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**Faculty of Law**

**LL.M Programme in Transnational Justice and Crime Prevention**

**An International and African Perspective**

**Truth Commissions: Did the South African Truth and  
Reconciliation Commission serve the purpose for which it was**

**established?**

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**(Mode I) in the Faculty of Law at the University of the Western Cape.**

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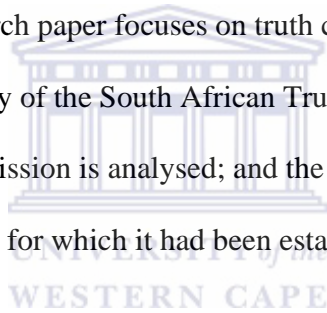
## **Keywords**

- 1) Accountability;
- 2) Amnesty;
- 3) Dictatorships;
- 4) Fact finding bodies;
- 5) Human Rights Abuses;
- 6) Prosecution;
- 7) Reconciliation;
- 8) Transitional Justice;
- 9) Terms of Reference; and
- 10) Truth Commissions.



## Abstract

Since the 1980's, many dictatorships around the world have been replaced by new democracies. These old dictatorships were notorious for their human rights abuses.<sup>1</sup> Many people were killed and tortured; and many others were disappeared.<sup>2</sup> When the new governments came into power, they had to confront these injustices that were perpetrated under the predecessor regime. This was necessary to create a culture of human rights; promote a respect for the law and access to justice. Many confronted these injustices in different ways, some granted amnesty, some prosecuted and others instituted truth commissions<sup>3</sup>. This research paper focuses on truth commissions. The research focuses particularly on the study of the South African Truth Commission. The mandate of the South African Truth Commission is analysed; and the investigation into whether the commission served the purpose for which it had been established is discussed.<sup>4</sup>



**24 October 2010**

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<sup>1</sup> See International Human Rights Clinic (2008: 122).

<sup>2</sup> See Centre for the Study of Violence and Reconciliation (2010: 2.1.1).

<sup>3</sup> Freeman M (2006: 4).

<sup>4</sup> Gobodo-Madikizela P (2003: 51).

## **Declaration**

I declare that '*Truth Commissions: Did the South African Truth and Reconciliation Commission serve the purpose for which it was established?*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



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**Muneer Abdurooaf**

24 October 2010

## Dedication

This work is dedicated to my parents, wife, brothers and sisters.



## Acknowledgements

First of all, I thank my creator (Allah Almighty) who gave me the ability to further my studies, and to have completed my research paper. I also thank my parents who have unselfishly supported me, and stood by me.

Thereafter, I am indeed indebted to my supervisor, Professor Lovell Fernandez, who has assisted and guided me through the research process. I thank Idowu Jacob Adetomokun for proof reading my work, and for advising me on the grammar. And finally, I thank my loving wife, Zainab Salie, for her assistance and invaluable input.



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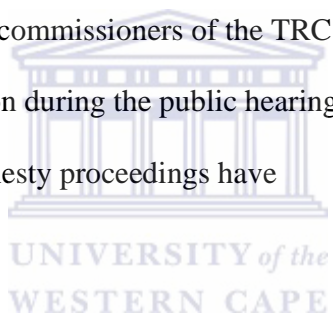


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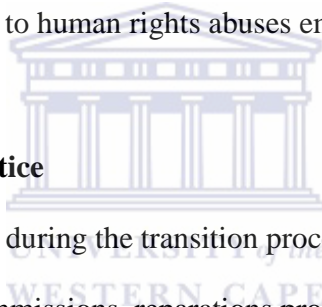
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## Chapter 1: Introduction

### 1.1 Definition of Transitional Justice

Transitional justice is a range of judicial and non-judicial responses to systematic or widespread violations of human rights committed by former governments.<sup>5</sup> It has established itself as the standard approach used for political transitions to democracy.<sup>6</sup> It seeks recognition for victims; and for the promotion of possibilities for peace, justice, reconciliation and democracy.<sup>7</sup> It is not a special form of justice but rather justice adapted to societies transforming themselves after a period of pervasive human rights abuses. In some cases these transformations happen suddenly; in others, they take place over many decades.<sup>8</sup> This type of response to human rights abuses emerged since the 1980's.<sup>9</sup>



### 1.2 Forms of Transitional Justice

Various initiatives may be used during the transition process. These initiatives include criminal prosecutions, truth commissions, reparations programmes, gender justice, security reform, and memorialization efforts.<sup>10</sup> These initiatives, however, do not form a *numerus clausus*.<sup>11</sup> Transitional justice models also employ comparative learning techniques; model borrowing; and recruitment of practitioners or professionals from other conflict settings, as they then make use of their previous experiences.<sup>12</sup>

The problems which stem from past human rights abuses are often too complex to be solved by any one of the above initiatives. Practice and experience have suggested that

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<sup>5</sup> International Centre for Transitional Justice (2009: 1); Humphrey M (2008: 3); Sooka Y (2009: 24).

<sup>6</sup> Humphrey M (2008: 3).

<sup>7</sup> International Centre for Transitional Justice (2009: 1); Humphrey M (2008: 3).

<sup>8</sup> International Centre for Transitional Justice (2009: 1).

<sup>9</sup> International Centre for Transitional Justice (2009: 1).

<sup>10</sup> Brahm E (2007: 62); International Centre for Transitional Justice (2009: 1).

<sup>11</sup> International Centre for Transitional Justice (2009: 1).

<sup>12</sup> Humphrey M (2008: 3).

transitional justice should include several measures which complement each other, as no single method is as effective on its own, as when combined with the others.<sup>13</sup>

### **1.3 Research Question**

The focal point of this research paper is truth commissions. The topic of truth commissions is very extensive as there are various aspects which may be investigated. These include comparative studies of various truth commissions around the world; investigations into specific truth commissions; investigations into the difficulties which truth commissions undergo; or investigations of specific aspects of particular truth commissions.<sup>14</sup> This research paper will deal with the general history of truth commissions around the world as an introduction. The South African Truth and Reconciliation Commission (hereafter TRC) will then be examined as the main focus of the research. The transition to democracy in South Africa will be discussed.<sup>15</sup> The paper will then examine the main factors which led to the establishment of the TRC.<sup>16</sup> The discussion will evaluate the mandate of the TRC<sup>17</sup>, the question of qualified amnesties granted, the scope of reparations and post-TRC developments with regard to prosecutions<sup>18</sup>. This research paper will be based on desktop research which will comprise the usage of primary and secondary sources.

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<sup>13</sup> International Centre for Transitional Justice (2009: 1); Humphrey M (2008: 3).

<sup>14</sup> Freeman M (2006: 11).

<sup>15</sup> Christie K (2000: 9 ff).

<sup>16</sup> Gobodo-Madikizela P (2003: 51).

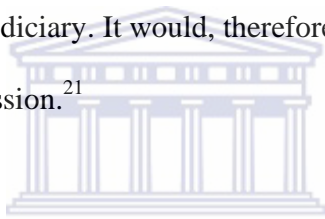
<sup>17</sup> Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>18</sup> Fernandez L (2006: 65).

## **1.4 Truth Commissions**

### **1.4.1 Definition of a truth commission**

Truth commissions are generally temporary bodies officially sanctioned by the State and generally focus on the past. They investigate patterns of abuses over a period of time, and complement their work with the submission of a report.<sup>19</sup> They are established in countries where there is an emergence from periods of political conflict or post-conflict transitions.<sup>20</sup> Usually the situation is such that the prosecution of all those perpetrators of human rights violations would almost be impossible for various reasons, which may include the destruction of the judiciary. It would, therefore, almost be inevitable for the establishment of such a commission.<sup>21</sup>



### **1.4.2 Ways of establishing a truth commission**

Truth commissions may be established in various ways. They may be established by international organisations, non-governmental organisations (NGO's), or by their national governments.<sup>22</sup>

### **1.4.3 Aims of truth commissions**

Truth commissions are established for five basic aims. They are aimed at discovering, clarifying, and formally acknowledging past abuses; responding to specific needs of victims; contributing towards justice and accountability; outlining institutional

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<sup>19</sup> Hayner P (2002: 14).

<sup>20</sup> Avruch K and Vejarano B (2002: 52); Freeman M (2006: 4).

<sup>21</sup> Freeman M (2006: 3).

<sup>22</sup> Avruch K and Vejarano B (2002: 37).

responsibility and recommending reforms; and promoting reconciliation and reducing conflict over the past.<sup>23</sup>

#### **1.4.4 Mandate of truth commissions**

The mandates of truth commissions, generally, differ depending on the nature of the conflict which they are charged with investigating. It may be empowered to assign individual or group responsibility. Truth Commissions are also, as a rule, empowered to propose methods for the compensation of victims, and/or to recommend measures to bring about reconciliation.<sup>24</sup>

#### **1.4.5 Forms of truth commissions**

There are three types of truth commissions that have come into existence over the years: international, mixed and national truth commissions. International truth commissions comprise foreign nationals of the country in question; mixed truth commissions comprise both nationals and foreign nationals of the country in question; and national truth commissions comprise only the nationals of the country in question. The best known international truth commission was the Salvadoran truth commission. This commission comprised three foreign nationals who were designated by the United Nations Secretary General.<sup>25</sup> The best known mixed truth commission was the Guatemalan truth commission. This commission comprised a German Law Professor (Professor Tomuschat) and two Guatemalan nationals.<sup>26</sup> The South African Truth and

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<sup>23</sup> Hayner P (2002: 24).

<sup>24</sup> Buergenthal T (2006: 104 f).

<sup>25</sup> Buergenthal T (2006: 106); Hayner P (2006: 309).

<sup>26</sup> Buergenthal T (2006: 105).

Reconciliation Commission is the best known example of a national truth commission.<sup>27</sup>

Other examples of national truth commissions are the Argentinean and Chilean truth commissions.<sup>28</sup>



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<sup>27</sup> Boraine A (2009: 137); Buergenthal T (2006: 105); Hayner P (2006: 309).

<sup>28</sup> Hayner P (2006: 309).



## **Chapter 2: The South African Truth and Reconciliation Commission**

### **2.1 Why South Africa chose to establish a truth commission**

South Africa's transition to democracy was quite a unique one, as it resulted from a political compromise between the outgoing (apartheid) government and the liberation movements.<sup>29</sup> The outgoing government wanted to protect their members from civil and criminal prosecutions; and the liberation movements wanted to hold the previous government accountable for past human rights abuses.<sup>30</sup> A blanket amnesty was considered at the negotiations. However, this was rejected by the representatives of the democratic movements. Full prosecutions of those who committed gross violations of human rights were also not an option that the apartheid government would accept. The negotiations concluded in a settlement (individual amnesty) which was put into the Postamble of the Interim Constitution (hereafter IC).<sup>31</sup> The IC did not, however, make mention of a truth commission. Recommendations for the establishment of a truth commission were later considered at two conferences held in 1994 by the Institute for Democracy in South Africa (hereafter IDASA) and Justice in Transition. These conferences made it possible for local stake holders in the transition process to meet people who had experienced and participated in similar transitions around the world.<sup>32</sup>

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<sup>29</sup> Campbell P (2000: 42); Colvin C (2008: 176); Van der Merwe H (1999: 159); Simpson G (1998: Introduction).

<sup>30</sup> Simpson G (1998: Introduction).

<sup>31</sup> Colvin C (2008: 179); Simpson G (1998: Introduction).

<sup>32</sup> Colvin C (2008: 179).

## 2.2 Previous truth-finding initiatives

The establishment of the TRC was certainly not the first initiative of its kind in South Africa.<sup>33</sup> There were previous attempts by both the National Party (hereafter NP) government and subsequently the African National Congress (hereafter ANC) to unravel the truth about the past.<sup>34</sup> The (McNally Commission) was appointed in 1989 to examine claims regarding the alleged presence of a hit squad. While the commission found the allegations to be unfounded, later court cases showed that the allegations were largely true. A second commission, the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation (Goldstone Commission), provided more substantiation of human rights abuses committed by the security forces. A subsequent commission (Steyn Commission) was established to follow-up on the findings of the Goldstone Commission, and to also examine the responsibility of high level military personnel. It produced a report to the State President which resulted in the forced resignation of 23 high-ranking officers of the South African Defence Force (hereafter SADF). The content of the report was, however, was not made public at that time.<sup>35</sup> A further two commissions were established by the ANC in 1992 and 1993. In 1992 the ANC initiated the Commission of Enquiry into the complaints by Former ANC Prisoners and Detainees (The Skweyiya Commission).<sup>36</sup> It was mandated to investigate human rights abuses which occurred in camps outside of South Africa. The commission, however, was accused of bias and lack of due process.<sup>37</sup> In 1993 Nelson Mandela established a commission to re-look into the alleged abuses in the ANC detention camps. The

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<sup>33</sup> Christie K (2000: 33); Van Der Merwe H (1999: 163).

<sup>34</sup> Van Der Merwe H (1999:162).

<sup>35</sup> Van Der Merwe H (1999:163).

<sup>36</sup> Christie K (2000: 54 f); Hayner P (1994: 625 ff).

<sup>37</sup> Christie K (2000: 54 f).

commission was named as the 'Commission of Enquiry into certain allegations of cruelty and human rights abuses against ANC prisoners and detainees by ANC members' (The Motsuenyane Commission).<sup>38</sup> It was run like a trial and the report was subsequently accepted by the African National Congress (hereafter ANC). The ANC, however, denied the reports findings that the ANC had a systemic policy in place. It consequently called for a truth commission to be set up to cover both sides of the abuses in South Africa since 1948.<sup>39</sup>

### **2.3 The creation of the South African Truth and Reconciliation Commission**

The South African Truth and Reconciliation Commission (hereafter TRC) was based on the final clause (Postamble) of the Interim Constitution of 1993.<sup>40</sup> Its enabling Act was passed in Parliament as the Promotion of National Unity and Reconciliation Act, No 34 of 1995 (hereafter TRC Act).<sup>41</sup> It should be noted that until then, the TRC Act was the longest ever debated piece of legislation in the South African Parliament. It took about two years to be passed.<sup>42</sup> The creation of the South African TRC was quite different to that of other countries. Chile's truth commission was based on a presidential decree.<sup>43</sup> El-Salvador's truth commission was initiated through UN-brokered peace agreements. Guatemala's truth commission, on the other hand, was based on peace agreements.<sup>44</sup> The

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<sup>38</sup> Christie K (2000: 54 f); Hayner P (1994: 625 ff).

