Diritto Penale Contemporaneo
RIVISTA TRIMESTRALE
REVISTA TRIMESTRAL DE DERECHO PENAL
A QUARTERLY REVIEW FOR CRIMINAL JUSTICE

Tempo, Memoria e Diritto Penale

Memory Laws in European and Comparative Perspective (M.E.L.A)

Bologna - Febbraio / Dicembre 2018

ISSN 2240-7618

4/2018

Editore Associazione "Progetto giustizia penale", via Altaguardia 1, Milano - c.f. 97792250157
ANNO 2018 - CODICE ISSN 2240-7618 - Registrazione presso il Tribunale di Milano, al n. 554 del 18 novembre 2011.
Impaginazione a cura di Chiara Pavesi

Perspectives on South Africa's Unfinished Business of Dealing with Past Atrocities, and Considering Present Priorities

Prospettive sul lavoro incompiuto del Sudafrica nel fare i conti con le atrocità del passato e considerare le priorità del presente

Cuestiones pendientes sobre las atrocidades sudafricanas del pasado y las prioridades actuales

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Giustizia penale di transizione | Justicia penal transicional | Transitional Criminal Justice

Abstracts

South Africa's celebrated and relatively peaceful transition from apartheid to democracy in the early 1990's is anew the subject of scrutiny, debate and controversy. Given the 400 years of colonialism, apartheid and structural violence, transitional justice in South Africa must be viewed in the context of deep political, social and economic transformations still underway. While the Truth and Reconciliation Commission (TRC) helped to facilitate these transformation processes, the democratic, post-apartheid state's failure to prosecute apartheid-era human rights violations despite explicit recommendations by the TRC, has left the normative legacy of the TRC in doubt. This paper explores the implications of this aspect of South Africa's transition, considering current priorities and discourses.

La transizione del Sudafrica dall'apartheid alla democrazia nei primi anni '90, molto celebrata e relativamente pacifica, è di nuovo oggetto di scrutinio, dibattito e controversie. Dati i 400 anni di colonialismo, apartheid e violenza strutturale, la giustizia di transizione in Sudafrica deve essere vista nel contesto di profonde trasformazioni politiche, sociali ed economiche ancora in corso. Mentre la Commissione per la verità e la riconciliazione (TRC) ha contribuito a facilitare questi processi di trasformazione, il fallimento dello Stato democratico, post-apartheid, nel perseguire le violazioni dei diritti umani dell'apartheid, nonostante le raccomandazioni esplicite della TRC, ha messo in dubbio l'eredità normativa della TRC. Questo articolo esplora le implicazioni di tale aspetto della transizione in Sud Africa, considerando le priorità e i discorsi attuali.

La celebrada y relativamente pacífica transición desde el apartheid a la democracia, que tuvo lugar a principios de la década de 1990 en Sudáfrica, es nuevamente objeto de escrutinio, debate y controversia. Dados los 400 años de colonialismo, apartheid y violencia estructural, la justicia de transición de Sudáfrica debe contemplarse en un contexto de profundas transformaciones políticas, sociales y económicas que aún están en curso. Si bien la Comisión de la Verdad y la Reconciliación (TRC) ayudó a facilitar estos procesos de transformación, el fracaso del Estado democrático posterior al apartheid en relación con la persecución de las violaciones de los derechos humanos cometidas durante la era del apartheid, a pesar de las recomendaciones explícitas de la TRC, ha puesto en duda la eficacia normativa de la TRC. Este trabajo explora las implicaciones de tal aspecto de la transición de Sudáfrica, considerando las prioridades y discursos actuales.

Sommario

1. Introduction.

South Africa's celebrated and relatively peaceful transition from apartheid to democracy in the early 1990's is anew the subject of scrutiny, debate and controversy, perhaps not so much internationally in the academic world of transitional justice studies, but certainly in South African public discourse.[1] In fact, South Africa's long transition was never going to be a simple process of moving from A (apartheid) to B (democracy). Given the 400 years of colonialism, apartheid and structural violence, transitional justice in South Africa must be viewed in the context of deep political, social and economic transformations still underway. This is the question of the "political economy of racial inequality".[2]

