apartheid state. Sadly, this debate was lost in the Commission.

²⁹ International Convention on the Suppression and Punishment of the Crime of Apartheid(adopted 30 November 1973, entered into force 18 July 1976)1015 243(Apartheid Convention)

³⁰ Natives Land Act 26 of 1913.

It is therefore not surprising that Mahmood Mamdani, the Ugandan scholar³¹ criticized the Commission for reducing what had happened in South Africa into a ‘narrow truth’, which failed to take account of the unjust economic and educational policies, as well as the racial dispossession of land.

Mamdani also criticized the TRC’s limited approach to dealing with political violence and political justice and its failure to address socio-economic justice between victim and perpetrator.³² He argued that the narrow focus on victim and perpetrator relationships deliberately and purposefully ignored the structural and administrative features of settler colonial apartheid and its racialized and ethicized socio-economic stratifications.

This omission he said would by extension, create a false moral equivalency between the violence of the apartheid regime and the response of the resistance and violence associated with the liberation movement.³³

Mamdani argued that to come to grips with the legacy of apartheid, it was necessary to understand how identities had been institutionalized and reproduced as instruments of governance and subjection under apartheid. Mamdani’s primary criticism of the TRC process was that its truth - centred focus was based on the metaphor of the Holocaust that gave rise to the Nuremburg trials where according to him, the victors sat in judgment of individual perpetrators from the vanquished and ignored their own violations.³⁴

What needs to be understood though, is that the TRC was a microcosm of people who came from different spectrums, races and classes in our society, which meant that we won some and lost some, in the compromise. The Crime of Apartheid and the Apartheid Convention was explored at the legal hearings held by the Commission³⁵. The Commission also held thematic hearings which focused on labor policies and the political economy.

Another consequence of the TRC’s focus on political violence raises the disconnect of beneficiary complicity from the need to deal with the systemic questions of land dispossession, forced removals, Bantu education, the exclusion of Black South Africans from the economy and administrative atrocities³⁶. By 1985, Lauren Patzky and Cheryl Walker reported under the Surplus Peoples Project on Forced Removals in South Africa, that more than three and a half million people were forcibly displaced in South Africa between 1960 and the mid-1980s alone, in one of the largest state-organized projects of forced mass racial/ethnic displacement in modern times, which in all probability amounts to the crime of ethnic cleaning. Today, forced removals continue to shape post-apartheid’s human, social and economic geography, haunting the spatial

³¹ Mamdani, M. (2013). *The Logic of Nuremberg*. London Review of books, 35(21), 33-34.

³² M Mamdani: *Reconciliation Without Justice*, page 46 Paper in Southern Review of Books November /December 1996

³³ Ibid page 48

³⁴ M Mamdani: *Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in SA*, page 63 Paper in Politics and Society 2015

³⁵ International Convention on the Suppression and Punishment of the Crime of Apartheid. Adopted by the General Assembly of the United Nations on 30 November 1973.

³⁶ K Schaffer and S Smith: *Human Rights and Story telling and the Position of the Beneficiary in Antjie Krog’s Country of my Skull*, page 1579 Paper in PMLA Vol 121 No 5 (October 2006)

arrangements of post-apartheid cities and intensifying contemporary forms of inequity and structural poverty.

Many critics of the TRC, including Hein Marais noted that the political mandate of the commission also excluded bureaucratic and administrative modes of subjection that were legally enacted during apartheid³⁷

There is no doubt that subsequent Truth Commissions particularly on the African continent influenced by the critique of the South African TRC in dealing with structural causes of violence and violations, began to explore that most internal armed conflicts were built around identity, ethnicity and religion but also implicated political elites as the real beneficiaries of conflicts.

These deep-rooted conflicts in deeply divided societies pose two central questions:

- What conceptual framework is most useful for dealing with the structural and psychological nature of contemporary conflict?
- What practical approaches and activities have the greatest potential for moving these conflicts towards peaceful outcomes?

The mandates of truth commissions now incorporate the need to go beyond civil and political rights violations to deal with structural violence and the root causes of violence including the systemic issues of the production, transfer, and ready availability of weapons, which fuel and make possible an extraordinary level of armed violence.