<sup>39</sup> Christie K (2000: 54 f); Hayner P (1994: 633); Fullard M and Rousseau N (2008: 217).

<sup>40</sup> The Interim Constitution Act 200 of 1993.

<sup>41</sup> TRC (2010: Legal background to the TRC).

<sup>42</sup> Fullard M and Rousseau N (2008: 217).

<sup>43</sup> Presidential Decree No. 355.

<sup>44</sup> Hayner P (2006: 297 f).

South African experience was quite unique, as it was the outcome of hundreds of hours of hearing and considerable input from civil society.<sup>45</sup>

The composition of the commission was determined by the President in consultation with his cabinet, which at that time included National Party ministers.<sup>46</sup> The Act also required the Commissioners to be 'fit and proper persons' who were impartial and who did not have high political profiles.<sup>47</sup> The nomination and selection process was highly transparent and open to public input.<sup>48</sup>

The commissioners chosen came from different political, professional, and racial backgrounds.<sup>49</sup> They were chosen by the president. There were 17 commissioners appointed, six of whom were legal practitioners.<sup>50</sup> Three committees were created: the Human Rights Violations Committee (hereafter HRVC), the Amnesty Committee (AC), and the Reparation and Rehabilitation Committee (hereafter RRC).<sup>51</sup> Two additional structures (which assisted these committees) were the Investigation unit<sup>52</sup>, and various subcommittees.<sup>53</sup>

The HRVC was responsible for investigating human rights abuses that took place between 1 March 1960 and 10 May 1994.<sup>54</sup> It was required to use the statements made to

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<sup>45</sup> Freeman M and Hayner P (2001: 140).

<sup>46</sup> Promotion of National Unity and Reconciliation Act, s 7 (1); Van Der Merwe H (1999:180).

<sup>47</sup> Promotion of National Unity and Reconciliation Act, s 7 (2) (b).

<sup>48</sup> Van Der Merwe H (1999:181).

<sup>49</sup> Van Der Merwe H (1999:181).

<sup>50</sup> Fullard M and Rousseau N (2008: 224).

<sup>51</sup> Promotion of National Unity and Reconciliation Act, s 3 (3); Van Der Merwe H (1999:186).

<sup>52</sup> Promotion of National Unity and Reconciliation Act, s 3 (3) (d).

<sup>53</sup> Van Der Merwe H (1999:186); Promotion of National Unity and Reconciliation Act, s 3 (3) (d).

<sup>54</sup> Promotion of National Unity and Reconciliation Act, s 3 (3) (d); Freeman M and Hayner P (2001: 140); South African History Online (2010: Truth and Reconciliation Commission).

the TRC in order to find victims of gross human rights violations. It had to then refer these victims to the second committee (the RRC).<sup>55</sup>

The RRC had to provide support for the victims in an effort to restore their dignity.<sup>56</sup> It also had to design and put forward recommendations (based on the findings of the AC and HRVC) for a reparation programme.<sup>57</sup> The programme had to promote rehabilitation and healing for the survivors, their families, and the community at large.<sup>58</sup> The main goal was to develop effective ways of preventing such abuses from recurring in the future.<sup>59</sup>

The RRC was, however, the least publicized of the three committees.<sup>60</sup>

The AC processed and decided on individual applications for amnesty.<sup>61</sup> It had to do this by ensuring that the amnesty applications were carried out in accordance with the TRC Act.<sup>62</sup> It should be noted that the entire amnesty committee consisted of judges and lawyers.<sup>63</sup> The amnesty committee was empowered to grant amnesty (criminal and civil) to those who committed abuses during the apartheid era, as long as the crimes were politically motivated, proportionate, and there was full disclosure made by the persons seeking amnesty.<sup>64</sup> Each amnesty application had to be given approval by President Mandela before it became final.<sup>65</sup> 7000 amnesty applications were made.<sup>66</sup>

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<sup>55</sup> Campbell P (2000: 48).

<sup>56</sup> Campbell P (2000: 48).

<sup>57</sup> Promotion of National Unity and Reconciliation Act, s 3 (3) (d); Freeman M and Hayner P (2001: 140); South African History Online (TRC); Leseka M (2000: Chapter 2).

<sup>58</sup> Campbell P (2000: 48).

<sup>59</sup> Campbell P (2000: 48).

<sup>60</sup> Leseka M (2000: Chapter 2).

<sup>61</sup> Promotion of National Unity and Reconciliation Act, s 3 (3) (d); Freeman M and Hayner P (2001: 140); South African History Online (2010: TRC).

<sup>62</sup> Campbell P (2000: 48).

<sup>63</sup> Fullard M and Rousseau N (2008: 224).

<sup>64</sup> Promotion of National Unity and Reconciliation Act, s 3 (3) (b) and s 18.

<sup>65</sup> Campbell P (2000: 48).

<sup>66</sup> Boraine A (2009: 137 ff); Freeman M and Hayner P (2001: 140).

It should be noted that the TRC was initially appointed by parliament to operate for a period of 18 months, with the possibility of extending its operation for another six months.<sup>67</sup> However, the TRC came into existence on 16 December 1995 and continued operating until 30 October 1998. On this date, its interim final report (five volumes) was presented to the State President.<sup>68</sup> The AC continued its operation until it had completed hearings on all the amnesty applications.<sup>69</sup> The TRC thus operated much longer than was initially expected. The work of the AC was concluded on 31 May 2001.<sup>70</sup> Its Report was released on 21 March 2003.<sup>71</sup>

South Africa's operational period was also quite long in comparison to other truth commissions (around the world) that were established during more or less the same time period. The Chilean truth commission completed its findings in over a year. The El Salvadoran truth commission completed its findings in under a year.<sup>72</sup>

#### **2.4 The mandate of the South African Truth and Reconciliation Commission**

The South African TRC was mandated to promote national unity and reconciliation by establishing a complete picture of the gross human rights violations committed between 1 March 1960 and 10 May 1994.<sup>73</sup> The dates covered were just under 34 years. Chile had to investigate 17 years of human rights abuses. The El-Salvadoran truth commission had to

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<sup>67</sup> Promotion of National Unity and Reconciliation Act, s 43 (1).

<sup>68</sup> See Fullard M and Rousseau N (2008: 216).

<sup>69</sup> Van Der Merwe H (1999:186), TRC Report, vol. 6, p. 1; South African History Online (2010: TRC).

<sup>70</sup> TRC Report, vol. 6, p. 1.

<sup>71</sup> Van Der Merwe H (1999:186), TRC Report, vol. 6, p. 1; South African History Online (2010: TRC).

<sup>72</sup> Hayner P (2006: 297 f).

<sup>73</sup> Promotion of National Unity and Reconciliation Act, s 3 and 4 (f); Hayner P (2006: 298); Colvin C (2008: 181).

cover less than 12 years of violations. The Guatemalan Truth commission had to cover approximately 34 years of violations.<sup>74</sup>

The South African TRC had to make use of the three committees to achieve its objectives. It had to compile a report providing a full account of its findings and give recommendations of measures which would prevent future violations of human rights.<sup>75</sup>

It should be noted that the commissions' detailed empowering Act gave it power to grant individualised amnesties, to search for evidence, to seize evidence, to subpoena witnesses and even to run a witness protection programme.<sup>76</sup> The TRC had a staff of 300, who were housed in four offices throughout the country. It had an annual budget of approximately US\$ 18 million per year, for two and a half years. It, therefore, represented a major departure in both scale and ambition from previous truth commissions around the world. The commission heard testimony from more than 21 000 victims and witnesses. It should be noted that approximately 2 000 of these witnesses and victims testified publicly.<sup>77</sup> The commission had hearings which focused on crimes against individuals. It further convened special sessions that were devoted to key institutions and their contributions to the apartheid structure.<sup>78</sup>

## **2.5 Recommendations of the South African Truth and Reconciliation Commission**

The TRC's mandate required it to recommend reparation measures with regard to victims of human rights violations.<sup>79</sup> It further required the TRC to recommend measures to

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<sup>74</sup> Hayner P (2006: 297 f).

<sup>75</sup> Promotion of National Unity and Reconciliation Act, s 3; Colvin (2008: 181).

<sup>76</sup> Freeman M and Hayner P (2001: 140).

<sup>77</sup> Boraine A (2009: 137 f); Freeman M and Hayner P (2001: 140).

<sup>78</sup> Boraine A (2009: 137 f).

<sup>79</sup> Promotion of National Unity and Reconciliation Act, s 3 (1) (c).

prevent the future violations of human rights.<sup>80</sup> Both these tasks were undertaken by the Reparation and Rehabilitation Commission. These recommendations will be discussed under the chapter on Reparations.

## **2.6 Positive Remarks of the South African Truth and Reconciliation Commission**

The most remarkable aspect of South Africa's transition from apartheid to democracy was that it happened through dialogue and eventual negotiated settlement.<sup>81</sup> This is quite different to post-war Germany, which was as a result of a war. South Africa's transition, however, was similar to that of Chile, as both South Africa and Chile's transformations were negotiated. Germany decided to prosecute, and was later accused of applying victor's justice. Chile, on the other hand, established a truth commission, but could not prosecute those who committed gross human rights violations, as much of the power was still with the previous government. Germany is thus an example of victors' justice and Chile, on the other hand, is an example of where *de facto* blanket amnesty was applied. South Africa, however, through the negotiated settlement, managed to avoid blanket amnesty, by allowing it only where the person applying for amnesty made full disclosure of the crime in question; and that the act was politically motivated.<sup>82</sup> This amnesty for truth requirement was the first of its kind.<sup>83</sup>

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<sup>80</sup> Promotion of National Unity and Reconciliation Act, s 3 (1) (d).

<sup>81</sup> Bell P (2000: Background).

<sup>82</sup> Simpson G (1998: Introduction); Athiemoolam L (2003: 3 f).

<sup>83</sup> Simpson G (1998: Introduction).



### **Chapter 3: Truth, Reconciliation and Reparations**

This chapter attempts to investigate the process followed by the South African Truth and Reconciliation Commission (hereafter TRC) in giving effect to its mandate. This chapter, more specifically, investigates whether or not the TRC had served the purpose for which it was established with regard to the promotion of national unity and reconciliation.

Firstly, the aspect of ‘truth’ in the context of promoting national unity and reconciliation will be investigated. Secondly, the aspect of ‘reconciliation’ with regard to promoting national unity and reconciliation will be looked at. The third topic of discussion will be the issue of reparations granted by the government.

#### **Chapter 3.1: Truth Findings**

South Africa’s TRC was charged by Parliament to establish a complete picture of the causes, nature, and extent of gross violations of human rights. The picture should have included the antecedents, circumstances, factors and context of the violations.<sup>84</sup> It should be noted that there were no submissions for the TRC to cover more violations.<sup>85</sup>

Truth findings were the major role of the Human Rights Violations Committee (hereafter HRVC) as it had the power of investigation granted to it by the commission.<sup>86</sup> The truth required by the TRC Act is known as macro-historical truth, as it provides a framework for understanding the structural causes of violence, and leads to the identification of the causes and authors of the abuses.<sup>87</sup> Macro-historical truth findings include identifying: those who were responsible for patterns of human rights violations; when and why

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<sup>84</sup> Promotion of National Unity and Reconciliation Act, s 3 (1) (a); Freeman M and Hayner P (2001: 140).

<sup>85</sup> Fullard M and Rousseau N (2008: 218).

<sup>86</sup> Omar D (2010: Explanation of the TRC).

<sup>87</sup> Chapman A and Ball P (2008: 143 f); Promotion of National Unity and Reconciliation Act, s 3 (1) (a).

decisions were taken to abuse communities and groups; how these abuses were enacted; and what kinds of structural factors enabled these human rights violations to occur.<sup>88</sup>

Macro-historical truth findings are especially relevant in societies where pervasive human rights violations took place. Examples of such countries are Uganda, Chile, El Salvador and South Africa.<sup>89</sup> In such a context, the person who pulled the trigger would not usually be the same person who created the political conditions that resulted in the crime being committed.<sup>90</sup> Specific violations are usually the outcome of orders taken at higher levels of the hierarchy, and in order to determine ultimate responsibility, it is paramount to identify the intellectual authors of the crimes in question.<sup>91</sup>

Macro-historical truth findings (in the absence of direct confession from the perpetrators) would require tens of thousands of cases to be analyzed. This could be done by utilising social-science methodologies that would display a pattern, and thereby uncover a policy abuse. These types of determinations require extensive research, advanced methods of data collection and processing, and complex information management systems which would lead to the analysis and the interpretation of the findings.<sup>92</sup>

South Africa is not the first country to charge its commission with macro-historical truth findings. In Guatemala, the Guatemalan Historical Clarification Commission made use of such an initiative and reported that 200, 000 people were killed; 83 percent of whom were

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<sup>88</sup> Chapman A and Ball P (2008: 145).

<sup>89</sup> Hayner P (2006: 300 ff).

<sup>90</sup> Chapman A and Ball P (2008: 145).

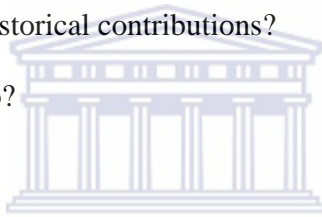
<sup>91</sup> Chapman A and Ball P (2008: 145 f); Promotion of National Unity and Reconciliation Act, s 3 (1) (a).

<sup>92</sup> Chapman A and Ball R (2008: 146).

Mayan.<sup>93</sup> This led them to the conclusion that State had engaged in genocide against the Mayan community.<sup>94</sup> El-Salvador, Peru and several other truth commissions have also made use of such methods to make important macro-historical truth findings.<sup>95</sup>

In order to evaluate whether the TRC fulfilled its mandate regarding the establishment of macro-historical truth, the following issues will be looked at:

- (a) How did the TRC define truth?
- (b) How did the TRC interpret its mandate?
- (c) Which sources did the TRC use to establish the truth?
- (d) What were TRC's macro-historical contributions?
- (e) What did the TRC fail to do?



