



COMPARATIVE STUDY OF TRANSITIONAL JUSTICE IN AFRICA

# **SOUTH AFRICA**

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# African Comparative Transitional Justice Study: South African Case

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## Introduction

South Africa transitioned from an authoritarian apartheid state to a democratic one on 27 April 1994 with its first democratic elections. The South African Truth and Reconciliation Commission (TRC) was South Africa's national transitional justice (TJ) process that sought to redress the gross human rights violations committed during a period of the apartheid regime and to promote social reconciliation. It was mandated to operate between 1996 and 1998.<sup>1</sup> Its Final Report was released in 2003.<sup>2</sup> It has been simultaneously applauded as a model of success and criticised for its failure to address critical issues, such as socioeconomic rights violations and gendered crimes. Furthermore, it has been criticised for its limited mandate to apartheid-era crimes, and not addressing the colonial period under which the blueprint for apartheid can be traced. On the backdrop of a complex transition to democracy, the transitional process emerged in a context of deeply divided identity politics and concerns around the capacity for the African National Congress (ANC) to gain sufficient autonomy over the country. In its formulation and implementation, the TRC and its mechanisms (such as conditional amnesty) were embedded in the contestation over the substance of the post-apartheid identity, one that captured the non-racial, egalitarian values in the new Constitution. It is within this context that this case study seeks to unpack the key drivers and impact of the TJ process in South Africa. The study seeks to assess the linkages between contextual variables and choices in transitional justice policies, to demonstrate how stakeholders within the South African state were enabled or constrained by certain historical and current dynamics within the societal, institutional, political, and economic spheres. It aims to map out the range of choices facing transitional justice actors and understand how TJ supported or undermined the promotion of sustainable peace and preventing future human rights abuses.

The first section considers the path dependencies created during colonialism, including how it shaped institutions, key identity groups, and societal relations. "Path dependencies" is used in this study to identify key historical events and outcomes that shaped processes and events in the long-run. The second section focuses on conflict factors. First, it shows how the struggle against apartheid can be seen as a struggle between South African identity groups for nationhood and statehood that continued since colonialism. This section demonstrates the relationship between political, social, and economic patterns and the conflict. It concludes by discussing the elements of apartheid that the TJ process responded to, as well as those elements it neglected. The third section of this study focuses on the political and societal factors that shaped TJ decision-making. It particularly highlights the key actors that were relevant to this process. The fourth section discusses the TJ options that decision-makers could reasonably choose from considering their aims. It relates this to the path dependencies identified in sections one, two, and three. Building on the preceding section, the fifth section focuses on the determinants of the specific TJ policies and mechanisms selected. Lastly, the sixth section assesses the effectiveness of the TJ policies that were implemented, drawing out the possible lessons to be learned from the South African experience.

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<sup>1</sup> The TRC's Amnesty Committee was permitted an extension and concluded in 2003.

<sup>2</sup> Available at <http://www.justice.gov.za/trc/report/index.htm>.

It is necessary to briefly explain the concepts that will be used when referring to the different race groups in this case study. The terms used to refer to the various race groups in South Africa changed during the colonial, apartheid, and post-apartheid eras. For example, the terms “Natives”, “Bantu”,<sup>3</sup> “Non-European”, and “non-white” were each varyingly used to refer to black South Africans. The use of the majority of these terms implicitly adopts whiteness as a reference base and places esteem and superiority upon it. Therefore, this paper agrees with Steve Biko’s problematisation of such collective terms, and uses “black” to refer to the race groups that were oppressed under colonialism and apartheid.<sup>4</sup> The official South African Census identifies four race groups presently: black African; Coloured; Indian/Asian; and white. This paper will adopt the Census’ terminology when describing the individual race groups. South Africa’s colonial and apartheid experience saw these regimes use anti-black racism and white supremacy to construct a racial hierarchy, whereby the white population was treated as “superior” and black population as “inferior”. This paper’s use of racial categories seeks to demonstrate how white supremacy and anti-black racist intersected with other factors to produce the drivers and shapers for the TJ process in South Africa, and the lasting impact that the socially constructed hierarchies have had in present-day South Africa. The use of race terms is not to validate racist beliefs, but to explain and recognise the impact of the social constructions that were attributed to race as a means of oppression, segregation, and discrimination politically, economically, and socially. Furthermore, Section 2 will show the resistance to this process. In particular, the Black Consciousness Movement’s engagement with this terminology and the psychological effects of white supremacist governance and discourse will be unpacked. Sections 3 to 6 will critically analyse the engagement with race discourse during the transition and post-transition years.

At once, the South African case demonstrates that, similarly for other colonies on the continent at the time, the conflict between colonial powers created a hierarchal system that placed those of European descent at the pinnacle of socioeconomic and political privilege. However, the South African case departs from other cases as a settler colony for the internal conflict between the British and the Afrikaans gave rise to hierarchies within hierarchies. Similar patterns are observed as society became increasingly racialized along class lines – a deliberate outcome of colonial and apartheid policies – that shaped the fabric of political, social and economic resistance for decades to come. Furthermore, this case shows how in order to consolidate a political and social democracy, non-racialism became a necessary precursor to collective action across the non-white (and even, liberal white) populations – with consequences for the quasi-communist agenda adopted by the ANC in the 1990s, and filtering into its transitional justice policy framework. Lastly, the aim for a National Democratic Revolution over an economic one, meant that the scope of transitional justice was consequently reserved for gross human rights and did not address the psychological, physical, social and economic violence of apartheid – affecting the majority of black South Africans living under apartheid.

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<sup>3</sup> This term refers to the Bantu language groups and was used as a collective term to refer to black Africans. The term is not inherently derogatory but was used as a pejorative term under apartheid.

<sup>4</sup> Steve Biko, “The Definition of Black Consciousness,” *I Write What I Like: 1946-1977*, (London: Cambridge, 2005), 48-53.

## **1. Colonialism in South Africa**

### **1.1. Pre-colonial and Colonial factors**

South Africa is a highly heterogeneous country. This heterogeneity was manipulated, codified, and emphasised under the colonial and apartheid regimes in order to divide the population into racial and ethnic groups.

The Khoikhoi and San people are two groups that occupied southern Africa before Bantu speaking groups had migrated southwards from central Africa. The San were a hunter-gathering society that lived largely in the northern regions (in present-day Botswana).<sup>5</sup> As the San population grew, new practices developed such as pastoralism. The Khoikhoi splintered from the San and focused on domesticated animal herding practices. The Khoikhoi largely occupied the western regions of southern Africa, including the Cape. The differences in the practices between the Khoikhoi and San saw them, at times, in conflict with each other.

Between the 8<sup>th</sup> and 16<sup>th</sup> century, the Bantu-speaking populations of central and eastern Africa migrated to southern Africa.<sup>6</sup> The Nguni (to which the amaXhosa and amaZulu belong), Sotho-Tswana, Venda, and Tsonga -speaking populations arrived in southern African as part of this long migratory process.<sup>7</sup> The amaZulu had settled in the north east of southern Africa, and the rest of the groups had settled in the central and southern regions of the region. The arrival of these groups and contestation over cattle grazing lands pushed the Khoikhoi groups toward the west coast. Consequently, the Khoikhoi were the indigenous group who first encountered the Dutch colonialists due to their location in the Cape.<sup>8</sup>

It is against this backdrop that this section outlines the colonial history of South Africa and its impact on the country's institutional framework, societal relations, and conflict patterns. Given the course of colonialism and decolonisation, this section lays out the dynamics that explain the nature of the apartheid state and the institutional structure thereof. The factors examined are not exhaustive, but seen as instructive for understanding the apartheid conflict. The factors should be understood as interrelated.

The key factors identified in this Study as path dependencies that shaped apartheid are:

- Shifts in economic production and the impact upon labour;
- Social divisions along racial, ethnic, and nationalist lines;
- The education system;
- The legal system; and
- Segregation policies.

### **1.2. Colonial Society**

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<sup>5</sup> South African History Online, "The Khoikhoi," 30 June 2017, available at <http://www.sahistory.org.za/article/khoikhoi>, accessed on 18 July 2017.

<sup>6</sup> Robert Ross, *A concise history of South Africa*, Cambridge University Press, 2008.

<sup>7</sup> Ibid.; Siegfried Huigen, *Knowledge and colonialism: eighteenth-century travellers in South Africa*, Brill, 2009.