5. Unfinished Business

As we deal with the squandering of the opportunities in our country for land restitution, the prosecution of those who did not apply for amnesty or were refused amnesty and the failure to implement reparations properly or ensure that Black South Africans are enabled to access the economy, feelings of betrayal and anger run deep, compounded by the failure of the beneficiaries of apartheid and colonialism to accept their responsibility for the crimes and also the betrayal of the beneficiaries of the transition who have failed to deliver transformative justice to our people. The Unfinished Business of the South African Truth and Reconciliation commission includes the failure to prosecute apartheid era crimes, reparations, transformative justice which would see restitution, and institutional reform. Instead, the last 23 years have witnessed the denuding of institutions including the NPA, the Hawks and intelligence to name but a few. This is compounded by the notion of a secret deal ostensibly concocted to give apartheid perpetrators another bite at the amnesty cherry and also the venality of public and private officials who have been utterly corrupt bringing South Africa almost to its knees.

The Unfinished Business involves a process spanning more than 23 years beginning in 2005, when families of apartheid victims and human rights organizations in South Africa supported by the Foundation for Human Rights brought an application to compel the National Prosecutorial Authority to publish prosecution guidelines which were declared unconstitutional on the basis that it effectively amounted to another opportunity for an amnesty through the back door³⁸ Civil society filed a second application in 2008 to the courts to stop President Mbeki, using his

³⁷ H.Marais: Limits to Change: The Political Economy of Transition, Cape Town University Press and London Zed Books Ltd (1998)

³⁸ <http://www.saflii.org/za/cases/ZAGPHC/2008/422.html>

discretion in respect of Presidential Pardons to provide perpetrators of political crimes with another opportunity for an amnesty³⁹. The Constitutional Court ruled against this as this would have amounted to a complete negation of the work of the Truth Commission, and constitutes a complete betrayal of the rights of victims and their families

Nonetheless, it is germane to recall that the special unit, the Special Priority Crimes Litigation Unit (PCLU) established in the National Prosecuting Authority's office to pursue apartheid era crimes in the wake of the TRC did not prioritise or vigorously pursue its mandate. Where prosecutions have taken place, they have been pursued at the instance of family, friends, activists, and a handful of researchers and human rights lawyers. Alarming, hardly any effort has been made to secure successful prosecutions from the side of the state. Only a few high-profile cases are now being revisited through the tireless efforts and sustained pressure by family and friends using legal mechanisms.

Inquest into the death of Ahmed Timol

For example, the apartheid era inquest that covered up the state's murder of activist Ahmed Timol was re-opened in 2017⁴⁰. Judge Billy Mothle in an extraordinary judgment overturned the suicide finding of the first inquest court, ruling that Timol had been tortured and murdered by the security branch operatives who then staged an elaborate cover up of his murder. Rodrigues, a party to the cover-up of the torture and murder, led Mothle to recommend that he be indicted for the murder of Ahmed Timol and for defeating the ends of justice⁴¹.

Rodrigues successfully petitioned the SCA for leave to appeal, and although granted leave, the SCA dismissed his appeal on 21 June 2021, paving the way for his criminal trial to begin on 12 July 2021, which was again delayed when he appealed the decision of the SCA to the Constitutional Court. He had appeared in court no less than 21 times, at great public expense before he died. Rodrigues's death is a huge blow, not only to the Timol family, but to many other families of apartheid era victims whose search for the truth about how their loved ones died has been deliberately obstructed by the delay in pursuing these cases. Foundation for Equality before the Law, an organization representing the apartheid generals have petitioned the ConCourt to be substituted in his place and have asked for a permanent stay of prosecution⁴².

The Foundation for Human Rights also assisted families of victims to reopen inquests into the deaths of Ahmed Timol, Neil Aggett the trade unionist and Hoosen Haffejee. Under the pressure from civil society, the state also decided to consolidate the inquest of Neil Aggett with the inquest of Ernest Dipale. The foundation has on its files at least another 20 cases involving deaths in detention.

The Inquest Judge who presided over Neil Aggett's inquest will deliver his judgement on 4 March 2022. The Haffejee judgment is still outstanding as is the judgment in the Ernest Dipale inquest. The Foundation is also awaiting decisions by the Minister of Justice and Constitutional Development regarding the reopening of inquests into the deaths of Mathew Mabelane, Bayempini Mzizi and Imam Haron.