### **3.1.1 How did the TRC define truth?**

The TRC distinguished between four notions of truth: factual truth; personal truth; social truth; and restorative truth.<sup>96</sup> According to the TRC, factual truth is impartial evidence.<sup>97</sup> It is the legal notion of bringing to light factual corroborated evidence.<sup>98</sup>

Personal truth evokes the cathartic benefits of storytelling which could contribute towards psychological healing after trauma.<sup>99</sup> This is a form of restorative justice.<sup>100</sup> This process

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<sup>93</sup> Hayner P (2001: 48); See Freeman M and Hayner P (2001: 141 ff).

<sup>94</sup> Chapman A and Ball P (2008: 145).

<sup>95</sup> Chapman A and Ball P (2008: 145 f); Hayner P (2001: 48).

<sup>96</sup> TRC Report, vol. 1, p. 113; Avruch K and Vejarano B (2002: 39).

<sup>97</sup> Chapman A and Ball P (2008: 146).

<sup>98</sup> TRC Report, vol. 1, p. 111.

<sup>99</sup> Chapman A and Ball P (2008: 146).

<sup>100</sup> TRC Report, vol. 1, p. 9.

involves restoring the dignity of victims. This is done through the official acknowledgment of the victim's version of what happened.<sup>101</sup>

Social truth refers to the process and dialogue that surrounded the work of the TRC.<sup>102</sup>

This was achieved by the public hearings and the media.<sup>103</sup>

Finally, restorative truth is the kind of truth that places facts and their meaning within the context of human relationships.<sup>104</sup> Acknowledgement is an example in this regard as it affirms that the persons pain is real and worthy of attention.<sup>105</sup>

It should be noted that of the four notions of truth used by the TRC, only factual truth contributes towards macro-historical truth findings as was required by the TRC.

### **3.1.2 The TRC's approach to human rights violations**

It should be noted that the TRC's mandate was limited to investigating only physical gross human rights abuses.<sup>106</sup> Forced removals and the displacement of millions of people based on race did not form part of its mandate. Everyday policies and practices of apartheid that did not result in killings, abduction, torture, or severe ill-treatment did also not form part of its mandate.<sup>107</sup> This led to major criticism of the TRC and its process.<sup>108</sup>

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<sup>101</sup> Brahm E (2004: Strengths and Weakness of Truth Commissions).

<sup>102</sup> Chapman A and Ball P (2008: 146).

<sup>103</sup> TRC Report, vol. 1, p. 117.

<sup>104</sup> Chapman A and Ball P (2008: 146); TRC Report, vol. 1, p. 117; Avruch K and Vejarano B (2002: 39).

<sup>105</sup> TRC Report, vol. 1, p. 117.

<sup>106</sup> Chapman A and Ball R (2008: 147); Fullard M Rousseau N (2008: 225).

<sup>107</sup> Hayner (2006: 302); See Fullard M Rousseau N (2008: 225); See also Campbell P (2000: 51).

<sup>108</sup> Fullard M Rousseau N (2008: 225).

### 3.1.3 Which sources did the TRC use to establish the truth?

It should be noted that the majority of the official State records were destroyed by the security forces prior to the TRC's coming into existence.<sup>109</sup> As a consequence, the TRC mainly had three primary data sources which it could use for macro-historical analysis. These sources were the victims' statements, the human rights violations' hearings, and the amnesty process.<sup>110</sup>

The Human Rights Violations Committee (hereafter HRVC) had interviews with the survivors, witnesses, and surviving relatives of victims from the apartheid regime. These interviews were guided by a protocol designed to elicit empirical and narrative truth.<sup>111</sup> The original version of the protocol provided for open ended questions. However, the protocol was later amended to provide only for closed-ended questions, which led to the process being frequently described as a dog licence application. A limited space for a narrative was eventually re-incorporated into the protocol.<sup>112</sup>

The HRVC held five types of public hearings<sup>113</sup> which included: human rights violations hearings; event hearings; theme hearings that focused on groups or types of victims; hearings that dealt with the role of political parties; and institutional hearings dealing with the role of organizations.<sup>114</sup> It invested most of its staff-time in the human rights violations hearings.<sup>115</sup> This provided an opportunity for the victims to testify. The

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<sup>109</sup> TRC Report, vol. 1, p. 201; See Brahm E (2004: The operation of truth commissions).

<sup>110</sup> Chapman A and Ball R (2008: 150).

<sup>111</sup> See Brounéus K (2007: 4).

<sup>112</sup> Chapman A and Ball R (2008: 151).

<sup>113</sup> See Brahm E (2004: The operation of truth commissions).

<sup>114</sup> TRC Report, vol. 6, p. 570; See Brahm E (2004: The operation of truth commissions).

<sup>115</sup> Chapman A and Ball R (2008: 153).

location and dates of these hearings can be found in the TRC's report.<sup>116</sup> During these hearings, deponents were given about 30 minutes to convey their narratives. The commissioners did not play an important role during this process, as they merely commented on the narratives, and rarely followed up questions to clarify the information conveyed by the deponents. The HRVC, therefore, treated these hearings more as a forum to affirm the participants and to undertake broad public education about the general nature of the abuses and sufferings under apartheid, than as a means to elicit good quality information for truth recovery purposes. The hearings were, therefore, primarily used as a source of anecdotal data for the themes in the report.<sup>117</sup> The HRVC selected witnesses to participate in the hearings using a variety of criteria. It required that the hearing should reflect accounts from all sides of the political conflict; that the entire thirty-four year mandate period should be covered; that those who testify should be diverse and include men, women and the experiences of youth; and that there should be an attempt to at least provide an overall picture of the experiences of the region.<sup>118</sup> These criteria resulted in a situation where White statement-givers were four times more likely to be selected for the hearings than African statement-givers.<sup>119</sup> The people who testified in the hearings were, therefore, not representative of the population that gave statements.

It should be noted that one of the requirements for obtaining amnesty was that the applicant should have made full disclosure of the act, omission or offence.<sup>120</sup> The Amnesty Committee took a legalistic view of this requirement as it only admitted

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<sup>116</sup> TRC Report, vol. 4, p. 24 f.

<sup>117</sup> Chapman A and Ball R (2008: 153 f).

<sup>118</sup> TRC Report, vol. 5, p. 5 f.

<sup>119</sup> TRC Report, vol. 1, p. 168; Chapman A and Ball R (2008: 154).

<sup>120</sup> Promotion of National Unity and Reconciliation Act, s 20 (1) (c).

information pertaining to the events for which the applicants requested amnesty. It did not even attempt to collect a career history from individual applicants, which would have enabled them to place the abuses in the context of the collective violations of specific units.<sup>121</sup>

#### **3.1.4 What were the TRC's macro historical contributions?**

The TRC has (to a limited extent), contributed towards macro-historical findings. It established that there were patterns of human rights abuses that occurred during the apartheid era; that the State security forces were involved in these violations; and it established findings of accountability.<sup>122</sup>

#### **3.1.5 Patterns of Human Rights abuses**

The HRVC collected a total of 21 519 victim statements during its two-year operational period. At least one gross human rights violation was contained in over 15 000 of the statements. Over 30 384 violations were contained in the 21 519 statements that were taken. The HRVC thus made over 15 000 findings during this period.<sup>123</sup>

#### **3.1.6 Involvement of the State Security Council (hereinafter SSC) in the Violations**

The TRC made good progress in establishing the involvement of the SSC with regard to human rights violations. One of the main contributions made by the amnesty process was that it challenged the argument presented by the political leadership of the former apartheid government (specifically F.W. de Klerk) that the violations were conducted by

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<sup>121</sup> Chapman A and Ball R (2008: 156).

<sup>122</sup> Chapman A and Ball R (2008: 159 f).

<sup>123</sup> TRC Report, vol. 6, p.570; See van Der Merwe H (1999: 190).

a handful of bad apples in renegade units. The hearings also offered insights into the manner in which the security police waged war against the ANC; particularly its efforts to eliminate operatives and suspects in the ANC's military wing.<sup>124</sup>

### **3.1.7 The TRC's Findings on Accountability**

The TRC made findings that both State and non-State parties were responsible for gross human rights abuses. The TRC's evidence indicates that the State was responsible for the greatest number of gross violations of human rights that were committed during the thirty- four year mandate period.<sup>125</sup>

Certain members of the SSC were liable under the TRC Act. These include the State President, the minister of defence, minister of law and order and the heads of the security forces. Their liability was based on the notion that they foresaw that their usage of the words such as take out, wipe out, eradicate and eliminate would result in the killings of political opponents. They were, therefore, responsible for planning gross human rights violations. Even though some of the members of the SSC did not foresee that the usage of the words would result in killings; they were still morally and politically responsible for the killings. This was due to their failure to exercise proper care in their usage of words; their failure to investigate killings that had occurred; and their failure to heed complaints about the abuses that had taken place. Their usage of militant rhetoric created a climate where human rights violations were possible. They were, therefore, guilty of official tolerance of violations, and are thus accountable for such violations.<sup>126</sup>

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<sup>124</sup> Chapman A and Ball R (2008: 159).

<sup>125</sup> TRC Report, vol. 5, p. 213; See Humphrey M (2008: 4).

<sup>126</sup> TRC Report, vol. 5, p. 218; See Cilliers A (2000: Truth and Reconciliation Commission).



The report also provides that various political parties were accountable for gross human rights abuses. The TRC concluded that the Inkatha Freedom Party (hereafter IFP) was the primary political party responsible for gross human rights violations.<sup>127</sup>

### **3.1.8 What did the TRC fail to do regarding its mandate to establish the truth?**

The TRC's enabling Act provided that it should establish a complete picture of the causes, nature and extent of the human rights violations; which should include the antecedents, circumstances, factors and context of these violations; and the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.<sup>128</sup> The TRC failed in many ways with regard to its mandate in establishing truth. It failed to explain apartheid as an organisational phenomenon; it failed to understand apartheid as a system; it failed to deal with racism adequately; it failed to identify the intellectual authors of apartheid crimes; and it failed to highlight ethnic violence and the role of a third force.<sup>129</sup>

#### **3.1.8.1 Failures of the TRC with regard to truth finding**

The TRC focused its attention on actual cases and acts; but not on the antecedents, causes, organisations, ideologies, and perspectives that gave rise to the acts.<sup>130</sup> It looked at individual cases, but did not look at the broader picture, as was required by the TRC Act. It did also not investigate the causes of the violence. There was no assessment made on how particular units came to be as violent as they did; how these units evolved over

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<sup>127</sup> TRC Report, vol. 5, p. 213 and 233; See Rauch J (2004: The Race and Citizenship in Transition Series).

<sup>128</sup> Promotion of National Unity and Reconciliation Act, s 3 (1).

<sup>129</sup> Chapman A and Ball R (2008: 161 ff).

<sup>130</sup> See Simpson G (1998: Listening to the voices of victims).

time; or how racist beliefs were indoctrinated among new recruits.<sup>131</sup> The TRC had power to investigate all of these avenues and to collect all of this data; however, it decided not to do so.<sup>132</sup>

The TRC appeared to assume that the purpose of these hearings was to document the nature of the human rights abuses that took place within particular institutions and sectors. It did not, however, examine why they occurred or the overall role that these institutions played within the apartheid system.<sup>133</sup> The commission endorsed the position in international law that provides that apartheid is a form of systematic racial discrimination and separation, and that it constitutes a crime against humanity.<sup>134</sup>

However, the matter of racial discrimination was not discussed any further in its report.<sup>135</sup>

The TRC Report provides that when searching for justice and accountability with regard to past crimes, it is important to go beyond those who commit the crimes, and to identify those who were complicit in the violations, as they planned and conceptualised them.<sup>136</sup>

However, the TRC did very little in this regard.<sup>137</sup> The TRC was unable to establish the extent of covert networks; and how they evolved and mutated during the conflict period.

It is, therefore, not clear whether the senior security force personnel involved represented their own, state or right-wing agendas. It should be noted, however, that that the TRC at

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<sup>131</sup> Chapman A and Ball R (2008: 162); See Fullard M and Rousseau N (2008: 216).

<sup>132</sup> Brahm E (2004: The operation of truth commissions).

<sup>133</sup> Chapman A and Ball R (2008: 164).

<sup>134</sup> TRC Report, vol. 5, p. 222.

<sup>135</sup> Chapman A and Ball R (2008: 164 ff).

<sup>136</sup> TRC Report, vol. 6, p. 633.

<sup>137</sup> Chapman A and Ball R (2008: 166 ff).

least acknowledged the probability of the existence of several agendas, at different levels within political and security force hierarchies.<sup>138</sup>

The TRC investigated the role of a third force involved in the violence.<sup>139</sup> Its report provides that allegations of third force activity reached a crescendo in the wake of the Boipatong massacre in June 1992. The TRC did not, however, undertake detailed investigations into all allegations of security force complicity, as it relied on a number of reports submitted to it by monitoring groups who went into Boipatong after the massacre. It thus based its report only on the testimony received.<sup>140</sup>



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<sup>138</sup> TRC Report, vol. 6, p. 588; Brahm E (2004: The operation of truth commissions).

<sup>139</sup> Van Der Merwe H (1999: 208).

<sup>140</sup> TRC Report, vol. 6, p. 585.

### **Chapter 3.2: Reconciliation**

The TRC was established by the Promotion of National Unity and Reconciliation Act (hereafter TRC Act)<sup>141</sup> which grew out of the Interim Constitution (hereafter IC).<sup>142</sup> The IC did refer to reconciliation, but did not, however, explain what should be achieved through reconciliation. The provisions found in the IC epitomized the promulgation of a model for achieving reconciliation, but did not define the core-concept.<sup>143</sup>

The TRC Act required the TRC to promote national unity and reconciliation.<sup>144</sup> It should be noted that the South African TRC was initially mooted only as a truth commission. However, the notion of national unity and reconciliation was only later added. This was largely done to address the perception of the non-liberation movements that a witch-hunt would follow.<sup>145</sup> The TRC Act did not define what reconciliation meant. It did not specify which activities would contribute towards the process of reconciliation. It did not identify the parties that were to be reconciled. It did not establish a committee or unit for the purpose of reconciliation; or offer guideposts or indicators to evaluate the contribution of the TRC to reconciliation.<sup>146</sup>

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<sup>141</sup> Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>142</sup> The Interim Constitution, Act 200 of 1993.