<sup>8</sup> Ross, *A concise history of South Africa*.

South Africa had two key colonising powers. The first settler colonialists were the Dutch in 1652. Their settlement lasted until the British eventually defeated them, after a number of attempts, in 1815. The British remained the colonial power in South Africa until 1934, when South Africa became a self-governing nation within the British Empire. In 1961, South Africa officially became the sovereign Republic of South Africa. The colonial period brought significant socioeconomic, legal, geographic, and political shifts in South Africa. This study is focused upon the apartheid period, to which the transitional justice process reflected upon responded. Thus, this section focused primarily upon the broad dynamics that the colonial period affected that could be argued to have create path dependencies for the apartheid period.

Colonisation began in 1652 when the Dutch East Indian Company (Verenigde Oost-Indische Compagnie, or “VOC”) used the Cape of Good Hope (on the south-west coast) as a stopover port on their route between Europe and Asia.<sup>9</sup> The VOC’s use of the Cape as a resupply station had intense labour requirements. This led to the eventual (yet staggered) introduction of foreign slaves and indentured labour to the region. The drive for slaves was the result of the (a) the desire to exploit the resources available in the Cape for trade purposes, and (b) a “labour shortage” as a result of the Khoikhoi population’s refusal to work for the VOC.<sup>10</sup>

The slave trade was one that profited not just the colonial powers, but also the African leaders involved. In exchange for slaves, African leaders secured access to firearms, which gave them a considerable military power against their enemies.<sup>11</sup> The slaves that arrived in the Cape in the early 1700s were primarily from India and Madagascar.<sup>12</sup> The maltreatment of the slaves meant that their population size depended upon continued slave import. Despite the estimated 60 000 slaves that had been brought to the Cape between 1652 and 1807, their total population in 1838 was approximately 38 000.<sup>13</sup> This is in sharp contrast to the European population’s growth rate, which doubled with each generation as a result of reproduction.<sup>14</sup> Slavery in the Cape was characterised by power relations in which the colonialists tried to secure domination over the slaves, despite the slaves’ efforts to challenge this dynamic.<sup>15</sup> Slavery was officially abolished within the British Empire in 1834. Most of the former slaves either remained workers with their previous slave owners or worked as tradesmen in Cape Town. With time, this population was integrated and naturalised into the Cape society.<sup>16</sup>

The expansion of the Cape Colony under both the Dutch and British regimes saw a century of frontier wars as the borders of the Cape Colony were pushed northwards and eastwards. The nine Cape Frontier Wars (or Xhosa Wars) occurred between 1779 and 1878. The expansion was driven by the colonial powers’ interests in securing more farming land, which brought them into conflict with groups who already occupied these lands – the Khoikhoi, the

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<sup>9</sup> Ibid.; Huigen, *Knowledge and colonialism*.

<sup>10</sup> South African History Online, “History of slavery and early colonisation in South Africa.”

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> South African History Online, “History of slavery and early colonisation in South Africa.”

San, and the amaXhosa.<sup>17</sup> The ongoing tensions during this century of intermittent conflict demonstrates tensions between each of these major groups, and it is important to recognise that the tactics used amongst and within each group varied. For example, while some Xhosa groups resisted the colonial expansions, others cooperated as a means of securing their relative power.

### The Great Trek and Mfecane

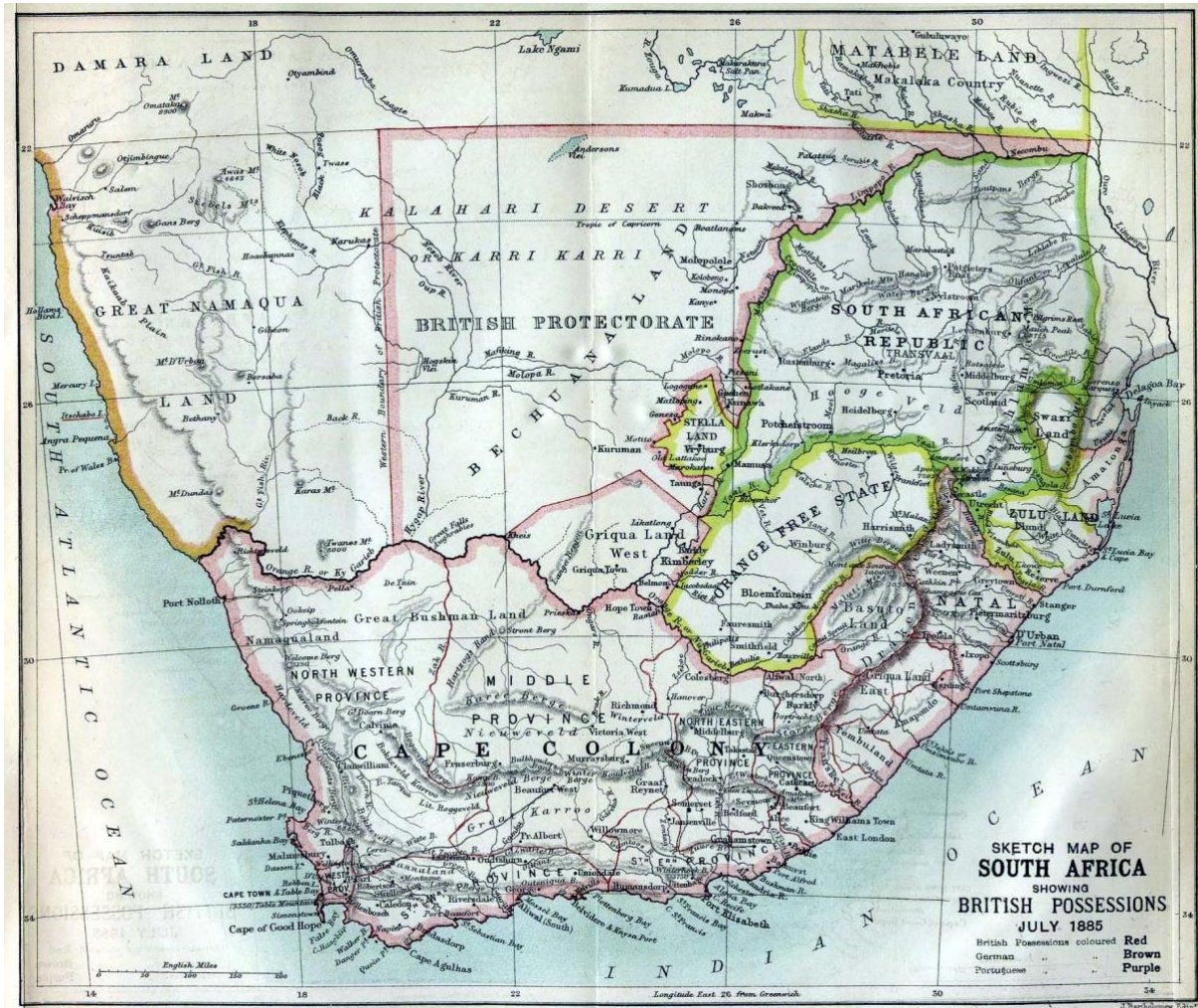


Figure 1: Map of South Africa in 1885 under the British Colonial Regime.

Source: <http://www.britishempire.co.uk/images3/southafrica1885map.jpg>

The Dutch settlers in the eastern frontier towns of the Cape Colony embarked north-east toward the interior of the country on what became known as the “Great Trek” from 1836.<sup>18</sup> The aim of the Trek was to secure a “homeland” for the Dutch-speaking semi-nomadic pastoral farmers, who became known as the “Voortrekkers”, “trekboers” or “boers”. The Great Trek would later become a significant part of Afrikaner nationalism. The commemoration of the Trek was imbued with religious motifs, as the Voortrekkers (and, later, the Afrikaans nationalists) followed a Calvinist tradition. The Trek was remembered as

<sup>17</sup> South African History Online, “Conquest of the Eastern Cape 1779-1878,” 21 July 2017, available at <http://www.sahistory.org.za/article/conquest-eastern-cape-1779-1878>, accessed on 14 October 2017.

<sup>18</sup> South African History Online, “Great Trek 1835-1846,” 2 June 2017, available at <http://www.sahistory.org.za/article/great-trek-1835-1846>, accessed on 14 October 2017.



the Afrikaans exodus in pursuit of their independent land. Therefore, the significance of the Trek was not just the changes in the geographic and demographic landscape of South Africa, but also the way it was popularised and commemorated in Afrikaans nationalism.