The decolonization debate, brought to the fore by the "Rhodes Must Fall" and "Fees Must Fall" student movements of 2015, is just the most recent manifestation of South Africa's efforts to deal with its past, present and future.[3] Transformation and decolonization, then, are far deeper and evidently more complex processes compared to the more focused, circumscribed and legally defined transitional mechanisms of the 1990's. To be clear: the transitional mechanisms agreed upon between the major parties at the constitutional negotiations that effectively ended apartheid were *essential*.[4] Regardless of the current criticism and even skepticism, it is submitted that without the transitional mechanisms – most notably the Interim Constitution of 1993 and later the Truth and Reconciliation Commission (TRC) – South Africa would probably have collapsed into a bloody civil war, with no prospects of a peaceful and democratic future, let alone social and economic transformation and decolonization in a meaningful sense.

This paper does not pretend to be a comprehensive discussion or even overview of transitional justice in South Africa. It is also not dealing with general issues of transformation and decolonization, although there are references to these phenomena to provide context. The aim with this paper, then, is to focus on one aspect of transitional justice in South Africa, namely the prosecution, or rather, lack of prosecution, of apartheid-era human rights violations.

2. Qualified amnesty – and prosecution in reserve.

It is trite that South Africa's model of transitional justice included qualified amnesty (in exchange for truth) and the prospect of prosecutions for apartheid-era atrocities for those cases that did not qualify for amnesty or that were not successful in terms of amnesty applications.[5] These aspects were dealt with in terms of temporal and substantive restrictions. But the essential deal was this: apartheid-era atrocities (on both sides of the conflict) would be "forgiven" on condition that perpetrators come forward to tell the truth about what happened. The warning to perpetrators and the reassurance to victims was that those perpetrators who would not come forward to apply for amnesty, or who would be unsuccessful in their applications, would ultimately be prosecuted in a criminal court for the apartheid-era atrocities.

\Unfortunately, as we shall see, very little came of the promise of prosecution. Twenty years after the TRC-hearings, only a handful of apartheid-era crimes were prosecuted, and there is little or no progress on some of the most high-profile apartheid-era atrocity cases. It raises the troubling question: was South Africa's much vaunted transition built on a lie? The

[1] For a discussion of South Africa's TRC in comparative perspective, see Werle and Vormbaum (2018), pp. 184-189.
[2] James and Van de Vijver (2000), p. 199.
[3] For more history and context, see Nyamnjoh (2017), pp. 256-258.
[4] Villa-Vicencio and Verwoerd (2000) p. 22.
[5] For more context and background, see Boraine (2000), pp. 258-299.

victims (and/or their descendants), who were asked to give up their demands for justice in return for the promise of a new land, a grander "justice", are now left with the bitter realization that justice was denied then *and* now. But why? And what impact, if any, does this profound disappointment have on South Africa's ongoing efforts to deal with its past? Is the question of prosecution (or lack thereof) for past atrocities at the heart of the current discourse in South Africa? Should it be? Or is it a marginal issue of parochial interest for a relatively small number of individual victims, while the big debates in South Africa are dominated by the systemic issues of economic inequality and structural violence?

3. The TRC as transitional mechanism.

Sisonke Msimang, in a recent essay published in *Foreign Affairs*, argues that the TRC amnesty process's narrow focus on individual perpetrators of gross human rights violations, rather than the broader and deeper structural violence of the apartheid state (and the colonialism on which apartheid was predicated) amounted to a failure, not only in terms of the direct victims of apartheid (such as the 3.5 million people who were forcibly removed from their homes) but also more broadly a failure to bring justice for the millions more who were deprived of economic opportunity due to the racist apartheid laws; for the generations of people subjected to substandard education, and so on. By individualizing responsibility (and forgiveness) via the TRC amnesty process, the structural legacies of apartheid and colonialism were left to fester and that helps to explain the current discontent and more urgent demands for broad-based economic justice.[6]

In retrospection (which always seems to be a rather strong vantage point in any debate!) arguments like the one presented by Msimang sounds compelling. The argument seamlessly joins the TRC amnesty process's narrow scope in dealing with past atrocities with a broader critique of South Africa's transitional processes. The verdict, then, is that South Africa's transition was morally and operationally flawed. And the failure to prosecute apartheid-era atrocities is a small but searing part of this narrative of failure and disillusionment.