<sup>143</sup> Borer T (2004: 28).

<sup>144</sup> Promotion of National Unity and Reconciliation Act, s 3 (1); Simpson G (1998: Introduction).

<sup>145</sup> Fullard M and Rousseau N (2008: 217).

<sup>146</sup> Chapman A (2009: 46); See Promotion of National Unity and Reconciliation Act, s 3.

### **3.2.1 How did the TRC interpret its mandate? Did it promote reconciliation?**

The following questions will be examined in this regard:

- a) How did the TRC interpret its mandate, and who should be reconciled?
- b) How did individual commissioners of the TRC interpret 'reconciliation' during the Public Hearings?<sup>147</sup>
- c) What effect did the amnesty proceedings have on reconciliation?

### **3.2.2 How did the TRC interpret its mandate? Who should be reconciled?**

Reconciliation was not clearly defined in the TRC's mandate. It was therefore, left to its own devices to wrestle with both the definition of the term and how to structure its work to best facilitate it.<sup>148</sup> The TRC acknowledged in its report that the interpretation of reconciliation was highly contested.<sup>149</sup>

The TRC referred (during its work) to reconciliation as both a process and a goal.<sup>150</sup> It further referred to four levels of reconciliation, namely: coming to terms with the painful truth; reconciliation between victims and perpetrators; reconciliation at a community level; and promoting national unity and reconciliation.<sup>151</sup> The first level of reconciliation concerned closure for both the victim and the perpetrator. The second level concerned forgiveness<sup>152</sup> and healing between the victim and perpetrator. The third level of reconciliation concerned community reconciliation.<sup>153</sup> Finally, the fourth level of

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<sup>147</sup> Chapman A (2008: 47).

<sup>148</sup> Borer T (2004: 28).

<sup>149</sup> TRC Report, vol. 1, p. 106.

<sup>150</sup> See Brahm E (2004: Strengths and weaknesses of truth commissions).

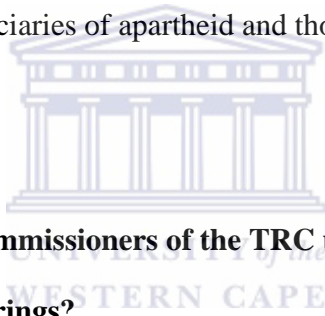
<sup>151</sup> TRC Report, vol. 1, p. 106 ff.

<sup>152</sup> See Simpson G (1998: Listening to the voices of victims); See also McGregor L (2001:37).

<sup>153</sup> See van der Merwe H (199: 371).

reconciliation concerned reconciliation between those who benefited from the past and those who continue to be disadvantaged<sup>154</sup> by past discrimination.<sup>155</sup>

The TRC's recommended that multi-layered healing of human relationships was required in post-apartheid South Africa. These include the relationship of individuals with themselves; the relationship between victims; the relationship between survivors and perpetrators; the relationship within families, the relationship between neighbours, communities and within communities; the relationship within different institutions; the relationships between different generations; the relationships between racial and ethnic groups; the relationship between workers and management and; above all, the relationship between the beneficiaries of apartheid and those who have been disadvantaged by it.<sup>156</sup>



### **3.2.3 How did individual commissioners of the TRC understand reconciliation during the Public Hearings?**

The TRC acknowledged that it had a particular difficulty of understanding the meaning of unity and reconciliation at a national level. The views of members of the TRC ranged from the politico-judicial approaches to explicitly religious approaches to reconciliation. These approaches are fairly different. It should be noted that there was no attempt made by the TRC to integrate or harmonise the different conceptions of reconciliation.<sup>157</sup> Some of the commissioners spoke of reconciliation, but were unclear when assigning

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<sup>154</sup> Athimoolam L (2003: 4 ff).

<sup>155</sup> TRC Report, vol. 1, p. 108.

<sup>156</sup> TRC Report, vol. 5 p. 350 f.

<sup>157</sup> Chapman A (2008: 47).

responsibility.<sup>158</sup> Others focused on individual reconciliation; and, yet, others focused on national unity and reconciliation.<sup>159</sup>

### **3.2.4 What effect did the amnesty proceedings have on reconciliation?**

The TRC was mandated to promote national unity and reconciliation.<sup>160</sup> One of the ways in which the TRC had to do this was by facilitating the granting of amnesty.<sup>161</sup> This was done by the Amnesty Committee (AC). One of the striking features of the AC was that it had powers of implementation.<sup>162</sup> Three requirements were needed for a successful amnesty application: the application should have complied with the requirements of the Act; it should have been in relation to an act associated with a political objective; and the applicant should have made full disclosure of all the relevant facts associated with the act in question.<sup>163</sup> Once these requirements were met, the AC could grant amnesty to that person in relation to the act, omission or offence for which amnesty was applied for.<sup>164</sup> Martin Coetzee<sup>165</sup> says that the AC was the subject of intensive scrutiny and criticism from the very start. Even though the Amnesty Committee was a creature of statute and the result of a negotiated settlement, its task was seen to stand in contradiction to work of the other TRC committees.<sup>166</sup> The Human Rights Violations Committee (hereafter HRVC) devoted much of its time and energy to the acknowledgment of the painful

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<sup>158</sup> See Chapman A (2008: 48).

<sup>159</sup> Chapman A (2008: 47).

<sup>160</sup> Promotion of National Unity and Reconciliation Act, s 3 (1).

<sup>161</sup> Promotion of National Unity and Reconciliation Act, s 3 (1) (b); See Simpson G (1998: Introduction).

<sup>162</sup> See Promotion of National Unity and Reconciliation Act, chapter 4.

<sup>163</sup> Promotion of National Unity and Reconciliation Act, s 20 (1).

<sup>164</sup> See International Human Rights Clinic (2008: 52).

<sup>165</sup> Martin Coetzee was the Executive Secretary of the Amnesty Committee.

<sup>166</sup> Coetzee M (2003: 181).

experiences of victims of gross violations of human rights. However, the AC freed many of these perpetrators.<sup>167</sup>



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<sup>167</sup> Coetzee M (2003: 181); Promotion of National Unity and Reconciliation Act, chapter 4.



### Chapter 3.3: The South African TRC and Reparations

Since the 1980's, reparations have become a key element of democratic transitions. Many countries around the world have, to date, implemented reparation programmes through truth commissions. There is also an international obligation upon States to provide effective remedies for violations of fundamental human rights. These instruments include the 1948 Universal Declaration of Human Rights<sup>168</sup> and many other international legal conventions, covenants, declarations, and regional instruments.<sup>169</sup>

Reparations are one of the main means by which truth commissions seek to achieve national and individual reconciliation.<sup>170</sup> In South Africa, however, the issue of reparations was initially legislated in the Interim Constitution<sup>171</sup> which provided that the violent effects of apartheid should be addressed on the basis of understanding, reparations and *ubuntu*.<sup>172</sup> When the Final Constitution<sup>173</sup> was enacted on December 10 1996, there was no direct mention made of reparations. However, schedule 6 of the Final Constitution provides that the provisions relating to amnesty contained in the Interim Constitution are deemed to be part of the Final Constitution for purposes of the Promotion of National Unity and Reconciliation Act (hereafter TRC Act). The TRC Act thus provided for the establishment of a Reparations and Rehabilitations Committee (hereafter RRC) which was tasked with dealing with matters regarding reparations.<sup>174</sup>

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<sup>168</sup> United Nations General Assembly Resolution 217.

<sup>169</sup> Colvin C (2008: 178).

<sup>170</sup> Hamber B and Wilson R (2002: The meaning of reparations and acknowledgement).

<sup>171</sup> Interim Constitution Act 200 of 1993.

<sup>172</sup> Colvin C (2008: 178 f); Interim Constitution Act 200 of 1993, Postamble.

<sup>173</sup> Constitution of South Africa Act 108 of 1996.

<sup>174</sup> Promotion of National Unity and Reconciliation Act, s 3 (c).

### 3.3.1 The Reparations and Rehabilitation Committee (RRC)

The RRC consisted of a chairperson, a vice chairperson and five other members. The TRC Act required its members to be suitably qualified, South African citizens, and broadly representative of the South African community.<sup>175</sup> The nationality requirement was akin to that of Argentina, as it too opted to constitute its members of its nationals.<sup>176</sup>

The RRC was mandated to design and put forward recommendations (based on the findings of the AC and HRVC) for a reparation policy.<sup>177</sup> It had to make recommendations to the President for both an urgent interim reparations policy (hereafter UIRP) and final reparations policy (hereafter FRP).<sup>178</sup>

The UIRP recommendations had to be made during the life of the TRC and the FRP recommendations had to be included in its final report. It could also make recommendations with regard to the creation of institutions that are conducive to a stable and fair society. Furthermore, it could recommend institutional, administrative, and legislative measures which would prevent human rights abuses.<sup>179</sup> The recommendations had to be handed over to the President. The President had to then consider the recommendations; and make his own recommendations to parliament. The joint houses of parliament had to then consider the Presidential recommendations and formulate its own recommendations. The recommendations (of the joint houses of parliament) had to then

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<sup>175</sup> See Promotion of National Unity and Reconciliation Act, s 24 (3).

<sup>176</sup> Hayner P (2006: 308).

<sup>177</sup> Promotion of National Unity and Reconciliation Act, s 3 (3) (d); Freeman M and Hayner P (2001: 140); South African History Online (2010: TRC); Leseka M (2000: Chapter 2).

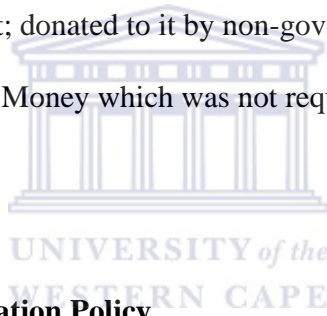
<sup>178</sup> Leseka M (2000: Chapter 2); See Campbell P (2000: 48).

<sup>179</sup> Promotion of National Unity and Reconciliation Act, s 4 (h); Colvin C (2008: 182).

be debated in parliament and approved in the form of a Parliamentary Resolution. The President had to then enact the resolution. The recommendations would then be the basis upon which reparations were granted.<sup>180</sup>

### **3.3.2 The President's Fund<sup>181</sup>**

Section 42 of the TRC Act provided for the creation of a fund<sup>182</sup> (President's Fund) that would hold, and later disburse, any funds that have been made available to victims as reparations. This fund had to be administered by officers in the public service (who were designated by the Minister of Justice). The fund had to contain all the monies appropriated to it by Parliament; donated to it by non-governmental sources; and that accrued to it from investments. Money which was not required for immediate use may have been invested.<sup>183</sup>



### **3.3.3 Urgent Interim Reparation Policy**

In 1996 (after the AZAPO<sup>184</sup> case) the RRC got down to its work. Its two principle mandates were to make determinations on applications for reparations, and formulate recommendations for urgent interim reparations (hereafter UIR) and final reparations (hereafter FR). It, however, took on a further responsibility of implementing the UIR program. The latter responsibility was not provided for in the TRC Act.<sup>185</sup>

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<sup>180</sup> Colvin C (2008: 183); See Leseka M (2000: Chapter 2).

<sup>181</sup> See Amnesty International and Human Rights Watch (2003: 9 f).

<sup>182</sup> Promotion of National Unity and Reconciliation Act, s 42.

<sup>183</sup> Promotion of National Unity and Reconciliation Act, s 42; Colvin C (2008: 182); See Khulumani Support Group (2007: Charter for Redress).

<sup>184</sup> *Azapo v President of the Republic of South Africa*.

<sup>185</sup> Colvin C (2008: 187).

The first task undertaken by the RRC was to complete its recommendations for the UIR. However, it was only empowered to recommend policy to the government. The RRC considered: terminally ill victims; victims who had no fixed homes or shelter; victims who were orphaned as a result of the violation; victims whose physical impairments markedly affect their social functioning; and victims requiring special education of mental or physical disability; as especially urgent applicants.<sup>186</sup>

The UIR payments were calculated based on the need and number of dependants the victim supported. Applicants with no dependants were eligible for a payment up to R2, 000. If the applicant had one dependant, he/she would be eligible for a payment up to R2, 900. If the applicant had two dependants, he/she would be eligible for a payment up to R3, 750. If the applicant had three dependants, he/she would be eligible for a payment up to R4, 530. If the applicant had four dependants, he/she would be eligible for a payment up to R5, 205. If the applicant had five or more dependants, he/she would be eligible for a payment up to R5, 705.<sup>187</sup>

These recommendations were handed over to the President in September 1996.<sup>188</sup> The Regulations, however, were only promulgated in April 1998. The first payments were made in July 1998<sup>189</sup>, as the TRC was ending its work.<sup>190</sup> The work of the RRC (with

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<sup>186</sup> Colvin C (2008: 188 f); Leseka M (2000: Chapter 2); See Amnesty International and Human Rights Watch (2003: 9 f).

<sup>187</sup> Colvin C (2008: 188 f); Leseka M (2000: Chapter 2); See Amnesty International and Human Rights Watch (2003: 9 f).

<sup>188</sup> Colvin C (2008: 182).

<sup>189</sup> Amnesty International and Human Rights Watch (2003: 9).