³⁹ Albutt vs Centre for the Study of Violence and Reconciliation and Others 2010(3)SA293(CC)

⁴⁰ <https://unfinishedtrc.co.za/ahmed-timol/>

⁴¹ The Reopened Inquest into the death of Ahmed Essop Timol 26 June 2017 IQ 01/2017

⁴² <https://www.samirror.com/justitia.html>

Intergenerational Trauma

Inter-generational trauma is defined as the transmission to younger generations of the oppressive or traumatic effects of a historical event. For example, a great grandmother who was placed in a concentration camp in Germany may have learned to cope by “cutting off” her emotions. Globally, researchers are exploring the intergenerational effects of the Holocaust, the Khmer Rouge killings in Cambodia, the Rwandan genocide, the displacement of American Indians, the enslavement of African-Americans and the impact of apartheid and colonialism on the next generation⁴³. The transgenerational effects are not only psychological, but familial, social, cultural, neurobiological and possibly even genetic as well, the researchers say. Psychologists are also investigating how traumatic effects may be transmitted across generations. In studies conducted on the mothers impacted by the 1994 Rwandan genocide and their teen children, the researchers found direct effects of the genocide, including the ways that mothers communicated with their children about the trauma, such as maintaining silence or expressing hope that such an event would never occur again⁴⁴. They also observed indirect effects, such as how the genocide affected the second generation through changes including heightened poverty, greater family work burden and compromised parenting.

In the case of South Africa, there are hundreds of families impacted by colonialism and apartheid era crimes and violations, which have not been addressed and where families particularly the next generation are unable to heal or begin closure given the unresolved issues linked to the death or enforced disappearance of a loved one at the hands of the apartheid government. Lukhanyo Calata, Thembi Nkadimeng, and Imtiaz Cajee, to name but a few members of the next generation, have taken up the struggle to unravel the truth about what happened to their loved one. Most of them were under the age of five when the loss of their family member occurred and have spent most of their adult lives dealing with the trauma of loss and with assisting older family members to cope as well. Massive interventions are required by social justice institutions if South Africa is to heal and reconcile itself at both individual and community level. The politics of reconciliation needs to go beyond politicians.

Political Economy

The [South African Reconciliation Barometer \(SARB\)](#), a nationwide public opinion survey by the Institute for Justice and Reconciliation (IJR), reveals that South Africans consistently identify “inequality” – (the gap between rich and poor – as the greatest division in our society. In this case, citizens’ perceptions converge with the statistical reality. Furthermore, a 2018 World Bank report titled [Overcoming Poverty and Inequality in South Africa](#) confirmed that “inequality has increased since the end of apartheid”.⁴ Richer households, according to the report, are almost 10 times wealthier than poor households. South Africa remains among the most unequal countries in the world, with a Gini coefficient for income per capita at 0.68 and the richest 20% controlling 70% of the country’s assets and resources and the wealthiest 10% owning more than half of the

⁴³ [Cultural Trauma and Epigenetic Inheritance](#), Lehrner, A., & Yehuda, R., *Development and Psychopathology*, 2018 International Center for the Study, Prevention and Treatment of Multigenerational Legacies of Trauma, <https://www.cambridge.org/core/journals/development-and-psychopathology/article/abs/cultural-trauma-and-epigenetic-inheritance/8C1FC1DCFF459B4B07F574386627F9DD>

⁴⁴ Berckmoes, L.H.; Eichelsheim, V.; Rutayisire, T.; Richters, A.; Holsa, B. How Legacies of Genocide Are Transmitted in the Family Environment: A Qualitative Study of Two Generations in Rwanda. *Societies* 2017, 7, 24. <https://doi.org/10.3390/soc7030024>

national income. The inequality gap has only widened as a result of the COVID-19 pandemic as more and more South Africans have fallen below the poverty line. Stats SA records the Gini coefficient for income per capita among black South Africans at 0.65. In its recent report in 2020, the United Nations Human Development Report, indicates that one in five South Africans lives on less than R28 (\$1.90) a day, and income inequality in the country is expected to worsen. More than 2 million people lost their jobs in 2020 as a result of the pandemic and the rate of inequality is only expected to intensify. The challenge for South Africa is that this poverty is deeply racialized, and has a gender dimension as well.

Restitution

Reparation goes to the very heart of human protection - it has been recognized as a vital process in the acknowledgment of the wrong to the victim, and a key component in addressing the complex needs of victims in the aftermath of violations of international human rights and humanitarian law⁴⁵.