Social scientists and historians are perhaps best placed to evaluate the "success" of South Africa's transition, which includes the work of the TRC. As a lawyer interested in transitional justice, I am reminded of what persons with first-hand knowledge of South Africa's negotiated settlement noted, namely that, given the political and military realities *at the time of the transition*,[7] the rather modest mandate of the TRC was probably the best possible compromise which, in turn, made possible the two decades of democratic reforms, including the current debates on economic and structural justice and decolonization. It is an open question whether an ambitious TRC with a broad mandate (which would presumably include the structural elements of the crime of apartheid and other systemic matters) and without an element of amnesty, would have been acceptable for the apartheid political and military elites who had much to lose post-apartheid – not only in terms of lost power, but also in material terms and in terms of personal freedom.

As we know, the TRC's aim was to bridge the divide between the oppressive past and the promise of a better future. As such, the mechanism of truth and reconciliation through an amnesty process formed part of the transitional arrangements in the context of South Africa's constitutional negotiations in the early 1990's which led to the end of apartheid and the advent of the democratic era. In this sense the TRC served the purpose of a bridge, yes, but also an escape hatch for those most responsible for the atrocities of the decades preceding the end of apartheid. The Interim Constitution of 1993, which was adopted by the various parties, including the apartheid government and the liberation movements and which provided the roadmap for the final transition from apartheid to democracy, contained an important so-called "Post-amble" (which enjoyed the same status as if it formed part of the main text of the interim Constitution itself).[8] The "Post-amble" provided as follows:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future

[6] Msimang (2017).
[7] Villa-Vicencio and Verwoerd (2000) 22.
[8] Basson (1995) 339.

> founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.
>
> *Nkosi sikelel' iAfrika. God seën Suid-Afrika*
> *Morena boloka Sechaba sa heso. May God bless our counry*
> *Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika*

The Promotion of National Unity and Reconciliation Act 34 of 1995 ("the TRC Act") was adopted by the new democratically elected parliament and gave effect to the principles set out in the Post-amble to the Interim Constitution. The Truth and Reconciliation Commission (TRC) – established under the TRC Act – had as its main objective the promotion of "national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past". Furthermore, it was envisioned that the TRC would establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights committed between 1960 and 1994. "Gross human rights violations" were defined in the TRC Act as:

> "[T]he violation of human rights through – (a) the killing, abduction, torture or severe ill treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to 10 may 1994 within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive".

It is important to note that the later date of 1994 coincided with the inauguration of President Nelson Mandela as South Africa's first democratically elected head of state. This date was viewed as the true starting point of the "New South Africa". Even though the Post-amble of the Interim Constitution mentioned the cut-off date for the TRC's mandate as December 1993, that date was moved in order to cover some of the political violence which occurred just before the first democratic elections which were held in April 1994. It is clear, however, that the period of 1960 to 1994 does not cover the temporal totality of colonialism and apartheid in South Africa, but only a few of the most violent decades characterized by the increasingly oppressive apartheid laws and practices and the armed struggle against the apartheid state. As for amnesty, the TRC was granted the powers to facilitate the granting of amnesty to persons who made full disclosure of all the relevant facts relating to acts associated with a political objective (on both sides of the conflict). The TRC was also tasked to establish and to make known the fate or whereabouts of victims and to restore the human and civil dignity of such victims by affording them an opportunity to relate their own accounts of the violations and by recommending reparations measures in respect of such violations. Finally, in terms of the need for an historical record, the TRC was tasked to compile a comprehensive report of the Commission's functions, including recommendations of measures to prevent future human

rights violations.

The various structures of the TRC corresponded with the main mandates. There were three committees dealing with (a) human rights violations, (b) reparations and rehabilitation, and (c) amnesty. The latter committee was quasi-judicial in nature, chaired by a high court judge. Applicants had to make full and honest disclosures of their involvement with gross human rights violations and had to show that these violations were committed with political motive.