<sup>190</sup> Colvin C (2008: 182).

regard to the UIR) was completed in 2001. R44, 000, 000 was paid out to 14 000 victims in the form of cash payments which ranged between R 2, 000 to R 5, 600.<sup>191</sup>

It should be noted that most of the victims who received the UIR payments were pleased with the payments. However, they all agreed that the amounts that they received made little material difference in their lives. The victims' understanding of what the purpose of the reparations was differed significantly. Some held the view that it was symbolic gestures of acknowledgment. Others saw the payments as inadequate, and consequently fell even more alienated from the TRC's mission of forgiveness and reconciliation.<sup>192</sup>

None of them, however, saw it as blood money used to buy their silence in the face of amnesties that dishonoured the dead. The latter issue was quite problematic with other reparations programmes.<sup>193</sup>

Those who were denied the payment became jealous and mad. Those who received payment reported an increase in family and community conflicts. It should be noted that the money received by the victims was used for essentials, tombstones, and or memorial celebrations for those who had died in the struggle.<sup>194</sup>

#### **3.3.4 Final Reparation Policy**

The RRC was also tasked with drafting the final reparations policy (hereafter FRP) which would be handed over to the President. The RRC had difficulty in understanding what was meant by reparations by only looking at the TRC Act. It, therefore, turned to

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<sup>191</sup> Colvin C (2008: 188 f); Leseka M (2000: Chapter 2); See Amnesty International and Human Rights Watch (2003: 9 f).

<sup>192</sup> Karen Brounéus (2007: 6).

<sup>193</sup> Colvin C (2008: 189).

<sup>194</sup> Colvin C (2008: 189 f); See TRC Report, vol. 6, p. 166.

international literature on reparations and to the South African community in order to derive a working definition.<sup>195</sup> The RRC consequently derived its working definition of reparations from common international definitions of reparations. The definition was based on redress, restitution, rehabilitation, restoration of dignity, and re-assurance of non-recurrence.<sup>196</sup> It also held a series of public hearings to open up the debate with regard to the final reparations policy. It subsequently held a national consultative process with individual victims, victim advocacy groups, churches, NGO's, civil society and human rights organisations. It did this in order to refine and develop a policy around final reparations.<sup>197</sup>

When the victims were asked (in private) as to what their primary needs were, the majority of them saw money or compensation as their primary priority and need. The secondary need was for investigations into the violations they have suffered.<sup>198</sup>

The most enduring issue in the reparations debate was symbolic versus financial reparations.<sup>199</sup> Most victims asked for money, and most non-victims were reluctant to equate reparations with cash. The RRC was initially reluctant to recommend any form of financial reparations as it held that there was a greater need for symbolic and collective reparation. However, it later integrated financial reparations as a central part of its policy recommendations.<sup>200</sup>

There was also much public debate as to whether the reparations should be in straight monetary payments, or whether service packages would be more appropriate.

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<sup>195</sup> See Naidu E (2004: Methodology).

<sup>196</sup> See Naidu E (2004: Background).

<sup>197</sup> Colvin C (2008: 189 f).

<sup>198</sup> Colvin C (2008: 191).

<sup>199</sup> Amnesty International and Human Rights Watch (2003: 9).

<sup>200</sup> Colvin C (2008: 191); Hamber B (2000: 221); See Amnesty International and Human Rights Watch (2003: 9 f).

Other debates surrounded the issue of sustainability. Khumbula<sup>201</sup>, a victim support group, argued that reparations should be accompanied by financial planning and legal protection, in order to protect victims from those who might attempt to defraud the victims. The Cape Town NGO's had a different view. It saw this as irrelevant patronising. It held the view that the reparations were symbolic in nature, and not meant to be a victim's means of support. The RRC ultimately decided to recommend financial payments called individual reparation grants. With regard to the formula for calculating the value of the grants, the RRC recommended that no distinction should be made based on the severity of violation inflicted upon the victim, and the victim's present financial status.<sup>202</sup>

In October 1998, the TRC handed over its interim<sup>203</sup> final report to the President.<sup>204</sup> The RRC's recommendations appear in Volume 5, Chapter 5 of the report. The recommendations were summarised in the final two volumes of the final report which were released in March 2003.<sup>205</sup>

The policy provided for two reasons why reparations were needed. It provided that there could be no healing without adequate reparation and rehabilitation measures. The second reason provided by the policy was that reparations were necessary to counterbalance amnesty.<sup>206</sup> It further emphasised South Africa's international obligation to provide victims of human rights abuses with fair and adequate compensation.<sup>207</sup> The report

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<sup>201</sup> Khumbula was launched in 1998 as a non-governmental organisation that aimed to address the conditions of ex-combatants after the liberation struggle. See Naidu E (2004: Finding a Place in History).

<sup>202</sup> Colvin C (2008: 192); See Amnesty International and Human Rights Watch (2003: 8 f).

<sup>203</sup> The report was an interim report as the work of the amnesty committee was still continuing. The final two volumes of the TRC final Report was released in March 2003.

<sup>204</sup> Amnesty International and Human Rights Watch (2003: 9).

<sup>205</sup> Colvin C (2008: 193).

<sup>206</sup> Amnesty International and Human Rights Watch (2003: 8); TRC Report, vol. 5, p. 170.

<sup>207</sup> United Nations General Assembly Resolution 217.

provides that the compensation should be substantial. It further provides that reparations are a moral requirement of the transition out of apartheid, and it links reparations to the moral integrity of the TRC process. It recommended that the implementation of reparations should be development centred, simple and effective, culturally appropriate, and community based. It should promote healing and reconciliation.<sup>208</sup>

### **3.3.5 Principles that guided the development of the RRC's reparations and rehabilitation policy**

It should be noted that there were five principles that guided the development of the RRC's reparations and rehabilitation policy. These principles include: urgent interim reparations, individual reparations grants, symbolic reparations, community rehabilitation, and institutional reform.<sup>209</sup> The position with regard to urgent reparation grants has already been discussed under 3.3.3. The TRC also recommended that the different forms of reparations should complement each other.<sup>210</sup>

Individual reparations grants were recommended in the TRC's final report. It was based on the median annual household income in 1997 for a family of five in South Africa.<sup>211</sup> It comprised three components which included: the acknowledgment of suffering (50%); access to services (25%); and daily living costs (25%).<sup>212</sup>

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<sup>208</sup> TRC Report, vol. 5, p. 172 ff.

<sup>209</sup> Naidu E (2004: Background); TRC, vol. 5, p. 184 ff.

<sup>210</sup> Naidu E (2004: Background).

<sup>211</sup> Amnesty International and Human Rights Watch (2003: 9).

<sup>212</sup> TRC Report, vol. 5, p.184 ff.



Symbolic reparations were designed to facilitate the restoration of dignity of the victims. The reparations included individual interventions, community interventions and national interventions.<sup>213</sup>

Community rehabilitation focused on special types of reparations for communities. The RRC recommended that the measures should be integrated in the broader attempt to transform services in South Africa.<sup>214</sup>

The RRC was also mandated to make recommendations that would help prevent the recurrence of human rights violations. In this regard, the RRC recommended that the measures and programmes outlined in the chapter on recommendations<sup>215</sup> should become part of the operational plans and ethos of a wide range of sectors in society (i.e. institutional reform).<sup>216</sup>



### **3.3.6 Implementation Process**

It should be noted that the RRC's recommendations also included plans for the implementation process. It suggested that a structure should be developed in the office of the President. It should have a secretariat and a fixed life-span. Its function was to oversee the implementation of the reparation and rehabilitation policy proposals and recommendations.<sup>217</sup>

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<sup>213</sup> TRC Report, vol. 5, p. 188 ff.

<sup>214</sup> TRC Report, vol. 5, p. 190 ff; See Naidu E (2004: Background).

<sup>215</sup> TRC Report, vol. 5, p. 304 ff.

<sup>216</sup> TRC Report, vol. 5, p.194 ff.

<sup>217</sup> TRC Report, vol.5, p. 312; See Naidu E (2004: Background).

The recommendations made by the RRC did not give much guidance with regard to the RRC's understanding of the potential economic burdens of its recommendations. Its recommendations generally comprised simple lists of possible reparative measures.<sup>218</sup>

The government allocated R30, 000 to each victim as a one-time payment. At R30, 000 a victim, the total expenditure with regard to victims amounted to approximately R660, 000, 000.<sup>219</sup> The RRC's recommendations also included several schemes for financing the reparations. These included: wealth tax (which has been ruled out by government)<sup>220</sup>; once-off levies; retrospective surcharges; one off donations; surcharge on golden handshakes.<sup>221</sup> These ideas were also offered as part of broader macro-economic policies that would support reconstruction and development. It should be noted that the victims acted quite negatively to the R30, 000 individual grants. Many victim organisations insisted that a once-off payment of a token amount was not acceptable.<sup>222</sup>

### **3.3.7 Interaction between government and victims**

It should also be noted that no meaningful conversation has taken place between the government and representatives of victims or civil society. The then Minister of Justice, Maduna, said that the government was under no obligation to consult with victims during any point of the process. Since dialogue seemed unlikely to produce the desired results, the victims decided to turn to legal activism in their case against the government.

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<sup>218</sup> Colvin C (2008: 193 ff); See Leseke M (2000: Conclusion).

<sup>219</sup> Colvin C (2008: 197 f).

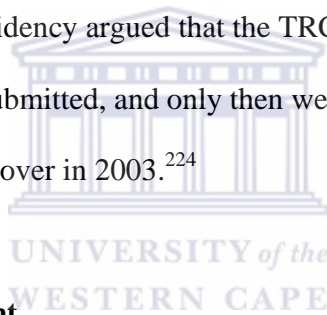
<sup>220</sup> See Valji N (2003: Apology without reparation).

<sup>221</sup> TRC Report, vol. 5, p. 318; See Hamber B and Wilson R (2000: Revenge and punishment as forms of closure).

<sup>222</sup> Colvin C (2008: 199 f).

However, they lacked the legal knowledge with regard to which options were available. They also lacked resources to pursue these options. However, with the aid of legal aid organisations, there were some legal initiatives that took place in this regard. An example of such an initiative would be where the Khulumani (victim support group) filed a suite under the terms of the Access to Information Act in order to access the governments draft policy on reparations.<sup>223</sup>

The reason given by government (after the handing over of the interim final report, and before the handing over of the final two volumes of the final report) for the delay in taking the reparations process further, is that the TRC's AC has not finished its work. The Department of Justice and Presidency argued that the TRC was not officially and legally over until its final report was submitted, and only then were they able to take the process further. The report was handed over in 2003.<sup>224</sup>



### **3.3.8 Final one-time payment**

In 2003 the South African government decided to provide victims with a one-time payment of R30, 000. It further stated that community reparations and assistance would be made available with the remaining funds in the President's Fund.<sup>225</sup>

### **3.3.9 Court Cases before and after the submission of the TRC's interim final report**

The TRC saw it as vital to grant an 'acceptable' form of reparations. This is due to the amnesty provisions found in the TRC Act, which preclude victims of human rights

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<sup>223</sup> Amnesty International and Human Rights Watch (2003: 9 f).

<sup>224</sup> Colvin C (2008: 199 ff).

<sup>225</sup> Naidu E (2004: Background).

abuses from initiating civil claims against persons who had been granted amnesty.<sup>226</sup> In the AZAPO case, the validity of the amnesty provision s 20 (7) of the TRC Act was challenged on constitutional grounds. Section 20 (7) provides that a person who had been granted amnesty may not be held liable criminally or civilly liable with regard to that act. The court held that the provision is constitutional, but there is however, a need for a reparation programme to be put in place for the victims of human rights abuses.<sup>227</sup> The decision was based on the reasoning that the TRC Act obliges the government, and not civilian entities, to give reparations.<sup>228</sup>

In 2002, while the victims were waiting for the final government reparations policy, a claim was filed in New York by the South African Khulumani Victim Group via the Alien Tort Claims Act (hereafter ATCA).<sup>229</sup> The claim was filed against corporations who it alleged aided and abetted the Apartheid State.<sup>230</sup> The defendants, however, appealed to dismiss the actions.<sup>231</sup> In 2003, the South African government decided to provide victims with a one-time payment of R30, 000. It also intended to provide community reparations and assistance through opportunities.<sup>232</sup> The reparations payouts began in November 2003.<sup>233</sup> The South African government then submitted an *ex parte* declaration to the court stating that the suite was interfering with its sovereign interests. On 29 November 2004, Judge Sprizzo in the Southern District Court granted the

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<sup>226</sup> Leseka M (2000: Chapter 2).

<sup>227</sup> South African History Online (2010: Truth and Reconciliation Commission); Coetzee M (2003: 181).

<sup>228</sup> Leseka M (2000: Chapter 2).

<sup>229</sup> Colvin C (2008: 208).

<sup>230</sup> Humphrey M (2008: 8).

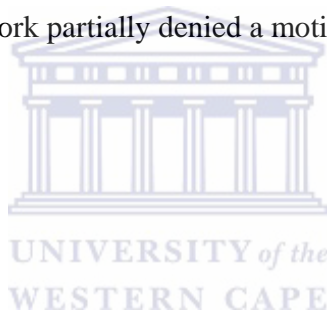
<sup>231</sup> The Hague Justice Portal (2009: South African Apartheid Litigation).

<sup>232</sup> Colvin C (2008: 209).

<sup>233</sup> Colvin C (2008: 209 f).

defendants' motion to dismiss the case in full on grounds that aiding and abetting liability is not available under the Alien Tort Claims Act (hereafter ATCA).<sup>234</sup>

On 12 October 2007, the plaintiffs appealed to the Second Circuit Court of Appeals. The Appeal Court ruled by majority that the District Court erred in its decision, and that the plaintiffs could plead a theory of aiding and abetting under the ATCA. On 12 May 2008, the case was taken to the United States Supreme Court. The case was not heard due to the court lacking a quorum to hear the case.<sup>235</sup> Five of the nine judges recused themselves as they have financial interests in some of the defendant companies. The case would only be heard in 2012 when the court has a quorum. On 9 April 2009, the US District Court for the Southern District of New York partially denied a motion by the defendants to dismiss the claim.<sup>236</sup>



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<sup>234</sup> The Hague Justice Portal (2009: South African Apartheid Litigation).

<sup>235</sup> The Hague Justice Portal (2009: South African Apartheid Litigation).

<sup>236</sup> The Hague Justice Portal (2009: South African Apartheid Litigation).

## **Chapter 4: Developments after the TRC with regard to prosecutions**

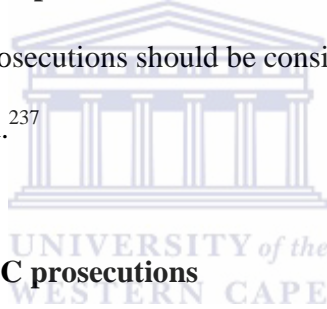
This chapter examines post-TRC developments with regard to prosecutions.