Some politicians have argued from the lofty position of beneficiary of the transition ‘that people did not do this for money’⁴⁶. This is true. Nobody did it for money. At the same time, those who participated in the struggle received a special pension, are gainfully employed and incredibly well resourced. I have not heard anybody saying that they are refusing to take a salary. I have not seen that those who have been granted amnesty have lost anything other than their public image. They still have their pensions, their land, their assets including cars, and land and pensions. Victims of apartheid era crimes did not even receive the full amount of reparations recommended by the TRC. Neither has community reparations been paid over and the President’s Fund is well endowed still and reputed to be more than 1,8 billion rand in credit⁴⁷.

South Africa’s Political Economy

South Africa’s precarious economic state has been exacerbated by a kleptocracy of political elites, in positions of power in both the public and private sector. The levels of venality and greed ushered in under the rule of former President Jacob Zuma are extraordinary with more than R1.5 trillion lost to state capture, and coupled with the destruction of key parastatals and institutions and the decimation of institutions including the National Prosecutorial Authority, the Hawks and Intelligence.

The depths of poverty and inequality were illustrated by the July riots in Johannesburg and Kwa-Zulu Natal in 2021. The riots initially a response to the jailing of former South African President Jacob Zuma, and in which more than 300 people died in the worst violence that South Africa has experienced since the end of the apartheid-era led to widespread looting, with key infrastructure targeted by rioters. Insurance estimates claimed the riots caused around 50 billion rand (\$3.2 billion, €2.8 billion) in damage. While considered to be politically motivated, the riots and looting

⁴⁵ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Commission on Human Rights, E/CN.4/Sub.2/1993/8 and a later version E/CN.4/1997/1

⁴⁶ Y. Sooka, "Peace with accountability and respect for human rights: Ensuring sustainable dividends for the future", Track Two (Cape Town: Centre for Conflict Resolution, Vol.11, No.1, March 2002), p. 3.

⁴⁷ <https://www.justice.gov.za/reportfiles/other/presfund-anr-2020-21.pdf>

also revealed the deep levels of deprivation amongst Black South Africans. Cheryl Carolus, an ANC stalwart pointed out recently, that South Africa had reached new lows with government officials in collusion with the private sector stealing PPE funds effectively robbing and depriving the most poor.

While we know that the racialized poverty and inequality in our country have their roots in our colonial and apartheid past, it is however no longer useful to apportion blame or responsibility but rather to focus on solutions.

While not an excuse for our dire explosive situation, South Africa mirrors most global economies in the world, which have failed to provide the conditions in which citizens can thrive. A World Economic Forum study on social mobility in 2020, pointed out, “an individual’s opportunities in life remain tethered to their socio-economic status at birth, entrenching historical inequalities”⁴⁸. This presents a challenge not just for the individual, but also society and the economy. It’s a systemic issue. Human capital is the driving force of economic growth, and anything that undermines the best allocation of talent and impedes the accumulation of human capital significantly hampers growth. Poor social mobility coupled with inequality of opportunity underpin these frictions, suggesting that if the level of social mobility were increased, it could act as a lever to economic growth⁴⁹.

The Global Social Mobility Index considers what a country can do holistically to foster relative social mobility for all citizens, which is markedly different from other methodologies⁵⁰. The index focuses on drivers of relative social mobility instead of outcomes, such as a policies, practices and institutions. This allows it to enable effective comparisons throughout regions and generations. It uses 10 pillars, which in turn are broken down into five determinants of social mobility – health, education, technology access, work opportunities, working conditions and fair wages and finally, social protection and inclusive institutions. Not unsurprisingly, Denmark figures as the country with the best conditions for social mobility at a measure of 85.2. South Africa is ranked at 77 and a measure of 41.2. Most other African countries with the exception of a few outrank us on the global scale. The study also maps different kinds of social mobility such as intragenerational mobility or absolute income mobility to mention just a few. The study found for example, assuming constant relative social mobility levels in these countries, that it would take six generations to reach median income in France, in comparison to just two in Denmark or three in Sweden, Finland and Norway. In South Africa or Brazil, the number of generations necessary to reach median income jumps to between nine and thirteen generations, unless there is a massive series of interventions⁵¹.

One of the pillars used in the study is ‘Access to Technology’ which measures the level of technology access and adoption among the population. The study notes that while enhancing access to education throughout life is crucial to foster social mobility, the ability to access those opportunities can often be unequal and perpetuate historical inequalities. The study points out that ‘Access to technology’ has the potential to act as a further equalizer, by providing

⁴⁸ <https://www.weforum.org/reports/global-social-mobility-index-2020-why-economies-benefit-from-fixing-inequality>

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ <https://www.weforum.org/reports/global-social-mobility-index-2020-why-economies-benefit-from-fixing-inequality>

information to everyone irrespective of their socio-economic background, as technology has the potential to ignore such distinctions and provide unrestricted access to knowledge. In addition, covid has led to the emergence of online learning, which has lowered the barriers to learning resources. Alongside formal education structures, online learning is instrumental in providing access to lifelong learning. This is particularly imperative in the new economy because of the cycle between adoption of technology and upskilling.