Although the TRC formed part of the grand bargain between the apartheid state and the liberation movements, it was not universally accepted by victims of gross human rights violations. In *AZAPO v President of the Republic of South Africa*,[9] a case before the newly minted Constitutional Court, a group of political parties and victims challenged the constitutionality of the TRC Act. The constitutional challenge focused on two main grounds. Firstly, it was argued that the amnesty provisions in the TRC Act violated the victims' right to have disputes settled in court (i.e. victims were effectively denied the route of recourse to criminal and civil justice in the courts of law and with the perpetrators as defendants). Secondly, it was contended that amnesty for gross human rights violations was contrary to international law, including international humanitarian law obligations. The Constitutional Court rejected these submissions and held that the Post-amble of the Interim Constitution of 1993 specifically authorised a law conferring amnesty on perpetrators of gross human rights violations associated with political objectives. The aims of truth and reconciliation, via an amnesty process, were not only legislative schemes, but indeed constitutional imperatives. The TRC Act was thus held to be consistent with the Interim Constitution.

At the end of its mandate and in line with the relevant statutory duties the TRC produced a seven volume final report.[10] Apart from the financial, logistical and institutional matters, the most remarkable and controversial parts of the report were those dealing with amnesty. The TRC has considered 21 300 victim statements (of which about 90% were not given under oath); and 38 000 instances of gross human rights violations were identified. In terms of amnesty the TRC has received 7127 amnesty applications, but most of these were rejected because they did not fall within the legal parameters (for instance "ordinary" murder cases as opposed to murder cases where the motive were political in nature). At the relevant cut-off date, the TRC had identified 1341 amnesty applications for public hearings. Around 850 incidents of gross human rights violations were determined to fall within the ambit of the amnesty parameters and could thus serve as the basis for individual applicants' amnesty applications. Since many incidents were rejected, some applicants were only partially successful with their amnesty applications. A good example is the amnesty application of Eugene de Kock, the commander of the apartheid-era security police base at the notorious Vlakplaas facility. De Kock presented a voluminous amnesty application of around 4000 pages, relating to 140 incidents (including torture, assault and murder). He was successful with most, but not all of these applications. For instance, he was unsuccessful with the applications relating to the killing of 5 people in 1992 and one killing in 1986. De Kock was consequently prosecuted in 1996 and sentenced to two life sentences in prison plus an additional period of 212 years in prison for the numerous killings for which he did not get amnesty. He was however released on parole in 2015.

4. Twenty years after the TRC: What happened to all the unresolved gross human rights violations cases?

It is clear from the discussion thus far that the amnesty provisions in the Interim Constitution and the TRC Act formed an integral part of the grand political bargain, which made progress towards a fully democratic South Africa possible. Although the Constitutional Court gave its blessing, so to speak, to these compromises in the above mentioned *AZAPO* case, the underlying premise was always that amnesty was not a goal in and of itself; it was a pragmatic mechanism and it was qualified. And, importantly, the amnesty aspect of the transitional mechanisms was premised on the promise that those perpetrators who were unsuccessful in their amnesty applications would face justice according to the ordinary criminal justice

[9] *AZAPO and others v. President of the Republic of South Africa and others* 1996 (4) SA 671 (CC).
[10] Available online here.

processes. But even shortly after the publication of the final TRC Report in 2003, it was already observed that in the TRC process itself and when the TRC issued its final report, the political compromise (epitomised by the amnesty provisions) became a bone of contention.[11] Two decades later, the "bone of contention" seems to be much more serious, namely a question about the moral foundations of the state, including the criminal justice system, operated by the political beneficiaries of the post-apartheid democratic order. The forgotten victims of the violent apartheid state are now fighting back by reclaiming the notion of "justice' in the post-apartheid democratic order. The lack of prosecution of apartheid-era gross human rights violations are now seen as more than just "bones of contention". It is also more than just a cool, detached and theoretical appraisal of the legacy of the TRC. It is about the morality of a legal and political order that was founded on the backs of victims who were willing to compromise their demand for justice for the sake of progress and reconciliation. The latter aspect seems to have been elusive. And all indications are that the democratic state is yet to deliver social justice and economic freedom to the millions of South Africans who are still the victims of the systemic violence of colonialism and apartheid. The least that the post-apartheid political beneficiaries should have done in terms of the transitional framework contained in the Interim Constitution and the TRC Act was to pursue those clear criminal cases that did not qualify for amnesty. That would have signaled a commitment to the restoration of a moral basis for the criminal justice system; it would have addressed individual accountability for some of the apartheid violence, even though it was not expected to deal with all the structural violence of colonialism and apartheid. But, as we will see, the democratic state simply abandoned even the minimum which was expected in terms of the original compromise which made the transition to democracy possible.