The following aspects will be looked at:

- 1) Special Units for Post-TRC Prosecutions
- 2) Prosecution of Political Crimes after the TRC
- 3) Political situation in South Africa
- 4) Possible way forward

### **4.1 The history of TRC-related prosecutions in South Africa**

The TRC recommended that prosecutions should be considered where amnesty had not been sought or had been denied.<sup>237</sup>



### **4.2 Special Units for post-TRC prosecutions**

The Goldstone Commission<sup>238</sup> completed its work regarding public violence and intimidation in 1993/1994. At this point in time, the Government assigned the task of investigating human rights abuses relating to conflicts of the past to Dr. Jan D'Oliveira, who was the then Attorney General of Pretoria. The South African Police Services were then seconded to his offices to undertake investigations with regard to these human rights abuses.<sup>239</sup>

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<sup>237</sup> TRC Report, vol. 5, p. 311.

<sup>238</sup> This commission was officially called: The Commission of Enquiry regarding Public Violence and Intimidation.

<sup>239</sup> Fernandez L (2006: 65); Bubenzer O (2009: 23 f).

### 4.3 Prosecutions by Special Units (1998-2003)

In 1998 all the dockets with D'Oliveira Unit in respect of which no prosecutions had taken place were transferred to the then newly-established offices of the National Prosecuting Authority (hereafter NPA) in Pretoria.<sup>240</sup> The then National Director of Public Prosecutions was Bulelani Ngcuka.<sup>241</sup> In 1999, a working group called the Human Rights Investigative Unit (HRIU) was established within the NPA on the initiative of Dullah Omar<sup>242</sup>. The Unit was headed by Vincent Saldanha.<sup>243</sup> It was mandated to review, investigate and possibly prosecute cases falling within the ambit of the TRC Act for which amnesty was denied, or where it was not applied for.<sup>244</sup> It had to continue the work of the D'Oliveira Unit. Its work continued until 2000. However, no court proceedings were instituted during its tenure.<sup>245</sup> In the year 2000, the dockets were transferred to the Directorate of Special Operations (hereafter DSO), better known as the Scorpions.<sup>246</sup> The working group, within the Scorpions, to which the TRC cases were allocated, was known as the Special National Projects Unit, which was headed by Advocate Chris Macadam. The work of this Unit continued until 2003, however, no court proceedings were instituted during its tenure as well.<sup>247</sup>

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<sup>240</sup> Fernandez L (2006: 65).

<sup>241</sup> Bubenzer O (2009: 24).

<sup>242</sup> Dullah Omar was the Minister of Justice at that time.

<sup>243</sup> Bubenzer O (2009: 24 f).

<sup>244</sup> This was said by the head of the HRIU in an interview between him and Bubenzer. See Bubenzer O (2009: 24).

<sup>245</sup> Bubenzer O (2009: 26).

<sup>246</sup> Fernandez L (2006: 66).

<sup>247</sup> Bubenzer O (2009: 26).

#### 4.4 Special Units after 2003

The Final Report of the TRC was presented to the President<sup>248</sup> on 21 March 2003.<sup>249</sup> The President then had two months in which to table the report in Parliament.<sup>250</sup> On the 24 of March 2003, Advocate Anton Ackerman was appointed, by presidential proclamation, as Special Director of Public Prosecution<sup>251</sup> and head of the newly founded Priority Crimes Litigation Unit (hereafter PCLU).<sup>252</sup> According to the proclamation, the PCLU is responsible for managing and directing the prosecution of crimes dealt with in the Implementation of the Rome Statute of the International Criminal Court Act<sup>253</sup>, which includes acts of terrorism and sabotage, high treason, sedition, mercenary activities and other priority crimes to be determined by the National Director of Public Prosecutions (hereafter NDPP).<sup>254</sup> There was no mention made of TRC-related prosecutions in the proclamation.<sup>255</sup> However, at the inception of the PCLU, the NDPP declared that all TRC-related crimes, for which amnesty had been denied, were ‘priority crimes’ in the context of the proclamation. On 15 April 2003, the TRC Report was tabled before Parliament by President Thabo Mbeki.<sup>256</sup> President Mbeki stated during his speech that it was in the hands of the NDPP to institute prosecutions where it was appropriate.<sup>257</sup> TRC-related matters initially made up the main proportion of the PCLU’s work.<sup>258</sup>

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<sup>248</sup> The then President of the country was Thabo Mbeki.

<sup>249</sup> Bubenzer O (2009: 28); International Human Rights Clinic (2008: 40).

<sup>250</sup> See Promotion of National Unity and Reconciliation Act, s 44.

<sup>251</sup> According to s 13 (1) (c) of the NPA Act, the President May Appoint Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain special functions.

<sup>252</sup> Proclamation by the President of the RSA (2003).

<sup>253</sup> Implementation of the Rome Statute of the International Criminal Court Act No 27 of 2002.

<sup>254</sup> Proclamation by the President of the RSA (2003).

<sup>255</sup> Proclamation by the President of the RSA (2003).

<sup>256</sup> Bubenzer O (2009: 28 f); International Human Rights Clinic (2008: 40).

<sup>257</sup> Statement by President of RSA (2003).

<sup>258</sup> Bubenzer O (2009: 29).



#### 4.5 The Priority Crimes Litigation Unit

In 2006, the PCLU consisted of six prosecutors, headed by Anton Ackerman.<sup>259</sup> Ackerman then instituted an audit of all available cases, which resulted in 459 cases.<sup>260</sup> Of this number, 160 cases were immediately deemed not to warrant further proceedings. Only 16 cases were identified as worthy for prosecution, and at least three were prepared almost immediately for indictment. The list handed over by the TRC did not contribute significantly to the work of the PCLU, as most of the cases on the list had already been known by the D'Oliveira Unit, which handed over its dockets to the PCLU. By the end of 2006, the PCLU was working on 16 cases in total, of which five were considered to be of high priority and were prepared to an advanced stage. The PCLU's primary focus is on cases where amnesty had been denied. The secondary focus is on cases where amnesty was not applied for at all. Cases that involved the use of egregious violence; and which resulted in the death of more than one person are of a higher priority than those that were directed at non-human entities such as sabotage attacks of the liberation movement. It should be noted that the approach followed by the PCLU is solely dependent on the availability of evidence and the egregiousness of the crime.<sup>261</sup> The biggest obstacle facing the PCLU is the severe lack of resources<sup>262</sup>, as it is responsible for a range of other issues, apart from TRC-related matters. In comparison to the D'Oliveira Unit, the PCLU has much less resources. Where the D'Oliveira Unit had

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<sup>259</sup> Bubenzer O (2009: 29).

<sup>260</sup> National Prosecution Authority, Annual Report 2002/2003.

<sup>261</sup> Bubenzer O (2009: 29 f).

<sup>262</sup> See International Human Rights Clinic (2008: 42 f).

about 20 carefully selected, highly skilled and experienced investigators, the PCLU has to rely on the investigators of the South African Police (hereafter SAPS).<sup>263</sup>

#### **4.6 Prosecution of politically-motivated crimes after the TRC**

The following cases represent politically-motivated crimes that were committed between 1960 and 1994, and which potentially fell within the TRC's mandate. Eight cases will be looked at in this regard. The first four cases represent proceedings that were conducted and initiated by regional prosecution authorities independent of any central or special units in Pretoria. The second set of four cases contains descriptions of cases that were constituted and conducted by the PCLU.

##### **4.6.1 The Wouter Basson Case (Former member of the SADF)**

On 04 October 1999 Dr. Wouter Basson, who was a member of the South African Defence Force (hereafter SADF) was charged with 67 counts of offences committed during the 1980's.<sup>264</sup> 29 of these offences concerned murders.<sup>265</sup> Most of the indictments were connected to political objectives and were allegedly committed in the fight against the opposition movement's anti-apartheid struggle.<sup>266</sup> Basson failed to apply for amnesty; and the application deadline had already lapsed at the time the charges were laid.<sup>267</sup>

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<sup>263</sup> Bubenzer O (2009: 31 ff); International Human Rights Clinic (2008: 42 f).

<sup>264</sup> S. v Basson (CC) Case no. CCT 30/03 (10 March 2004) at para. 1.

<sup>265</sup> Bubenzer O (2009: 34).

<sup>266</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 192.

<sup>267</sup> Bubenzer O (2009: 34).

After an extensive and very costly trial, he was eventually acquitted on all charges by the trial judge, Mr Justice Hartzenberg, on 11 April 2002.<sup>268</sup> The failure to secure a conviction was mainly due to the fact that Hartzenberg rejected most of the evidence and witnesses that testified on behalf of the State as unconvincing and untrustworthy.<sup>269</sup> Three issues emerged during the trial which were of central relevance in the Appeal Court and the Constitutional Court litigations. There was an application made for the recusal of Judge Hartzenberg based on the claim that he was biased and could, therefore, not rule on the case objectively.<sup>270</sup> The judge, however, refused to recuse himself. There was an application made from the prosecutor to introduce records of a bail hearing with regard to the fraud charges. Hartzenberg ruled that the bail records were inadmissible.<sup>271</sup> The third issue was with regard to the acquitted charges which concerned cases of murder and attempted murder that took place beyond the borders of South Africa.<sup>272</sup> Since South African courts (according to the trial court) have no jurisdiction to try crimes which were committed abroad,<sup>273</sup> the prosecutors rather pursued convictions (for these acquitted charges) for Basson's participation in the 'conspiracy' that took place in South Africa based on section 18 (2) of the Riotous Assemblies Act.<sup>274</sup> Hartzenberg, however, held that conspiracies to commit crimes abroad were not covered by section 18 (2) of the Riotous Assemblies Act.<sup>275</sup>

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<sup>268</sup> S. v Wouter Basson (T) Case no. 32/1999 (11 April 2002), unreported. See Bubenzer O (2009: 35).

<sup>269</sup> Bubenzer O (2009: 36).

<sup>270</sup> S. v Basson (CC) Case no CCT 30/03 (10 March 2004) at para. 4.

<sup>271</sup> S. v Basson (CC) Case no CCT 30/03 (10 March 2004) at para. 4.

<sup>272</sup> S. v Basson (CC) Case no CCT 30/03 (10 March 2004) at para. 223.

<sup>273</sup> S. v Basson (CC) Case no CCT 30/03 (10 March 2004) at para. 223.

<sup>274</sup> Bubenzer O (2009: 36 f).

<sup>275</sup> S. v Basson 2000 (3) All SA 430 (T) at 444g; Riotous Assembly Act.

Immediately after the judgement was handed down, the State applied for the judgment to be reserved on certain questions of law<sup>276</sup> for consideration by the Supreme Court of Appeal.<sup>277</sup> The application concerned the above three issues. Hartzenberg, however, reserved the recusal and the bail record issues for the Supreme Court of Appeal; but refused to reserve the question of whether he erred in law concerning the quashing of the above-mentioned charges.<sup>278</sup> In June 2002, the NPA appealed against the judgment to the Supreme Court of Appeal. However, the application was seriously defective<sup>279</sup> and the court did, therefore, not even consider the merits of the legal questions.<sup>280</sup>

In mid 2003, the prosecutors applied for special leave to appeal against the judgement of the Supreme Court of Appeal, and for leave to appeal the judgement of the High Court directly, at the Constitutional court.<sup>281</sup> The application concerned the three central issues which had been before the Supreme Court of Appeal.<sup>282</sup> The applications regarding the recusal and the admissibility of the bail records were dismissed.<sup>283</sup>

The Court then examined whether the quashing of the charges in the trial court was based on a proper interpretation of section 18 (2) of the Riotous Assembly Act by looking at the main arguments of counsel and the State.<sup>284</sup> Counsel for the State argued that the s 47 Military Discipline Code criminalised certain conduct of SADF members even though these acts were committed beyond the borders of South Africa. It also argued that s 19 A of the Riotous Assemblies Act provided that it was applicable in South West Africa. It

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<sup>276</sup> This provision can be found under section 319 (1) of the Criminal Procedure Act.

<sup>277</sup> *S. v Basson* (CC) Case no CCT 30/03 09 (September 2004) at para. 8.

<sup>278</sup> *S. v Basson* 2002 JOL 9680 (T) at para. 19.

<sup>279</sup> The application was in serious violation of the Supreme Court of Appeals rules.

<sup>280</sup> *S. v Basson* (CC) Case no CCT 30/03 (10 March 2004) at para. 11.

<sup>281</sup> *S. v Basson* (CC) Case no. CCT 30/03 (10 March 2004) at para. 1.

<sup>282</sup> *S. v Basson* (CC) Case no. CCT 30/03 (9 September 2005) at para. 1.

<sup>283</sup> *Bubenzer O* (2009: 49).

<sup>284</sup> *S. v Basson* (CC) Case no. CCT 30/03 (9 September 2005) at para. 210.

finally argued that South African Courts have jurisdiction to try crimes that were committed abroad where there was a sufficient connection between the crime and South Africa.<sup>285</sup>

The Court held that according to s 47 of the Military Discipline Code SADF members who commit offences are criminally liable; even if the crimes were committed abroad. Persons who committed murders beyond the borders of South Africa's would, therefore, be liable for prosecution in both the military and the ordinary South African Courts.<sup>286</sup>

The Court then looked at the argument of the State with regard to the connection between the crime and South Africa. It held that the rule which provides that South African courts do not have jurisdiction over crimes that are committed abroad is not absolute.<sup>287</sup> It held that courts do have jurisdiction in instances where there is a real and substantial link between the crime and country in question.<sup>288</sup> It based its ruling on a Canadian Supreme Court decision.<sup>289</sup> The Court, therefore, ordered that the quashing of the charges be set aside.<sup>290</sup> The Constitutional Court held that the previously quashed indictment stands and that it was up to the State to charge Basson anew.<sup>291</sup> However, the NPA decided not to re-charge Basson as it would violate the double jeopardy rule, which would be an inescapable obstacle for a new indictment.<sup>292</sup>

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<sup>285</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 210.

<sup>286</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 214ff.

<sup>287</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 223 f.