The Voortrekkers' ascent into the interior overlapped with the mfecane. "Mfecane" is the Zulu word for "crushing". This period is also known as the "difaqane" – "forced migration" – in Sotho. The mfecane refers to the period of intense battles between 1820 and 1840 among African chiefdoms in the north eastern regions of southern Africa. Accounts from the time are largely oral, and so explanations from groups that did not survive this period are lost. It is understood that a combination of environmental<sup>19</sup> and trade<sup>20</sup> factors brought disparate African groups into contest over arable land dominance in the region, and for trade relations with the Portuguese.<sup>21</sup> This period saw a shift within the military arrangements of societies in the region, and the eventual rise of King Shaka Zulu and the Zulu nation. The region that would become Lesotho was also established during the mfecane period.

This period saw populations in flux and mass displacement as a result of the ongoing battles. The entrance of the Voortrekkers into this region saw another group in contest over the land. However, this group was equipped with firearms, in addition to knives and their wagons, which served as shields during combat.<sup>22</sup> Therefore, their search for a new "homeland" and their pastoralism saw them engage in combat with African societies that occupied the north-eastern territories beyond the Cape Colony borders.<sup>23</sup> 1836 marked a major battle between the Voortrekkers and Ndebele, in which the Voortrekkers retreated after both sides experienced heavy losses. In January 1837 the first self-declared Boer Republic, the Orange Free State.<sup>24</sup> The second Boer Republic established was the South African Republic (later renamed the Transvaal), which was officially recognised by the United Kingdom as an independent region in January 1852.<sup>25</sup>

A splinter group broke away from the Orange Free State settlement and sought land eastwards toward Port Natal, which was in Zulu territory. On 16 December 1838, the Voortrekkers, under Andries Pretorius, and the Zulu, under Dingane, engaged in what became known as the Battle of Blood River. The Voortrekkers, though outnumbered, had the advantage of firearms. This led to the death of 3000 Zulu warriors and the declaration of the Republic of Natalia by the Voortrekkers. However, the United Kingdom did not recognise the independence of the Republic of Natalia and intervened on separate occasions to secure their interests in the area through the military occupation of Port Natal.<sup>26</sup>

The territorial expansion into Natal by the British brought them into conflict with the Zulu and Dutch occupants of the land. The British secured occupation of Natal in 1844. In the

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<sup>19</sup> Drought and famine.

<sup>20</sup> The introduction of maize by Portuguese traders in Mozambique.

<sup>21</sup> South African History Online, "Transformations in southern Africa after 1750," 8 May 2017, available at <http://www.sahistory.org.za/article/political-changes-1750-1835>, accessed on 14 October 2017.

<sup>22</sup> South African History Online, "Great Trek 1835-1846."

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Siyabona Africa, "Transvaal Republic," available at <http://www.krugerpark.co.za/the-transvaal-republic.html>, accessed on 14 October 2017.

<sup>26</sup> South African History Online, "Great Trek 1835-1846."

1860s, the British brought Indian indentured labourers to work in the sugar cane plantations because they could not secure the labour force numbers needed from local populations due to internal resistance. Particularly noteworthy is the Anglo-Zulu war of 1879 wherein the Zulu King, Cetshwayo, refused to cede to the British demand that he submit his army and cultural symbolism to the colony.<sup>27</sup> The British mounted an attack on Zululand and were surprised by the resistance that their siege encountered, initially having expected a quick victory. In fact, they had experienced defeat in the Battle of Isandlwana. However, an unauthorised attacked against a British garrison in Rorke's Drift, where the British after the previous day's Isandlwana battle, saw the Zulu forces incur massive casualties as they were fired upon by the British.<sup>28</sup> This placed the Zulu forces at a disadvantage, and the British secured their victory in the Battle of Ulundi, which saw the exile of King Cetshwayo. Consequently, the British indirectly ruled Zululand by dividing the kingdom into thirteen administrations that were governed by chiefs that were in allegiance with the British.<sup>29</sup> This system of indirect rule, coupled with a series of laws, such as hut taxes, eroded the economic power and social cohesion of the Zulu kingdom.<sup>30</sup> Zulu men eventually entered into the Witwatersrand labour market after a series of natural disasters between 1894 and 1897 undermined the traditional economy in order to meet the tax payments.<sup>31</sup> Thus, a migrant labour system that would continue to present-South Africa was started.

The establishment of the Boer Republics was not unchallenged by the local populations (as illustrated above) and the British. The British sought a confederation of the South African territories under which the African chiefdoms, Boer Republics, and British Colonies would be governed by the British Empire.<sup>32</sup> The aforementioned 1879 Anglo-Zulu war is evidence of one such effort to secure this confederation. The British annexation of the Transvaal Republic in 1877 led to the First Anglo-Boer War (1880-1881). The British were ultimately defeated during this war because of they had underestimated the military capabilities the Boer population, who had made use of guerrilla tactics used by. The Transvaal Republic was secured as an independent state. This war fuelled rivalries between these populations, and was a precursor to the Second Anglo-Boer War (also known as the South African War, 1899-1902).

### *Discoveries of Diamonds and Gold*

The discovery of diamonds in Kimberley (Cape Colony and border of Orange Free State) in 1866 and of gold in Johannesburg (in the Transvaal Republic) in 1886 were significant turning points during the colonial period. In addition to exacerbating the tension between the British and Afrikaans populations, both discoveries prompted significant economic shifts and new divisions of labour in order to meet the demands for these labour-intensive extractive minerals. Arguably, this set the foundation for the racialisation of capitalism in South Africa: in order to meet the demands for the labour-intensive diamonds and gold, a new division of

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<sup>27</sup> South African History Online, "Anglo-Zulu Wars 1879-1896," 26 January 2017, available at <http://www.sahistory.org.za/article/anglo-zulu-wars-1879-1896>, accessed on 14 October 2017.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> South African History Online, "First Anglo Boer War," 2 June 2017, available at <http://www.sahistory.org.za/article/first-anglo-boer-war>, accessed on 15 October 2017.

labour was introduced – namely a predominantly black and Afrikaans working class, under the mandate of the British Colony.<sup>33</sup>

Within rural areas, farming land was controlled predominantly by Afrikaans land-owners, while labour was assigned to black populations. Similarly, within the working class in urban and mining areas, Afrikaans labour was mostly higher skilled, while the lowest or no skilled jobs were held by black people. The upper class predominantly consisted of the British. To keep profits high and inputs low, black people were exploited as miners. Their low pay and inhumane treatment was justified using racist ideology. Hostels were established near the mines, and thus a migrant labour system was introduced. This migrant labour system left its imprint on modern-day South Africa in both economic and social (particularly familial and healthcare) terms.

South Africa had become the biggest gold exporter globally by 1890, which gave the Transvaal Republic some international prominence due to the international monetary system's use of the gold standard. Britain was the global hegemon and a secure supply of gold was essential to maintaining its power.<sup>34</sup> The Transvaal Republic had become a threat to the British Empire within South Africa as it has overtaken the Cape Colony as the key economic centre in the country.<sup>35</sup> The gold mining industry caused changes within the Transvaal Republic because its extractive needs required more labour and attracted (mostly British) immigrants to the Republic. The growth of this population posed a threat to the dominance of the Afrikaans-speaking population within the Transvaal Republic, which resulted in their being granted limited franchise and a second-rate political council in order to quell anticipated frustrations that could emerge if no political transformation was done but to maintain the power of the Afrikaans republic.<sup>36</sup> This, together with other factors including the tension caused by the British desire for a consolidated South African empire and continued desire for independence within the Boer Republics, sparked the Second Anglo-Boer War (1899-1902).<sup>37</sup>

While the Second Anglo-Boer War can be understood a war between the British Empire and Boer Republics, the role of black people should not be overlooked. Both warring parties resisted arming black people for fear of the long-term consequences that this could have. However, they ultimately had no choice but to rely upon black people to assist in the war.<sup>38</sup> The war meant that economic production had been undermined and the British army offered a stipend to black recruits. It therefore was an opportunity to replace lost income sources. Furthermore, some political schools within the black populations believed that a

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<sup>33</sup> Harold Wolpe, "Capitalism and cheap labour-power in South Africa: from segregation to apartheid," *Economy and Society*, no. 4 (1972): 429.