5. Justice delayed; justice denied.

The TRC considered 38 000 instances of gross human rights violations that occurred in the mandate period. As we have seen, around 850 incidents were ultimately considered to be within the parameters of the amnesty provision. This led the TRC to recommend that the National Prosecuting Authority (NPA) prosecute around 300 cases related to the instances of gross human rights violations. However, the NPA did not follow through with these prosecutions. Twenty years after the TRC not a single high-profile apartheid-related prosecution was undertaken by the NPA. It is only because some victims' families went to court that the NPA started, in 2018, to pay attention to the prosecution of perpetrators of apartheid-era gross human rights violations. The NPA has now identified 15 TRC-related cases for further investigation and possible prosecution. The NPA's sudden change of heart seems to have been triggered by the successful court application of the family of Ahmed Timol, an apartheid-era victim who died at the hands of the police.[12] The apartheid state contended that Mr Timol, who died almost 50 years ago in police custody, was due to suicide. The TRC was unable to make definitive findings as to the circumstances of many cases, including Timol's death. The TRC thus recommended that these cases be investigated for purposes of prosecution, but almost no progress was made since the TRC's final report and recommendations. So, the decision raised by the high court in October 2017 on the re-opening of the inquest into the death of Ahmed Timol is more than just a re-opening of a decades old individual case: In a sense it also represents the metaphorical re-opening of old wounds from the apartheid past. It ripped open the bandages applied by the TRC twenty years ago. Is it painful? Yes. Is it necessary? I submit that it is necessary.

6. Politics, prosecutorial power and discretion.

In February 2019 a startling admission was made by a senior official in the National Prosecuting Authority. In an affidavit filed in the ongoing investigation into the murder of Ahmed

[11] Villa-Vicencio and Verwoerd (2000) p. 22.
[12] *The re-opened inquest into the death of Ahmed Essop Timol*, Case Number: IQ01/2017, High Court of South Africa (Gauteng Division, Pretoria) 12 October 2017 (available here).

Timol at the high court in Pretoria, it was admitted that "political interference by senior politicians in government has led to the delays in the prosecution of apartheid-era crimes".[13]

There is no compulsory prosecution in South Africa. The governing principle in South African prosecutorial law and policy is the principle of prosecutorial discretion. This means that there is only a duty to prosecute so-called *prima facie* cases and if there are no compelling reasons for a refusal to prosecute. A *prima facie* case can be defined as: "The allegations, as supported by statements and real and documentary evidence available to the prosecution, are such a nature that if proved in a court of law by the prosecution on the basis of admissible evidence, the court should convict."[14] The NPA's discretion not to prosecute a *prima facie* case, is, of course, open to manipulation and abuse. The jurisprudence on this point suggests that there are several circumstances (not a closed list) where the NPA could refuse to prosecute even *prima facie* cases, but this should be done as exceptions, rather than the rule. These include: the relative triviality of the offence, the advanced age or very young age of the perpetrator, where a plea agreement was concluded between the prosecutor and the perpetrator, and the antiquated nature of the offence.[15] The NPA's Prosecution Policy – a guiding document issued in terms of the National Prosecuting Authority Act 32 of 1998 – provides for the possibility of a refusal to prosecute a prima facie where such a refusal would be in the "public interest". The relevant paragraph of the Prosecution Policy reads as follows: "There is no rule in law which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice."

The Prosecution Policy then proceeds to describe several factors that are considered relevant for purposes of determining whether a prosecution or a refusal to prosecute will be in the public interest:

"*The nature and seriousness of the offence*:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted – regardless of a complainant's wish not to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- -Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (In tis regard the degree of culpability of the accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial.)
- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.

[13] See here.
[14] Joubert (2017) p. 73.
[15] Joubert (2017) pp. 73.

- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay."[16]

It is worth repeating that the NPA's affidavit in the Ahmed Timol matter (referred to above) stated *political interference*, and not public interest or any of the other grounds listed in the Prosecution Policy, as reason for not investigating and prosecuting the Timol and other apartheid-era matters. But even if the NPA would argue that one or more of the factors in the Prosecution Policy were applicable to the Timol case, it is submitted here that a court should reject that or should, at the very least, treat such a line of argument with a great degree of circumspection. The TRC process was already a "public interest filter", so to speak. Moreover, the TRC provided the NPA with several incidents which were deemed prosecutable, based not only on the seriousness of the offences (gross human rights violations) but also in terms of the necessity to assert the rule of law and to provide justice that were denied for the many victims of gross human rights violations from the apartheid era.

7. A second truth commission?

There is a sense, twenty-five years into the democratic dispensation, that South Africa's transitional mechanisms, including the Constitution and the TRC, did not live up to expectations (at best), or (worst) were instrumental in creating the current malaise and dissatisfaction with socio-economic conditions and lack of accountability for centuries of injustice. I have noted earlier that these meta-debates are important but beyond the scope of this paper. I have also noted that my working assumption, based on the propositions of individuals who were part of the transitional negotiations, is that without the transitional mechanisms of the 1990's (including the TRC) the situation in South Africa would probably have escalated into a full-scale civil war. But the lack of post-TRC prosecutions does raise critical questions, not only about the transition itself but also about the price that victims had to pay for the greater good of political stability.

It is in the context of the renewed focus on the legacy of the TRC, the NPA's stunning neglect of apartheid-era prosecutions, as well as the allegations of political interference made by senior members of the NPA, that several former TRC commissioners decided to write a letter[17] to President Ramaphosa, South Africa's current head of state. The letter calls on the President to apologise on behalf of the state to the victims of gross human rights violations and their families who were denied justice. The former commissioners also request the President to appoint a commission of inquiry into the alleged political interference which has stopped the investigation and prosecution of almost all the cases which were referred by the TRC to the NPA. The former commissioners wrote:

"In our Final Report released on 21 March 2003 we stressed that the amnesty should not be seen as promoting impunity. We highlighted the imperative of "a bold prosecution policy" in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.

Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those refused amnesty. Sadly, this has not happened."

The letter further noted the changes in prosecutorial policy during the Mbeki administration, in terms of which "backdoor amnesties" for political expediency resulted in an effective end to NPA efforts to follow up on the TRC's list of apartheid-era gross human rights violations which needed to be investigated and prosecuted. The successful high court applications of victim groups and families of victims (such as the family of Ahmed Timol) forced the NPA to reopen the apartheid-era cases. But the letter also noted the very troubling fact that the investigations into the gross human rights violations were overseen by former members of the notorious Security Branch of the apartheid state's police force. If ever there was a case of

[16] Prosecution Policy para 4 (c), reproduced in Joubert (2017) p. 74.
[17] For the text of the full letter, see here.

rubbing salt into the wounds of apartheid victims, this would be a clear example.

The former commissioners consequently ask in their letter for the President to appoint a judicial commission of inquiry into the alleged political interference with and suppression of investigations into and prosecutions of apartheid-era gross human rights violations.

8. A (tentative) final thought.

South Africa is at a difficult juncture. Although the country managed to avoid a civil war twenty-five years ago, and even managed, albeit momentarily, to be the "Rainbow Nation" and posterchild for reconciliation, the deep and fundamental fault lines of inequality and economic injustice pose significant challenges to the democratic project. The cultural renaissance of the decolonization movement also makes the "Rainbow Nation" of Mandela and Tutu seem quaint and out of touch with the aspirations of a new generation of black students. They view the TRC with skepticism, even contempt – a sellout project of appeasement and humiliation. In this context a focus on TRC-related prosecutions could be parochially important, even morally compelling, but ultimately largely irrelevant in terms of the major socio-economic narratives which dominate current discourse.

I would argue for a different view: The prosecution of the TRC-cases is absolutely and unequivocally a moral imperative. That chapter needs to be closed. It is obviously important for the victims. But it is also important for the sustainability and longevity of the South African democratic project. It goes to the heart of what one can expect from accountable institutions in a democratic state which is built on the rule of law. The alternative would be to make a mockery of the entire transitional rationale, namely that the TRC was part of a bridge to a better and more just future. The TRC was not *the* future. But it helped to make possible a future where South Africans could, for the first time, seriously deal with their complicated and violent past. That is the promise for which the victims of gross human rights violations accepted the bitter pill of amnesty. That promise should not be betrayed.

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