<sup>288</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 228.

<sup>289</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 226.

<sup>290</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 265.

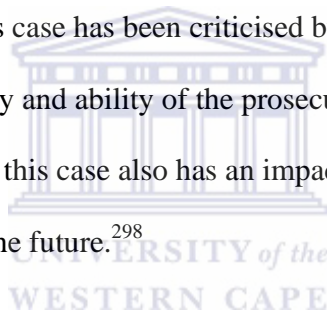
<sup>291</sup> S. v Basson (CC) Case no. CCT 30/03 (9 September 2005) at para. 260; See Menges W (2005: Dr. Death is off the hook in South Africa).

<sup>292</sup> Menges W (2005: Dr. Death is off the hook in South Africa).

#### **4.6.2 Mkosana and Gonya Case (Members of the former Ciskei Defence Force)**

Vakele Mkosana and Mzamide Gonya Mkosana were both charged with one count of murder and two counts of attempted murder in October 2001.<sup>293</sup> These charges were in relation to the Bisho Massacre (which occurred on 07 September 1992); and which was also one of the most serious and tragic political killings that occurred during the South African transition period.<sup>294</sup> Both accused made amnesty applications<sup>295</sup> which were subsequently refused in 2000 due to the absence of a political objective.<sup>296</sup>

On 3 March 2002, Judge White held that both accused were not guilty and were therefore acquitted on all charges.<sup>297</sup> This case has been criticised by many, including the NPA. It reflects critically on the capacity and ability of the prosecutorial arm of the criminal justice system. The outcome of this case also has an impact upon the State's willingness to prosecute similar crimes in the future.<sup>298</sup>



#### **4.6.3 The trial of Michael Luff (A former Policeman)**

In November 2001, Michael Luff was charged with murder in the Regional Court of Worcester in the Western Cape. Luff was accused of having shot William Dyasi in

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<sup>293</sup> International Human Rights Clinic (2008: 131); Bubenzer O (2009: 53); TRC Report, vol. 3, p. 143.

<sup>294</sup> TRC Report, vol. 3, p. 136 f; Bubenzer O (2009: 51).

<sup>295</sup> TRC Amnesty Applications AM/4458/ and AM/7882/97.

<sup>296</sup> TRC Amnesty Committee Decision number AC/2000/122.

<sup>297</sup> *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 95; International Human Rights Clinic (2008: 131).

<sup>298</sup> See Mallinder L (2009: 110).

1985.<sup>299</sup> Luff applied for amnesty with regard to this crime.<sup>300</sup> His application was, however, subsequently refused (in 2000) due to the lack of a political objective.<sup>301</sup>

In 2001, the case was resumed and went to trial. The prosecution proceeded without any involvement by the unit of TRC prosecutions in Pretoria. Luff was, however, acquitted in May 2002, by Magistrate Van Rensburg, as there was not sufficient proof to prove his guilt.<sup>302</sup> The victim's relatives found it difficult to accept that there was insufficient evidence, as Luff admitted to have killed Dyasi at the TRC hearings.<sup>303</sup>

#### **4.6.4 The Case of Tyani and Gumengu (Former members of the Transkei Homeland Security Police)**

In 2004, Tyani and Gumengu were each charged with having murdered Sithembele Zokwe on 8 August 1987.<sup>304</sup> In 1996, Aron Mtobeli Tyani and Pumelele Gumengu had applied for amnesty with regard to the murder.<sup>305</sup> The amnesty committee (in 2000) denied them amnesty for lack of 'full disclosure'.<sup>306</sup>

Tyani and Gumengu were found guilty of murder.<sup>307</sup> Both were sentenced to 25 years of imprisonment.<sup>308</sup>

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<sup>299</sup> Bubenzer O (2009: 58).

<sup>300</sup> TRC Amnesty Application AM 3814/96.

<sup>301</sup> TRC Amnesty Decision AC/2000/005.

<sup>302</sup> Bubenzer O (2009: 60); International Human Rights Clinic (2008: 131).

<sup>303</sup> Bubenzer O (2009: 60). See also section 31 (3) of the TRC Act for provision on self incriminating evidence.

<sup>304</sup> *S. v Tyani and Gumengu*, indictment. See Bubenzer O (2009: 60); See also See Mallinder L (2009: 110).

<sup>305</sup> TRC Amnesty Applications no. AM/3786/96 and AM/3610/96.

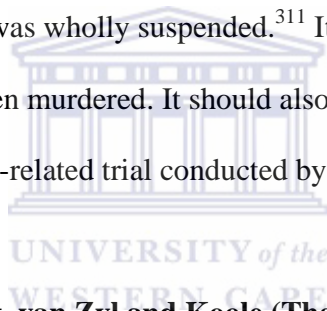
<sup>306</sup> TRC Amnesty Committee Decision no. AC/2000/042.

<sup>307</sup> *S. Tyani and Gumengu* (Transkei division) Case no. 76/2004, unreported, at para. 55. See Bubenzer O (2009: 62).

#### **4.6.5 The Eugene Terre' Blanche case (Former leader of the *Afrikaner Weerstandsbeweging*)**

Terre' Blanche was accused of various terrorist attacks during the 1990's which potentially fell into the TRC's mandate. Terre' Blanche, however, failed to apply for amnesty regarding these acts, but entered into a 'plea agreement' with the PCLU in terms of 105A of the Criminal Procedure Act.<sup>309</sup>

On 12 November 2003 Terre' Blanche pleaded guilty to five counts of terrorism in contravention of section 54 (1) (i) the Internal Security Act<sup>310</sup> and was sentenced to six years of imprisonment, which was wholly suspended.<sup>311</sup> It should be noted that Eugene Terre' Blanche has recently been murdered. It should also be noted that Eugene Terre' Blanche case was the first TRC-related trial conducted by the PCLU.<sup>312</sup>



#### **4.6.6 The case of Nieuwoudt, van Zyl and Koole (The PEBCO-Three Case)**

In 2004, Gideon Nieuwoudt (who died in 2005), Johannes Martin van Zyl, and Johannes Koole were each charged with three counts of abduction, assault and murder respectively.<sup>313</sup> They all, however, applied for amnesty with regard to these offences.<sup>314</sup> In 1999, all the applications were refused.<sup>315</sup> Nieuwoudt and van Zyl, however, made applications to review their refusal of amnesty in 2004. This occurred shortly after their

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<sup>308</sup> Bubenzer O (2009: 63); International Human Rights Clinic (2008: 131).

<sup>309</sup> Bubenzer O (2009: 64); Mallinder L (2009: 114).

<sup>310</sup> Internal Security Act 74 of 1982.

<sup>311</sup> Bubenzer O (2009: 64); Mallinder L (2009: 114).

<sup>312</sup> Bubenzer O (2009: 64); International Human Rights Clinic (2008: 131).

<sup>313</sup> Bubenzer O (2009: 67).

<sup>314</sup> TRC Amnesty Applications AM 3920/96; AM 5637/97; AM3748/96.

<sup>315</sup> TRC Amnesty Committee Decision AC/99/0223.



bail hearings.<sup>316</sup> If the review proceedings succeed; van Zyl would be freed from civil and criminal liability.<sup>317</sup> The proceedings against Koole are also affected by the review proceedings, as the charges will be tried jointly.<sup>318</sup>

The case at hand is similar to the proceedings of the Motherwell Four incident in which Nieuwoudt and two other policemen were convicted of murder 1996. The conviction was then immediately appealed to the Supreme Court of Appeal. An application for amnesty was also made with regard to the conviction in 1996. In this case the appeal proceeding was postponed pending a final decision on the question of amnesty. Amnesty was eventually denied to all the applicants in December 1999.<sup>319</sup> An application was then made in 2001 for a review of the amnesty refusal. The Supreme Court of Appeal held that the appeal litigation would remain pending until the review litigation has been concluded; as the amnesty application would only be disposed of once the review proceedings have been concluded.<sup>320</sup> In 2007, the (newly formed) amnesty committee decided to grant amnesty to du Toit and Ras, but refused amnesty to Nieuwoudt.<sup>321</sup> Nieuwoudt, however, died before the decision was handed down.<sup>322</sup>

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<sup>316</sup> Bubenzer O (2009: 68).

<sup>317</sup> Promotion of National Unity and Reconciliation Act s 20 (8).

<sup>318</sup> Bubenzer O (2009: 69); See Mallinder L (2009: 115 ff).

<sup>319</sup> TRC Amnesty Committee Decision AC/99/0345.

<sup>320</sup> Bubenzer O (2009: 70 f); See Mallinder L (2009: 115ff).

<sup>321</sup> Bubenzer O (2009: 71 f).

<sup>322</sup> See Mallinder L (2009: 115 ff).

#### **4.6.7 The Blani Case**

In October 2004, Buyile Roni Blani was tried for his involvement in the killing of two people in 1985. When the case was prosecuted in 1985, Blani had already managed to escape to exile in Angola. When Blani returned from exile in 1992, he failed to apply for amnesty.<sup>323</sup>

Ackerman came across Blani's docket and saw that the case was investigated fully and that the evidence was clear and compelling. In June 2004, Blani was arrested and then granted bail.<sup>324</sup> On 25 April 2005, Blani was convicted on all charges and sentenced to five years imprisonment, four of which were suspended for five years.<sup>325</sup>

#### **4.6.8 Kok, van der Merwe, Otto, van Staden and Smith (The attempted murder of Frank Chikane)**

In November 2004, the PCLU was ready to arrest three former officers of the South African security police (hereafter SAPS) on charges which related to the attempted murder of Frank Chikane in 1989.<sup>326</sup> The three former policemen were: former Major-General Christoffel Smith, Gert Otto and Johannes 'Manie' van Staden, who had to appear in court on charges of attempted murder. The accused persons did not, however, make use of the amnesty process.<sup>327</sup>

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<sup>323</sup> Bubenzer O (2009: 73 ff).

<sup>324</sup> Bubenzer O (2009: 73 ff).

<sup>325</sup> S. V Buyile Ronnie Blani (ECD) Case no. CC 81/2004 (25 April 2005), unreported. See Bubenzer O (2009: 75); See also Mallinder L (2009: 114).

<sup>326</sup> Bubenzer O (2009: 76); See Mallinder L (2009: 121).

<sup>327</sup> Bubenzer O (2009: 76 f).

After the accused were informed of their imminent arrests, the arrest warrants were withdrawn and the bail hearings were suspended.<sup>328</sup> It was reported that the decision was taken by senior members of the NPA. The ‘most likely scenario is that the NDPP, Bulelani Ngcuka, directed the PCLU to stop the proceedings.’<sup>329</sup> The official reason given by the NPA for the sudden reversal of the PCLU’s decision to prosecute was that it lacked guidelines for dealing with TRC-related prosecutions, and therefore specific guidelines were needed.<sup>330</sup> These events led to the imposition of the said moratorium on all TRC-related investigations in late November 2004.<sup>331</sup> The moratorium came to an end in January 2006, and only in early 2007 further developments on this case took place.<sup>332</sup>

In early 2007, the NPA informed the alleged three perpetrators that prosecutions would go ahead, and that it intended to focus on Adriaan Vlok and Johan van der Merwe as well.<sup>333</sup> In August 2007, Vlok, van der Merwe, Otto, van Staden and Smith were charged with one count of attempted murder, alternatively with the conspiracy to murder Chikane. In June 2007 a plea bargain was agreed upon. On 17 August 2007 the court had to rule on the plea bargain agreement, which it subsequently approved. The accused all pleaded guilty to the charge of attempted murder. Vlok and van der Merwe were sentenced by the Court to ten years imprisonment, wholly suspended for five years on the condition that they are not convicted of a similar crime. Otto, Smith and van Staden were sentenced to

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<sup>328</sup> Bubenzer O (2009: 77).

<sup>329</sup> Bubenzer O (2009: 77). See also section 22(1) and section 22(2) of the NPA Act. These provisions give wide powers to the NDPP.

<sup>330</sup> See Mallinder L (2009: 122).

<sup>331</sup> Bubenzer O (2009: 77).

<sup>332</sup> See Mallinder L (2009: 122 ff).

<sup>333</sup> See Mallinder L (2009: 121).

five years imprisonment, wholly suspended for five years on the condition that that they are not convicted of a similar crime.<sup>334</sup>

#### **4.7 The Politics behind TRC-related Prosecutions**

The success or failure of prosecutions is to a large degree dependant on the political support for such proceedings. Political factors clearly have major consequences for the overall process of criminal trials. Any assessment of post-TRC prosecutions, therefore, has to take account of the political context within which such trials find themselves.<sup>335</sup>

##### **The following points will be addressed:**

- 1) The governments approach in dealing with post-TRC prosecutions.
- 2) The moratorium imposed by the government.
- 3) The prosecution policy and directives.
- 4) The court case involving the declaring of the policy directives as invalid and unconstitutional.
- 5) Possible ways forward

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<sup>334</sup> Bubenzer O (2009: 79ff); Mallinder L (2009: 122).

<sup>335</sup> Bubenzer O (2008: 97).

#### 4.7.1 The governments approach in dealing with post-TRC prosecutions

It should be noted that the government rarely made public statements with regard to post-TRC prosecutions.<sup>336</sup> However, in 1998, the then President Nelson Mandela said that criminal trials should commence within a fixed time period that was realistic. The trials should be handled by the Office of the National Director of Public Prosecutions (hereafter NDPP). General amnesty should not be contemplated as it would undermine the culture of accountability.<sup>337</sup>

In 1999, the then President Thabo Mbeki indicated that a new amnesty law should be considered. He alluded to the fact that many people have not applied for amnesty; and if the search continues, many people would be arrested. He did not want people to be arrested for weeks on end with regard to crimes committed almost two decades back.<sup>338</sup>

In 2002, Mbeki pardoned 33 prisoners who were aligned to the ANC and PAC.<sup>339</sup> The majority of these prisoners were sentenced for politically related offences. Two-thirds of them had either been denied amnesty, or had not applied for amnesty at all.<sup>340</sup>

Later in 2002, at the ANC's national conference included discussions regarding guidelines for a broad national amnesty.<sup>341</sup> The presidency of the ANC declared that the

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<sup>336</sup> Bubenzer O (2008: 111).