<sup>34</sup> South African History Online, "Second Anglo-Boer War 1899 – 1902," 19 September 2017, <http://www.sahistory.org.za/article/second-anglo-boer-war-1899-1902>, accessed on 15 October 2017.

<sup>35</sup> South African History Online, "Second Anglo-Boer War 1899 – 1902," 19 September 2017, <http://www.sahistory.org.za/article/second-anglo-boer-war-1899-1902>, accessed on 15 October 2017.

<sup>36</sup> South African History Online, "Second Anglo-Boer War 1899 – 1902," 19 September 2017, <http://www.sahistory.org.za/article/second-anglo-boer-war-1899-1902>, accessed on 15 October 2017.

<sup>37</sup> South African History Online, "Second Anglo-Boer War 1899 – 1902," 19 September 2017, <http://www.sahistory.org.za/article/second-anglo-boer-war-1899-1902>, accessed on 15 October 2017.

<sup>38</sup> South African History Online, "Role of Black People in the South African War," 6 October 2017, available at <http://www.sahistory.org.za/article/role-black-people-south-african-war>, accessed on 15 October 2017.

British victory would benefit them – believing that the limited Coloured franchise in the Cape Colony would be extended nationally under a British Empire.<sup>39</sup>

There were three distinct phases in the Second Anglo-Boer War, initially with the Boers' victory seeming likely thanks to their guerrilla warfare tactics. However, the British ultimately emerged victorious from the Second Anglo-Boer War after bringing in more troops, burning down Boer farms, and imprisoning civilians in concentration camps. The combination of the last two tactics by the British in 1901 meant that the Boers' supplies were cut off and they were demoralised because their families were imprisoned.

The women, children, and black people imprisoned in concentration camps endured severe conditions of overcrowding, malnutrition, disease, and, consequently, high rates of death. It is worthwhile noting that the concentration camps were racially segregated – there were about 40 white concentration camps and 60 black concentration camps.<sup>40</sup> Approximately 26 370 people died in the white concentration camps and approximately 15 000 people died in the black concentration camps.<sup>41</sup> The treatment of the Afrikaans civilians in concentration camps, and their defeat in this War, would later contribute to the development of Afrikaans hyper-nationalism that reigned during apartheid – building onto the Great Trek narrative.

The British also incurred huge losses, particularly in the first phase of the War when they had underestimated the military strength of the Boer guerrilla fighters. The eventual military defeat of the Boers saw negotiations between British and Boer Republic leaders. The 1902 signing of the Peace Treaty of Vereeniging marked the surrender by the Boers to the British as well as absorption of the former Boer Republics into the British colony. However, the Treaty also promised that the former Boer Republics would be granted self-governing rights at a later stage. This was fulfilled under in the Union Act of 1910.

### **1.3. End of Colonisation**

Decolonisation from British rule took a peculiar form when contrasted against the waves of decolonisation that swept through the continent during the 1900s. The Union of South Africa was created in 1910, which consolidated the former Boer Republics (Orange Free State and South African Republic/Transvaal) with the British territories (Cape Colony and Natal Colony) as a singular British colony under one government.<sup>42</sup> Whilst the Union marked the technical end of colonisation of South Africa, it remained a dominion of the British Crown.<sup>43</sup> The South African Party (SAP) was the ruling party, led by Prime Minister Louis Botha. Botha promoted a cooperative relationship between English and Afrikaans speakers, particularly in resistance to the perceived dangers of a majority (black) uprising.

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<sup>39</sup> South African History Online, "Role of Black People in the South African War," 6 October 2017, available at <http://www.sahistory.org.za/article/role-black-people-south-african-war>, accessed on 15 October 2017.

<sup>40</sup> South African History Online, "The War," 27 June 2016, available at <http://www.sahistory.org.za/article/war>, accessed on 15 October 2017.

<sup>41</sup> Ibid.

<sup>42</sup> Preamble of the South African Act, 1909, available at <https://law.wisc.edu/gls/cbsa1.pdfhttps://law.wisc.edu/gls/cbsa1.pdf>, accessed on 19 July 2017.

<sup>43</sup> South African History Online, "National Party," 30 March 2011, available at <http://www.sahistory.org.za/topic/national-party-np>, accessed on 31 July 2017.

While both the Afrikaans and black South Africans resented British colonialism, they were not allied in their resistance, in part because they were competing for similar resources and means for survival, but also because their conceptions of independence were different.<sup>44</sup> Afrikaans independence, broadly speaking, meant liberation from British colonial rule and self-government in their own territories, with their language protected and recognised. Black liberation, while not uniform, generally meant freedom from white supremacy and self-governance. It should be noted that within each racial group there were nuanced divisions between more radical resistance, violence resistance, non-violence, collaborative, and otherwise. For example, there were divisions within the African National Congress about capitalism and communism, as well as multi-racial resistance and self-liberation. This eventually led to the breakaway liberation movement, the Pan African Congress. Similarly, there were differences about the use of violence. The Peaceful Resistance Campaign waged by Mahatma Gandhi, and the ideological marriage to non-violent resistance did not appeal to all Indians (or black people generally). This is evidenced by the various armed liberation groups that emerged in resistance to apartheid. Black Africans, Indian, Coloured, and white people did not have static and uniform ideologies about independence and freedom amongst or within their groups. Furthermore, the ideological shifts that did occur were not necessarily linear, although generalised historical accounts may present it as such. While appreciating that there were a host of different beliefs between and within each race group in South Africa, and also recognising that race was not the only identity that mattered and shaped post-colonial politics in South Africa, it can be said that the basis of the conditions of apartheid were set through the shared fear between the British and Afrikaners of an uprising from the majority black population.<sup>45</sup>

Fear was a powerful tool for politicians. It is conducive for extreme actions and is responsive to discourses that enhance such behaviour. Fear can be intensified and used as a political tool to tip the scale for one polity over another. The politicisation of racial and class identity, which intersected, lent itself toward capitalising upon the fears of marginalisation, annihilation, and disaffection experienced by all the actors outlined above. As such, one's participation in the Union of South Africa was informed by racial, class, and (to a lesser extent when compared to other African countries) ethnic identities. White supremacy and anti-black racism were political ideologies and policies that benefited both the English- and Afrikaans-speaking populations in the Union of South Africa. While tensions between these groups continue, anti-black racism and the fear of black majority rule gave politicians a means with which to try sell the Union to white South Africans.<sup>46</sup> However, it is also plausible to argue that both the colonialist and apartheid agenda were also driven by greed. The policies and means to supply this greed saw the manipulation of fear, identity, and race to secure economic and political systems that maximised socioeconomic and political power for the white minorities in South Africa. Responses to the developments of this system were varied among all groups, as has been highlighted in the preceding section. Some black people cooperated with white powers because there were opportunities and securities available through cooperation. Some groups resisted peacefully, and some resisted violently. The responses to apartheid will be explored in the next Section 2 of this study.

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<sup>44</sup> Nancy L. Clark and William H. Worger, *South Africa: The Rise and Fall of Apartheid*, Routledge, 2013.

<sup>45</sup> *Ibid.*, 17.

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

#### 1.4. Path Dependencies

The South African Act of 1909 was the British Parliament's legislation that established the political, legal, social, and economic arrangements of the Union. Significantly, the Act introduced the "Cape Qualified Franchise", where franchise extended to all adult males, regardless of race. However, other territories did not allow for black people to vote. During negotiations for the Union, efforts were made to extend this non-racial franchise to the rest of the Union but were unsuccessful. Consequently, section 35 of the Act provided that men of colour retained the right to vote in the Cape Colony.<sup>47</sup> However, the general qualification criteria for voting applied across all races in the Cape Colony: voters had to earn either a minimum of £50 per annum or occupy land to the value of £75; and be able to sign his own name and write his address and job.<sup>48</sup> This, in effect, reserved voting rights for the socioeconomic elite, even among the non-white populations.

The South African Act also consolidated what Mamdani has called the "bifurcated state" of South Africa.<sup>49</sup> The British created two legal systems to govern white and black people separately. White people were subject to common law, which treated them as citizens. Black people were subject to customary law, overseen by traditional leadership that has often been co-opted by the colonial powers. This treated them as subjects of the colonial power, and not as citizens able to make claim to the Crown. This bifurcated legal system represented the separate treatment of people on the basis of race, and the subordination of black people.