New technology also has the potential to drive business growth, create new jobs and augment existing jobs, provided it can fully leverage the talents of a motivated and agile workforce who are equipped with future-proof skills to take advantage of new opportunities through continuous retraining and upskilling. Similarly, access to technology can vastly expand the earning opportunities available to people by enhancing the market available to them to find roles, deploy their skills or share their assets. This is a challenge for South Africa as we saw during the covid pandemic.

A wonderful example in South Africa of a technology project is the ‘[goGOGOgo](#)’ project run by Jane Simmonds in Alexandra in Johannesburg which is teaching a group of older persons in the township to be more tech-savvy⁵². Pensioner Joyce Cindi said she had learned how to communicate with teachers during the Covid lockdown through an app used by her granddaughter’s school. Cindi is the legal guardian of the teenager.

“Before starting the lessons, I didn’t know how the app worked and I would miss important notices from the school. Now I can log in, check the notices and even

Yesterday, Toby Shapshank an IT expert in an article he wrote titled “South Africa’s judiciary needs an upgrade to the 21st century – immediately”, weighed in expressing his opinion on who the better candidate was for the post of Chief Justice said that Judge Dunstan Mlambo who is credited with introducing technology to improve the running of the courts and indicating that it needs to be modernized would get his vote.⁵³ He said ‘Forget about the desperately needed State Capture cases and think about the real necessity of an updated judicial system: the mothers embroiled in time-consuming, mentally draining and utterly outdated court processes for simple child maintenance orders. This is the sector of society that needs the judicial system to get a little 21st-century wake-up’. Imagine how we could create jobs for young people through digital technology, assist all the gogos in the informal market and improve the quality of their lives.

There is no doubt that the social and economic consequences of racialized inequality and poverty are profound and far-reaching: a growing sense of unfairness, precarity, perceived loss of identity and dignity, weakening social fabric, eroding trust in institutions, disenchantment with political processes, and an erosion of the social contract.

⁵² <https://www.go-gogo-go.org.za/about>

⁵³ <https://www.dailymaverick.co.za/opinionista/2022-02-16-south-africas-judiciary-needs-an-upgrade-to-the-21st-century->

[immediately/?tl_inbound=1&tl_groups\[0\]=80895&tl_period_type=3&utm_medium=email&utm_campaign=First%20Thing%20Thursday%2017%20February%202022&utm_content=First%20Thing%20Thursday%2017%20February%202022+CID_196f43ef0faf8aba826a445ec5810e6d&utm_source=TouchBasePro&utm_term=South%20Africas%20judiciary%20needs%20an%20upgrade%20to%20the%2021st%20century%20%20immediately](https://www.dailymaverick.co.za/opinionista/2022-02-16-south-africas-judiciary-needs-an-upgrade-to-the-21st-century-immediately/?tl_inbound=1&tl_groups[0]=80895&tl_period_type=3&utm_medium=email&utm_campaign=First%20Thing%20Thursday%2017%20February%202022&utm_content=First%20Thing%20Thursday%2017%20February%202022+CID_196f43ef0faf8aba826a445ec5810e6d&utm_source=TouchBasePro&utm_term=South%20Africas%20judiciary%20needs%20an%20upgrade%20to%20the%2021st%20century%20%20immediately)

Karl Marx observed that human beings are physical beings whose needs, aspirations and goals can be fulfilled mainly by material rather than ideal objects. He answered the raging debate that continues today on idealism versus materialism. We also need to address the failure by our own government and many other African governments to improve the material conditions of our people. This way we can avoid the migration from Africa to the rest of the world to seek economic opportunities that do not exist in home countries.

Above all, we need to restore hope that we can transform our country, address the racialized poverty and inequality if we do so from a point of solidarity and avoid navel gazing and the blame game. All of us need to make a concerted effort to create new pathways for social justice ensuring that everyone has a just and fair opportunity for success. As beneficiaries of apartheid and the transition, the next generation will ask the question around why we failed to do our bit to ensure a just transition in our country.

End