<sup>337</sup> Opening address of President Mandela (1999: National Houses of Parliament).

<sup>338</sup> Klaaren J and Varney H (2003: 265).

<sup>339</sup> Ngesi S (2003: 294).

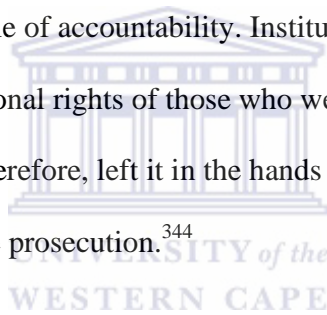
<sup>340</sup> Ngesi S (2003: 294).

<sup>341</sup> Bubenzer (2008: 112).

ANC was generally against the running of trials in the style of Nuremburg trials, as it would affect nation-building.<sup>342</sup>

It should be noted that consultations also took place between the government and the security forces during and after the TRC's operational period. The consultations led to an agreement that indemnity laws should be enacted.<sup>343</sup>

In 2003, the then President Mbeki tabled the TRC Report in parliament. He ruled out the possibility of a general amnesty as it would fly in the face of the TRC process, and severely undermine the principle of accountability. Instituting another amnesty process would also affect the constitutional rights of those who were on the receiving end of human rights violations. He, therefore, left it in the hands of the NDPP to pursue any cases that it believed to deserve prosecution.<sup>344</sup>



#### **4.7.2 The Moratorium imposed by government**

In November 2004, a moratorium was placed on all post-TRC cases pending the composition and approval of prosecution guidelines. This moratorium continued until January 2006 when the guidelines came into effect.<sup>345</sup> It should be noted that many cases prescribed during the moratorium period.<sup>346</sup>

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<sup>342</sup> Fernandez L (2006: 71); See Bubenzer O (2008: 113).

<sup>343</sup> Bubenzer O (2008: 113-128); See also Klaaren J and Varney H (2003: 265).

<sup>344</sup> Statement by President Mbeki (2003).

<sup>345</sup> Bubenzer (2008: 128 ff); International Human Rights Clinic (2008: 41 f).

<sup>346</sup> International Human Rights Clinic (2008: 41); See also Criminal Procedure Act, s 18.

### 4.7.3 The prosecution policy and directives

Section 179 (5) (a) and (b) of the Constitution and section 21 of the NPA Act, provides that the NDPP, with the concurrence of the Minister of Justice, has to determine and issue policy directives, which should be observed by the prosecutors in the prosecution process.<sup>347</sup> In January 2006, the NPA presented a set of guidelines to the public, which specifically concerned TRC-related prosecutions. The so-called (prosecution policy and directives relating to the prosecution of offences emanating from the conflicts of the past and which were committed before 11 May 1994) was an amendment of the general NPA prosecution policy.<sup>348</sup> The policy and directives gave prosecutors a wide discretion whether or not to initiate prosecutions. The purpose of the policy and directives were to guide the prosecutor's discretion by achieving a fair, transparent, consistent and predictable process. The policy and directives did not constitute a statute. It was, however, binding guidelines for prosecutors to follow when exercising their discretion. The policy amendment came into effect on 1 December 2005.<sup>349</sup>

The guidelines gave the prosecutor the power not to prosecute if certain conditions were met.<sup>350</sup> These guidelines were met with much criticism which included: that it amount to

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<sup>347</sup> The section reads:

(5) The National Director of Public Prosecutions

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process.

Section 21 of the NPA Act repeats this instruction.

<sup>348</sup> Prosecution Policy; International Human Rights Clinic (2008: 41 f).

<sup>349</sup> Bubenzer O (2008: 129).

<sup>350</sup> Prosecution Policy.

a replica of the TRC amnesty procedure<sup>351</sup>; that perpetrators were deliberately given a second chance to achieve impunity; that the process outlined in the guidelines lacked transparency; that it lacked victim involvement; that there was no consultation with victim organisations during its drafting stage; and that the PCLU lacks the resources to handle all of the possible cases.<sup>352</sup> It should also be noted that even though both the Constitution and the NPA Act require these guidelines to be drafted by the NDPP,<sup>353</sup> in the present case, the guidelines were entirely drafted by the government.<sup>354</sup> The criticisms led to a subsequent court case.<sup>355</sup>

#### **4.7.4 The court case regarding the constitutionality and validity of the prosecution policy**

Immediately after the amendments have entered into force, a number of human rights organisations requested of the government to set the guidelines aside.<sup>356</sup>

In July 2007, an application was launched at the Pretoria High Court against the amendment of prosecution policy.<sup>357</sup> The application sought a High Court order to suspend and stay the operation of the prosecution guidelines and to eventually declare the policy amendments to be unconstitutional, and therefore unlawful and invalid.<sup>358</sup>

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<sup>351</sup> Centre for the Study of Violence and Reconciliation (2009: NPA Prosecution Policy for Apartheid Crimes: State's application for leave to appeal dismissed).

<sup>352</sup> Bubenzer (2008: 139 f).

<sup>353</sup> See section 179 (5) (a) and (b) of the Constitution and section 21 of the NPA Act.

<sup>354</sup> Bubenzer O (2008: 129); See CSVr (2009: NPA Prosecution Policy for Apartheid Crimes: State's application for leave to appeal dismissed).

<sup>355</sup> Bubenzer O (2008: 129 f).

<sup>356</sup> Y. Sooka Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'. See Bubenzer (2008: 141).

<sup>357</sup> Bubenzer O (2008: 139 ff).

<sup>358</sup> Thembisile Nkadameng v NDPP, Notice of Motion, Case no. 32709/07 (TPD). See Bubenzer O (2008: 143).



On 12 December 2008, the High Court Judge Legodi declared the policy amendments inconsistent with the Constitution, unlawful and invalid and therefore suspended them.<sup>359</sup> The court held that the representations by perpetrators as envisaged by the policy amendment are not sanctioned by the Constitution.<sup>360</sup> Section 179 (5) (d) of the Constitution only provides for representations in cases where a decision to institute a prosecution has already been taken.<sup>361</sup> However, the court held that representations in terms of the amendments apply to persons who are still facing possible prosecution.<sup>362</sup> The Court held further that the representations in terms of the guidelines cannot be representation as required in terms of sections 105 A or section 204 of the Criminal Procedure Act, as both provisions apply only to situations where a prosecution has already been initiated.<sup>363</sup> The court held further that in terms of section 204 of the Criminal Procedure Act, indemnity is granted by a court and not by the NDPP.<sup>364</sup> The court, thus, labelled the amendments as a ‘recipe for conflict and absurdity’.<sup>365</sup> It also confirmed the position of the applicants in that it views the amended guidelines as a ‘copy of the TRC amnesty mechanism’.<sup>366</sup> It then held that there was a constitutional obligation on the NPA to prosecute.<sup>367</sup> It also held that the normal prosecution policy is sufficient to provide guidelines for the decision whether to prosecute or not.<sup>368</sup> Thus, the court declared the amendments to be unconstitutional. The NPA then lodged an appeal

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<sup>359</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 18.1.

<sup>360</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.3.1.1.

<sup>361</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.3.1.1.

<sup>362</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.3.1.2.

<sup>363</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.3.1.3.

<sup>364</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.3.1.4.

<sup>365</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.5.3.

<sup>366</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.14.3.

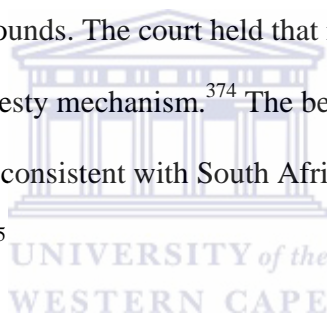
<sup>367</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.5.2.1.

<sup>368</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.4.

against the High Court ruling.<sup>369</sup> The appeal was, however, dismissed by Judge Legodi in the North Gauteng High Court in Pretoria on 04 May 2009.<sup>370</sup> Prosecutors are now obliged to prosecute cases arising from the conflicts of the past.<sup>371</sup>

#### **4.7.5 Possible way forward**

The NPA acknowledged that it lacks guidelines for dealing with TRC-related prosecutions. It should also be noted that it is almost impossible to attempt to prosecute all the crimes committed during the apartheid era.<sup>372</sup> It was for these reasons that the NPA attempted to amend its prosecutions policy.<sup>373</sup> However, the latter policy was challenged on constitutional grounds. The court held that it was unconstitutional due to it being a copy of the TRC's amnesty mechanism.<sup>374</sup> The best way forward now would be to find a strategy which is both consistent with South Africa's Constitution and the existing prosecution's policy.<sup>375</sup>



#### **Strategy**

Prosecutors should look at all the TRC-related cases where amnesty had been denied or not applied for at all.<sup>376</sup> From these cases, the NPA should then investigate which of the cases have sufficient evidence. Once this is established, it should assess all the cases

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<sup>369</sup> Bubenzer (2009: 147).

<sup>370</sup> Centre for the Study of Violence and Reconciliation (2009: 7 f); Legal Resource Centre (2009: NPA Prosecution Policy for Apartheid Crimes: State's application for leave to appeal dismissed).

<sup>371</sup> Centre for the Study of Violence and Reconciliation (2009: NPA Prosecution Policy for Apartheid Crimes: State's application for leave to appeal dismissed).

<sup>372</sup> Klaaren J and Varney H (2003: 265); Bubenzer O (2009: 77).

<sup>373</sup> Bubenzer O (2009: 77).

<sup>374</sup> Nkadimeng and Others v The NDPP and Others (TPD) Case no. 32709/07, unreported, at para. 15.4.3.

<sup>375</sup> See Varney H (2006: 3).

<sup>376</sup> See TRC Report, vol. 5, p. 311; See also CSV (2008: 3 f).

which are ready for prosecution. From the list of cases found, the most serious offences should receive top priority attention.<sup>377</sup>

The amended prosecution policy<sup>378</sup> (which was later held to be unconstitutional and invalid) focused mainly on disclosure of evidence by perpetrators.<sup>379</sup> Disclosure may still be used as part of the strategy. Prosecutions may make use of sections 204 and 105A of the Criminal Procedure Act (hereafter CPA) in dealing with perpetrators wishing to make full disclosure of crimes which they have committed during the apartheid era.<sup>380</sup>

Section 204 of the CPA provides that a witness may be granted full indemnity on a charge should he testify for the state and the court deems the testimony to be honest and frank. This testimony could then be used for the prosecution of more significant offenders.<sup>381</sup> Section 105A of the CPA provides for plea and sentencing agreements.

Prosecutors may make use of this section to obtain a guilty plea in exchange for a reduction of sentence. However, these agreements should be confirmed by courts.<sup>382</sup>

The reduction in sentence would also require an amendment to the criminal laws which provide for certain minimum penalties. These reduced sentences could include the carrying out of community service in the community of the victims. It can also include some form of community reparations in the form of financial contributions or symbolic acts. It should be noted that these amendments to criminal laws should be narrow in

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<sup>377</sup> Varney H (2006: Alternative Prosecutions Strategy); See Centre for the Study of Violence and Reconciliation (2008: 3 f); See also International Human Rights Clinic (2008: 164 f).

<sup>378</sup> See Prosecution Policy and directives relating to prosecution of Criminal Matters arising from Conflicts of the Past.

<sup>379</sup> Centre for the Study of Violence and Reconciliation (2008: 4).

<sup>380</sup> See Criminal Procedure Act 51 of 1977, s 105 A and 204.

<sup>381</sup> Varney H (2006: Alternative Prosecutions Strategy).

<sup>382</sup> Criminal Procedure Act 51 of 1977, s 105 A.

scope with regard to the period of operation. It should also be limited to the perpetrators who committed offences during the apartheid conflict period.<sup>383</sup>

The above procedures require the perpetrators to appear in open court. They would thus be before the victims and the wider public. They would be acknowledging their responsibility through the guilty plea. The conviction would be entered into the public record and the perpetrator would then not be able to walk away without any sanctions or obligations whatsoever.<sup>384</sup> The strategy is a much better option than the unconstitutional policy which was proposed by the NPA.

#### **4.7.6 Conclusion: Did the TRC serve its purpose for which it was established?**

South Africa's transition to democracy was a complex and difficult one. Its truth for amnesty approach was the first of its kind. Its mandate of achieving truth and reconciliation was quite an enormous (if not an impossible) task.

The TRC was responsible for the collection of a large amount of data which, to a certain extent, is now available to the public. It, therefore, contributed towards the documenting some of the human rights abuses which had occurred during the apartheid period.

However, the TRC failed to establish macro-historical truth findings which constituted a significant part of its mandate. What we have learnt from the South African TRC experience is that amassing large amounts of data will not in and of itself illuminate macro-historical truth findings.<sup>385</sup>

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<sup>383</sup> Varney H (2006: Alternative Prosecutions Strategy); See Centre for the Study of Violence and Reconciliation (2008: 8 ff).

<sup>384</sup> Varney H (2006: Alternative Prosecutions Strategy).

<sup>385</sup> Chapman A and Ball R (2008: 168).

The TRC had much difficulty with promoting reconciliation as it had no clear definition to work with. This was displayed by the different approaches used by the individual TRC members. The amnesty provisions also had a negative impact on the reconciliation process as many victims saw the perpetrators of gross human rights violations receiving civil and criminal immunity.

The main purpose of reparations is to restore the dignity of survivors, and to rebuild affected communities. It should also facilitate the re-integration of survivors in the community.<sup>386</sup> The South African experience did not restore the dignity of the survivors as many victims have still not received reparations. The AZAPO and the subsequent Khulumani court cases show that South Africans were, and still are not satisfied with the reparations provided by the government.

The issue with Post-TRC prosecutions has a severely negative impact on the reconciliation process, as the victims of gross human rights abuses have not seen justice been done. This is due to the fact that no post-TRC prosecutions have as yet been instituted. The lack of political will from the side of the government also negatively impacts on the reconciliation process.

The above factors display that the TRC has served the purpose for which it was established, to a very limited extent, but has not achieved the best results possible.

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<sup>386</sup> Khulumani (2009: Community Rehabilitation & Reparation: A National Priority?).

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