Following the unification of the colonial lands in South Africa under British rule, a series of laws were passed that regulated where black people could live and what jobs they could occupy – laws that were later infamously expanded upon under the apartheid regime. The key segregationist laws include: Mines and Works Act of 1911; Native Labour Regulation Act of 1911; Natives' Land Act of 1913; Native Affairs Act of 1920; Native (Urban Areas) Act of 1923; Hertzog Legislation of 1936. It also ensured that a liberal economy was instituted in South Africa. Thus, the blueprint of many of the segregationist tools used under apartheid were introduced by the British.

In 1915, the National Party (NP) was founded by General JBM Hertzog as an Afrikaner nationalist political party, with the prioritisation of the needs of the poor, Afrikaans working

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<sup>47</sup> "35. (1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of members of the House of Assembly, but no such law shall disqualify any person in the province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the province of the Cape of Good Hope by reason of his race or colour only, unless the Bill be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament. (2) No person who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour."

<sup>48</sup> Phyllis Lewsen, "The Cape Liberal Tradition—Myth or Reality?." *Race* 13, no. 1 (1971): 72-3.

<sup>49</sup> Mahmood Mamdani, "Amnesty or impunity? A preliminary critique of the report of the Truth and Reconciliation Commission of South Africa (TRC)," *Diacritics* 32, no. 3 (2002): 53.

class – with the memory of the destruction of the Anglo-Boer War still a feature in contemporary politics at the time. The NP emphasised the need for South Africa that was independent of Britain. In 1933, the SAP and NP formed a coalition government and merged as the United Party. However, the unification of the parties was unhinged in 1939 by divisions regarding South Africa's participation in World War II: Hertzog promoted neutrality whereas Smuts wanted South Africa to support Britain as an ally.<sup>50</sup> Smuts won the vote and took South Africa to war, and it was the conscription of the mostly poor working class that was most affected. This ultimately alienated the Afrikaans voters from the United Party, resulting in their voting instead for the NP (led by DF Malan) in 1948. This ushered in the apartheid regime.

The NP had very close relations with the Calvinist Dutch Reformed Church (Nederduitse Gereformeerde Kerk – “NGK”). A distinct feature of Afrikaner nationalism it espoused was the narrative that they were the “chosen people” by God – likening the Great Trek to the Exodus story from the Bible.<sup>51</sup> Thus, the NP presented themselves as both political and moral authority for the liberation of the Afrikaans people from the dominion of the British. The political authority of leaders was thus stronger as it directly derived from the moral principles and identity claims that bound Afrikaners together. Nationalist and segregationist policies were fuelled by those principles and were thereby inherently legitimated. This was evident before the apartheid regime was in power. An example is the 1938 political campaigns by the NP that promoted Afrikaner nationalist ideas of the “pure” white Afrikaans woman that needed “protection” against other races (black and Jewish), and therefore calling on voters to support a legal prohibition of interracial marriages.<sup>52</sup>

British dominance was not received passively by the various South African population and identity groups. In response to the exclusion of black people from the 1909 constitutional processes, black African delegates across the country met in Bloemfontein for the South African Native National Convention.<sup>53</sup> They had attempted to block the passage of the South African Act by sending a delegation to London, however, this effort was unsuccessful. Three years later, in 1912, the South African Native National Congress (SANNC) was formed by the educated elite black citizens, including professionals, chiefs, ministers, teachers, and businessmen.<sup>54</sup> The purpose of the SANNC was to resist racial discrimination and to promote that equal treatment before the law be extended across race groups in South Africa.<sup>55</sup> The SANNC was renamed to the African National Congress (ANC) in 1923. Two important shapers of the resistance against apartheid can be traced to this period.

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<sup>50</sup> South African History Online, “National Party,” 5 June 2017, available at <http://www.sahistory.org.za/topic/national-party-np>, accessed on 31 July 2017.

<sup>51</sup> André Du Toit, “No chosen people: the myth of the Calvinist origins of Afrikaner nationalism and racial ideology,” *The American Historical Review* 88, no. 4 (1983): 920-952.

<sup>52</sup> Jonathan Hyslop, “White working-class women and the invention of apartheid: ‘Purified’ Afrikaner nationalist agitation for legislation against ‘mixed’ marriages, 1934–9,” *The Journal of African History* 36, no. 1 (1995): 57-8.

<sup>53</sup> South African History Online, “The Freedom Struggle in Bloemfontein,” 18 August 2016, available at <http://www.sahistory.org.za/article/formation-sanncanc>, accessed on 19 July 2017.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

First was the equality of all races from a humanist perspective, and whether equality could be established through collaboration or resistance. There were divisions among liberation and resistance movements over time about whether or not their interests would be best secured independently or collaboratively. This marked important aspects of the liberation struggle waged by the ANC – in particular, its move towards non-racialism over time. Initially, ANC membership was reserved for black Africans only. In 1969 partial membership was allowed to “non-African” (Indian, Coloured, and white) race groups, and in 1985 a non-racial membership policy was undertaken.<sup>56</sup> The version of African nationalism the ANC initially espoused should be understood within the context of the country and continent at that time. Herein, the ANC sought to overcome the ethnic divisions that the British and Afrikaans leadership had emphasised as reasons why black people could not participate as citizens in the Union. The emphasis on black collaboration was in order to develop unity within the black African racial group – across complex ethnic identities that had histories of conflict.<sup>57</sup> Furthermore, the struggle against colonialism and later apartheid was seen as struggles against racism and racist policies – and not, for example, ethnic divisions.

From the 1940s, the ANC worked in alliance with other national liberation organisations in what was called the Congress Alliance. This served as a way to promote a black resistance campaign and movement against segregation and apartheid, while maintaining a black African-only policy for membership. The other organisations that they worked with were the South African Indian Congress (SAIC), the Coloured People Congress (CPC), and the Congress of Democrats (COD – a white organisation). While Indian resistance groups had their beginnings in 1903 with Mahatma Gandhi’s establishment of the Natal Indian Congress, the South African Indian Congress (1919) was the key organisation that waged a national struggle against the subjugation of Indian people. The CPC was formed in 1953, but similarly emerged as a reiteration of previous organisations formed to promote and protect Coloured people’s interests. Famously, the Freedom Charter of 1955 served as the commitment by the ANC and the Congress Alliance to a non-racial South Africa, as well as the security of the civil, political, social, cultural, and economic rights to people of all races in the country. The mobilisation of the collective underclass, and resistance against a white minority elite, consequently resulted in collective action in favour of the lowest, common denominator of agreement – non-racialism. This commitment to non-racialism factionalised the ANC, and later led to a breakaway group formed on 6 April 1959 – the Pan Africanist Congress (PAC). The PAC was led by Robert Sobukwe. The PAC’s Africanist ideology was that anyone who believed that the majority should rule South Africa belonged as citizens, but that the struggle against apartheid was best won by black Africans fighting for their own freedom. Sobukwe was also vehemently anti-communism, and did not approve of the relationship between the ANC and SACP.<sup>58</sup> Thus, the nuances within the black African resistance movement continued to emerge, more often than not, in response to ideological differences and not ethnic ones.

The ANC Women’s League (ANCWL) was launched at the 1943 ANC Conference. The ANCWL was established as a subsidiary body of the ANC, and all women (who had hitherto not been

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<sup>56</sup> Nhlanhla Ndebele, "The African National Congress and the policy of non-racialism: A study of the membership issue." *Politikon: South African Journal of Political Studies* 29, no. 2 (2002): 134.

<sup>57</sup> Ndebele, "The African National Congress and the policy of non-racialism," 135-6.

<sup>58</sup> Benjamin Pogrand. *How can man die better: The life of Robert Sobukwe*. Jonathan Ball, 2006.



permitted to join the ANC) that wanted to join the ANC were automatically members of the ANCWL.<sup>59</sup> There were two interesting limitations set for the body: (1) the League's purpose was to be a part of the anti-apartheid struggle, not a dedicated body for the sole pursuit of women's rights; and (2) the League was to be an ANC body solely – it could not join a bigger non-racial women's movement.<sup>60</sup> Initially the role played by the ANCWL was highly gendered – largely support activities such as catering and fundraising.<sup>61</sup> However, this shifted as political changes directly implicated women as well as a shift in the ANCWL's leadership from Madie Hall-Xuma to Ida Mtwana. Mtwana's leadership saw the creation of provincial branches of the League and the incorporation of working-class, township, and rural women.<sup>62</sup>

Second, the resistance against apartheid was understood as a class and race issue. Again, the ANC's position on this matter changed over time and saw divisions within the movement. The South African Communist Party (SACP), initially called the Communist Party of South Africa, was formed in 1921. It was a labour movement with a predominantly, but not exclusively, a white membership base.<sup>63</sup> The ANC developed an important relationship with the SACP in the 1950s with the shared goal of achieving national liberation for the working class (which mostly consisted of black people, although within the white population Afrikaners were more likely to be working class<sup>64</sup>). The relationship between the ANC and SACP has an important bearing on the liberation struggle as well as the democratic government that was formed post-apartheid.

The apartheid state's economic and political organisation was a direct response to the colonial period. The economic marginalisation of the Afrikaners by the British, and the latter's preferred use of cheap black labour, meant that the apartheid state sought to uplift its constituency as a direct response to the British labour divisions. Apartheid therefore became an 'affirmative action' policy, but in ways that were inherently violent and disruptive to black groups. For their British counterparts, who controlled much of the resources at the time, apartheid was just a continuation of democratic processes without universal suffrage. By the time South Africa declared itself a republic in 1961, a series of nationalist and segregationist policies had been passed to safeguard the interests of the Afrikaans population, while English speakers, no longer identifying as British, moved into a space of political neutrality concerning race relations, or adopted more liberal (read in favour of racial collaboration) leanings.

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<sup>59</sup> South African History Online, "History of Women's struggle in South Africa," available at <http://www.sahistory.org.za/article/history-womens-struggle-south-africa#contents-5>, accessed on 17 October 2017.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> South African History Online, "South African Communist Party," 30 March 2011, available at <http://www.sahistory.org.za/topic/south-african-communist-party-sacp>, accessed on 31 July 2017.

<sup>64</sup> Craig Charney, "Class conflict and the National Party split," *Journal of Southern African Studies* 10, no. 2 (1984): 270.

## **2. Conflict Factors**

The second section focuses on conflict factors. It begins by analysing how the struggle against apartheid can be seen as a struggle between South African identity groups for nationhood and statehood, particularly as a continuation from colonisation. This section demonstrates the relationship between political, social, and economic patterns of apartheid and the ensuing conflict. It concludes by discussing the elements of apartheid that the TJ process responded to, as well as those elements it neglected.

### **2.1. Conflict dynamics**

There were distinct dimensions of apartheid that collectively deprived black people<sup>65</sup> of their socioeconomic, cultural, and political rights – and consequently their dignity and freedom. For these purposes, apartheid can be informally been distinguished into two parts: petty apartheid and grand apartheid.

Petty apartheid refers to the laws that were created to regulate the everyday life of black people. For example, apartheid policies separated public amenities and facilities on the basis of race: there were demarcated white and black benches, beaches, transport, toilets, and restaurants. The key legislative Act that oversaw this was the Reservation of Separate Amenities Act, 1953. It served to ensure that white and black people in South Africa rarely shared public spaces. Furthermore, the apartheid state made inter-racial relationships illegal through the Prohibition of Mixed Marriages Act, 1950 and Immorality Act, 1957. This had its basis in eugenic thinking and sought to prevent the “dilution” of “superior” races with “inferior” ones.<sup>66</sup>

Grand apartheid refers to the apartheid laws that systematically marginalised black people spatially and economically. The Population Registration Act, 1950 provided for the official racial classification of all South Africans into one of the following populations: white, Coloured,<sup>67</sup> or black African. This was a white supremacist racial hierarchy, with white people at the top and black African people at the bottom. The racial group one was classified into determined how petty apartheid affected one’s freedom of movement, but also how grand apartheid systemically promoted marginalisation in access to education, health and economic participation.

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<sup>65</sup> It should be noted that South Africa had administrative control over Namibia (then South West Africa). This control was granted under a League of Nations mandate from 1915 to 1945, but South Africa maintained its administrative control until 1990. This saw a spill-over of the racist policies that were promulgated in South Africa into Namibia. While this paper does not discuss the involvement of South Africa in Namibia, it is worth acknowledging this process, as well as the fact that South Africa’s transitional justice mechanisms did not engage with this administrative occupation.

<sup>66</sup> Chris Ama Onwuzurike, "Black People and Apartheid Conflict," *Journal of Black Studies* 18, no. 2 (1987): 217.

<sup>67</sup> Largely referred to Indian people (mainly in present-day Kwa-Zulu Natal Province, but also included Chinese people. It excluded Japanese people, who were given the status as “honorary white”.

The Bantu Authorities Act, 1951 and the Promotion of black Self-Government Act, 1959 both legislated for the creation of ten “homelands” or “Bantustans”.<sup>68</sup> These were ethnically defined in order to divide and separate the black African population. The black African population comprised approximately 74% of South Africa’s total population, but the land set aside for the homelands was only 13% in total of the country’s territory. The homelands had their own government, which was an example of the apartheid state’s euphemism for apartheid: “separate development”. In reality, these homelands served to remove black African people from regions reserved for white people and consolidated their exclusion from the South African state by effectively redefining their citizenship.<sup>69</sup> This can be seen as an extension of the bifurcated state system established during colonialism. Black African people were not allowed to live outside of the homelands unless it was for labour purposes. The Influx Control Laws also required that all black people over 16-years-old in South Africa carry a passbook (known as a *dompas*, which translates to “dumb pass”). Failure to present a *dompas* upon request by police was an offence that could result in one’s arrest. Furthermore, the so-called traditional leadership of the homelands were often selected by the Apartheid government, and in exchange for their allegiance were socioeconomic and political beneficiaries in the survival of an apartheid state. Their links to the National Party often meant that traditional leaders were illegitimate within their territories, but nevertheless some were able to provide certain services to their populations. However, their limited powers beyond their territories and budgets often failed to translate into systemic and meaningful gains.

The forced removal of black people from urban centres to the outskirts of cities was ensured by the Group Areas Act, 1950. The forced removal process reserved prime residential and commercial property surrounding the inner cities for white people. The areas that black people were relocated to were separated from white areas by railways and golf courses – an extension of the ‘cordon sanitaire’ used in the Cape Colony during an outbreak of the plague.<sup>70</sup> In similar ways, the apartheid government used geopolitics to further ingrain the separation of races. Areas were reserved for each race group, a deliberate strategy much like the ethnicization of the homelands – to prevent black people from interacting and uniting to build mass resistance to the apartheid state.

There were a number of marches and demonstrations that rejected the land segregation laws that were passed, some of which predate the formal apartheid period. The Asiatic Land Tenure and Indian Representation Act No 28 of 1946 regulated the areas in Natal wherein Indian people would not be able to purchase land. Some political representation was legislated but it was limited to “...three White representatives in the Assembly and two in the Senate, along with two provincial councillors who could be Indian.”<sup>71</sup> The initial attempts

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<sup>68</sup> The ten “homelands” were: Transkei, Bophuthatswana, Venda, Ciskei, Gazankulu, Lebowa, QwaQwa, KaNgwane, KwaNdebele, and KwaZulu. The first four homelands were “nominally independent”. The apartheid state also created a similar homeland structure in South West Africa (present-day Namibia).

<sup>69</sup> Merle Lipton, “Independent Bantustans?” *International Affairs (Royal Institute of International Affairs 1944-)* 48, no. 1 (1972): 3 and 6.

<sup>70</sup> Maynard W Swanson, “The Sanitation Syndrome: Bubonic Plague and Urban Native Policy in the Cape Colony, 1900–19091.” *The journal of African history* 18, no. 3 (1977): 387-410.

<sup>71</sup> South African History Online, ““Ghetto Act” or The Asiatic Land Tenure and Indian Representation Act No 28 of 1946” is passed <http://www.sahistory.org.za/dated-event/ghetto-act-or-asiatic-land-tenure-and-indian-representation-act-no-28-1946-passed>, 1 June 2017, accessed on 17 October 2017.

to challenge this law on legal grounds failed, and consequently the Natal Indian Congress launched a national passive resistance campaign.

A group of 18 SAIC members camped on a plot of land that the law prohibited them from accessing on 13 June 1946 as an act of passive resistance. This was timed with Indian women negotiating their role in political activism. Six of the 18 in the group were women. Zainab Asvat rose to prominence at this event when she encouraged the protestors not to be intimidated by white spoilers who had attacked their camp.<sup>72</sup> She arrested and released that same night, and her participation in the campaign had inspired other women to join. She was later elected as a representative on the Transvaal Indian Congress Committee, along with Mrs PK Naidoo and Miss Suriakala Patel.<sup>73</sup> This event was thus both an example of peaceful resistance as well as the beginnings of Indian women's direct involvement in political protest.

All levels of the education system were also racially separated – physically, and in terms of curricula. The Bantu Education Act, 1953 determined that the education black people received should be limited to the occupations that they would hold. Bearing in mind that there was job reservation according to race, this meant that the education offered to black people in South Africa aimed to produce a low-skilled labour force with basic numeracy and literacy skills. Access to higher education institutions was also determined on by race. This meant that there were demarcated black African, coloured, Indian, and white universities. All levels of the education system reserved for black people were severely under-resourced, especially so for those who were African, because the Bantu Education Act provided that the financing of black education be linked to the direct taxes paid by the black population.<sup>74</sup>

Even though apartheid began in 1948, the colonial period enacted several segregationist laws that were a strong precursor to apartheid legislation. The Glen Grey Act of 1894 enacted under the government of Cecil John Rhodes, reduced the rights to own land for black people and implemented a labour tax in order to usher Xhosas to work for white farmers and industrialists.<sup>75</sup> The Natives Land Act of 1913 built upon the Glen Grey Act by confining black Africans to reserved lands and by depriving them of the right to own land.<sup>76</sup> The Representation of Natives Act of 1936 dealt with the political representation of black Africans and restrained them from voting in the common roll, but in a separate one.<sup>77</sup> Thus, it is evident that apartheid legislation drew on the principles and laws enacted by British and Dutch colonisers.

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<sup>72</sup> South African History Online, "History of Women's struggle in South Africa," available at <http://www.sahistory.org.za/article/history-womens-struggle-south-africa#contents-5>, accessed on 17 October 2017.

<sup>73</sup> Ibid.

<sup>74</sup> South African History Online, "Bantu education and the racist compartmentalizing of education," 10 June 2016, available at <http://www.sahistory.org.za/article/bantu-education-and-racist-compartmentalizing-education>, accessed on 15 October 2017.

<sup>75</sup> South African History Online, 2011; Thompson & Nicholls, 2011

<sup>76</sup> South African History Online, "The Natives Land Act of 1913," 6 March 2013, available at <http://www.sahistory.org.za/topic/natives-land-act-1913>, accessed on 1 August 2017.

<sup>77</sup> South African History Online, "Representation of Natives Act Passed," 2 April 2014, available at <http://www.sahistory.org.za/dated-event/representation-natives-act-passed>, accessed on 15 October 2017.

Nevertheless, the National Party further used different tools to consolidate its power in favour of the Afrikaans population. In addition to its legislative strategies of segregation, economic subordination, and political exclusion of black people, the state sought to ensure its military strength. In 1967, the state instituted compulsory military conscription for white males over the age of 16-years-old.<sup>78</sup> This ensured that the state had a constant supply for its security arms, and also meant that thousands of young men were forced to undergo apartheid military training. It also made use of an extensive spy network in order to infiltrate anti-apartheid movements and gain intelligence about their activities. Consequently, deep-seated suspicion and fear was sown within anti-apartheid movements.

## 2.2. Conflict Characteristics

The conflict in South Africa that is considered in this paper, can be understood as a period of resistance against apartheid led by the various liberation and anti-apartheid movements. Resistance against repression and the fight for liberation spanned many decades and forms, including militant and non-violent uprisings. Consequently, resistance strategies were in response to changing national, regional, and international factors. For example, the armed struggle waged by the ANC armed wing, Umkhonto we Sizwe, had clear phases that were influenced by international armed resistance trends. In the 1960s, Umkhonto we Sizwe was influenced by Che Guevara's "detonator theory",<sup>79</sup> and in the 1970s it was influenced by Vietnamese Commander Giap's "people's war" approach.<sup>80</sup>

The ANC and SACP are two of the key political organisations that sustained their liberation struggle against apartheid despite being banned in 1960 and 1950 respectively. However, they were not the only relevant organisations. The role of other political, student, and liberation movements, as well as civil society organisations (CSOs), were crucial for the eventual downfall of apartheid. This sustained and wide-scale resistance by a majority and combined with the economic unsustainability of apartheid, meant that by the late 1980s the state could no longer afford the intensive militaristic interventions to protect the interests of a minority. Price argues that the end of apartheid is a combination of factors that occur in the 1970s, including regional transformation, economic stagnation, domestic political upheaval, and international repercussions.<sup>81</sup> Indeed, the resistance movements suffered significant blows to their campaigns in the first two decades of apartheid. This section will briefly discuss the period before the 1970s, and then it will build upon Price to discuss the key internal, regional, and international factors that culminated to bring about the demise of the apartheid regime during the 1970s and 1980s.

### Defiance Campaign

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<sup>78</sup> South African History Online, "Enforcement of military conscription for all white males in SA," 30 July 2017, available at <http://www.sahistory.org.za/dated-event/enforcement-military-conscription-all-white-males-sa>, accessed on 1 August 2017.

<sup>79</sup> Howard Barrell, "The Turn to the Masses: The African National Congress' Strategic Review of 1978-79," *Journal of Southern African Studies* 18,1 (1992):69.

<sup>80</sup> Thula Simpson, "The People's War of Umkhonto we Sizwe, 1961-1990" (PhD. diss., University of London, 2006), 167.

<sup>81</sup> Robert M. Price, "Cracks in the Monolith," in *The apartheid state in crisis: Political transformation in South Africa, 1975-1990*. Oxford University Press on Demand, 1991, 72.

In its first few decades, the ANC subscribed to a policy of non-violent resistance. It launched its Defiance Campaign in collaboration with the SAIC and CPC on 26 June 1952. The Campaign was a nation-wide and multi-racial mass mobilisation movement against apartheid. The key tactics of resistance were boycotts, strikes, and civil disobedience.<sup>82</sup> Many participants in the mass action were arrested by the state police. This dynamic of unrest and arrest prevailed during the first four decades of apartheid.

The Defiance Campaign saw a number of notable women emerge in the anti-apartheid movements. Their roles varied, for example Florence Matomela and Fatima Meer were arrested for their participation in these events, whereas Bibi Dawood used her involvement to recruit hundreds of Campaign volunteers.<sup>83</sup> Lilian Ngoyi was another significant figure among women movements that also rose in prominence during the Campaign – later president of the ANCWL and the Federation of South African Women. Her participation in the Campaign saw an ideological shift in her politics toward a more militant approach to achieve freedom.<sup>84</sup>

The Defiance Campaign marked a change within the leadership of the ANC, with the election of former ANC Youth League leaders to the National Executive Committee, most notably Walter Sisulu and Oliver Tambo. Nelson Mandela also rose as a prominent leader during the Defiance Campaign. In response to the destabilization caused by the Campaign, the apartheid state introduced harsher repercussions, including torture and armed attacks, for defying apartheid laws, which caused the Congress Alliance to end its Defiance Campaign.<sup>85</sup>

### Women's March

Shortly after, and inspired by, the Defiance Campaign, the Federation of South African Women (FSAW) was founded in 1953 – although only officially launched in 1954 – by three women who were attending trade union conference: Florence Matomela (President of the ANCWL, Eastern Cape), Frances Baard, (Food and Canning Worker's Union) and Ray Alexander (General Secretary of the Food and Canning Worker's Union).<sup>86</sup> FSAW was a national umbrella broad-based women's organisation and it was the first of its kind in the country. FSAW was aligned with the Congress Alliance, and the Women's Charter was incorporated into the 1955 Freedom Charter. The Women's Charter made specific human rights demands in the interest of all women across race designations, such as property rights, maternity leave, and childcare support for working mothers amongst others.<sup>87</sup>

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<sup>82</sup> Clark and Worger, *South Africa*, 59.

<sup>83</sup> South African History Online, "History of Women's struggle in South Africa," available at <http://www.sahistory.org.za/article/history-womens-struggle-south-africa#contents-5>, accessed on 17 October 2017.

<sup>84</sup> Ibid.

<sup>85</sup> South African History Online, "Nelson Rolihlahla Mandela", 28 June 2011, available at <http://www.sahistory.org.za/people/nelson-rolihlahla-mandela#section3>, accessed on 1 August 2017.

<sup>86</sup> South African History Online, "History of Women's struggle in South Africa," available at <http://www.sahistory.org.za/article/history-womens-struggle-south-africa#contents-5>, accessed on 17 October 2017.

<sup>87</sup> Ibid.

The Women's March to the Union Buildings in Pretoria in protest against the implementation of the Pass Laws for women on 9 August 1956 was not the first of its kind. Other notable occasions that women had demonstrated in anti-pass campaigns and marches include the 1913 Bloemfontein and 1928 Potchefstroom anti-pass campaigns. The sustained effort by women in the Potchefstroom anti-pass campaign resulted in the pass laws for women being repealed within a year.<sup>88</sup>

While the extension of pass laws to apply to women nationally has been enacted in 1952, the issuing of pass and reference books for women was only rolled out from 1954.<sup>89</sup> Ten to twenty thousand women from all race designations participated in the march. They had tried to arrange that the Prime Minister JG Strijdom would be there to receive their petition. However, they never received a response to this request, which had been sent in mid-1956.<sup>90</sup> The marchers left their signed petition bundles outside of Strijdom's office. Ngoyi suggested that they stand in thirty minutes of silence outside the Union Buildings, and as they left they sang *Nkosi sikeleli Afrika*.<sup>91</sup>

This was a politically impactful event, that had is commemorated as a national holiday in present-day South Africa. Part of the significance of this event was the magnitude of the protest, and its affirming the powerhouse that the young FSAW had become. Of great importance, the March also produced a strong counter-narrative to two problematic myths that were being perpetuated by media: (1) FSAW was being run by white women; and (2) women were politically incapable and housebound.<sup>92</sup> It inspired a similar protest in Johannesburg, which Winnie Mandela attended, organised by the ANCWL's Albertina Sisulu and Lilian Ngoyi in October 1958. Winnie Mandela was among 1000 women arrested at the protest and, in lieu of applying for bail, she spent two weeks in jail in protest.<sup>93</sup>

### Sharpeville Massacre

The PAC organised a non-violent march to police stations in protest of the *dompas* on 21 March 1960. All marchers were to leave their passbooks at home and present themselves for arrest. The logic was that the unsustainability and absurdity of the *dompas* system would be clearly illustrated by over-filled prison cells. Approximately 5000 to 7000 people marched to the Sharpeville Police Station (north of Johannesburg). The police opened fire upon the unarmed crowd and murdered 69 people and injured hundreds more. The PAC leadership all participated in the march, including Sobukwe, and were arrested. This is demonstrative of how the correctional and judicial services were an instrument of the apartheid state and by no means neutral. The Sharpeville resulted in the apartheid state issued the Unlawful Organisations Act of 1960, which banned all anti-apartheid political organisations, driving the ANC and what remained of the PAC underground and into exile. The significance of the Sharpeville Massacre of 1960 is captured by the fact that the legislatures of the Act that

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<sup>88</sup> Ibid.

<sup>89</sup> South African History Online, "The 1956 Women's March, Pretoria, 9 August," 9 August 2017, available at <http://www.sahistory.org.za/topic/1956-womens-march-pretoria-9-august>, accessed on 17 October 2017.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> South African History Online, "Winnie Madikizela-Mandela," 8 August 2017, available at <http://www.sahistory.org.za/people/winnie-madikizela-mandela>, accessed on 17 October 2017.

provided for the TRC chose this event as the starting point for its mandate. The Sharpeville Massacre is marked as a major turning point for the struggle against apartheid because it shocked the entire country and the whole world. Furthermore, despite the fact that FSAW was not banned, it was severely undermined by the banning of the ANC, which led to many of its prominent members such as Ruth Mompati and Hilda Bernstein go into exile, and others like Ngoyi detained. This combined with FSAW's ideological roots in a resistance model that had become outdated by the end of the 1950s led to its decline.<sup>94</sup>

The radicalisation of the state prompted support for an armed struggle against the apartheid regime, and the subsequent creation of the armed wings of the ANC and PAC, Umkhonto we Sizwe<sup>95</sup> (MK, created on 16 December 1961) and Poqo (consequently named the Azanian Peoples Liberation Army, or APLA, and founded in 1960) respectively. These armed wings were the outcome of factions within ANC and SACP members<sup>96</sup> that believed a state that retained its power by force needed to be defeated by force.<sup>97</sup> MK was formally autonomous of the ANC because the latter applied a non-racial policy to membership and leadership, while MK was black African. The autonomy of the ANC was also a formality required because there was a divide within the ANC about pursuing an armed revolution, where Nelson Mandela formed part of those resorting to the use of arms. MK's sabotage campaign against the Apartheid government ran from 1961 to 1963. It emphasised that people were not the targets, but rather violence should be directed against symbols of oppression, such as pass offices.<sup>98</sup> The MK suffered a major setback with the arrest of its leadership (with the exception of Joe Slovo) on 11 July 1963 in what was known as the "Rivonia Raid". It was this arrest that led to the infamous Rivonia Trial and subsequent imprisonment of, *inter alia*, Nelson Mandela, Govan Mbeki, Walter Sisulu, Ahmed Kathrada, Denis Goldberg, and Lionel Bernstein.

Much like when the PAC leadership was arrested, the effect of the arrest of the Rivonia Six was a setback for the ANC, leaving a leadership void. It also saw the fracturing of the ANC into three "branches": The External Mission (exile movement initially based in Tanzania and Zambia); the Islanders (those imprisoned on Robben Island); and the MK. These different experiences of the ANC left its mark on the internal dynamics of the ANC as a political party owing to the different experiences and philosophies within each "branch".

### Internal Factors

#### *The Black Consciousness Movement and the Soweto Uprising*

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<sup>94</sup> South African History Online, "History of Women's struggle in South Africa," available at <http://www.sahistory.org.za/article/history-womens-struggle-south-africa#contents-5>, accessed on 17 October 2017.

<sup>95</sup> Translation: Spear of the Nation.

<sup>96</sup> Nelson Mandela, Joe Slovo, Walter Sisulu, Govan Mbeki, and Joe Modise.

<sup>97</sup> Thula Simpson, "The People's War of Umkhonto we Sizwe, 1961-1990" (PhD. diss., University of London, 2006), 67.

<sup>98</sup> Joe Slovo, "The Sabotage Campaign," *O'Malley Archives*, available at <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv02918/06lv02946.htm>, accessed on 1 August 2017.



In the aftermath of the Sharpeville Massacre and subsequent marginalisation of the liberation movements, a number of small (student and worker) organisations were united around ideas referred to as “Black Consciousness” in the late 1960s.<sup>99</sup> The South African Student Organisation (SASO), established in 1969, played a major role in popularising Black Consciousness ideology among young black people – especially those at universities and in high school.

Stephen Bantu Biko was the most prominent leader of the Black Consciousness Movement (BCM). Inspired by PAC member, Aubrey Mokoape, and his negative experiences at the 1967 National Union of South African Students (NUSAS) conference: “In the NUSAS conference of 1967 the Blacks were made to stay at a church building in the Grahamstown location, each day being brought to the conference site by cars etc. On the other hand their White “brothers” were staying in residences around the conference site. This is perhaps the turning point in the history of Black support for NUSAS. So appalling were the conditions that it showed the Blacks just how valued they were in the organisation.”<sup>100</sup> The conference organisers condemned the University for this separation, however Biko problematized the fact that the conference organisers had allowed the conference to go ahead knowing that the black students would be housed separately.<sup>101</sup> Debates about the role of NUSAS and anti-apartheid white liberals had preceded the conference. However, this experience at the conference demonstrated a tension whereby white liberals, who were de facto beneficiaries of apartheid, were trying to advocate for their black counterparts’ liberation.<sup>102</sup>

Biko saw black self-emancipation as a critical element in challenging and resisting anti-black racism and apartheid. Biko’s BCM writings challenged black people to engage with the psychological effects and internalisation of apartheid racism – advocating for self-love and self-liberation as components of the resistance against racism. BCM and SASO were critical for harnessing the political consciousness (or “conscientisation”) of young South Africans in the 1970s.

Mamphela Ramphela, who was romantically involved with Biko, was also strongly influenced by BCM. She was significantly involved in SASO in her own right, evidenced by her chairing her local SASO branch.<sup>103</sup> Ramphela was a qualified doctor who worked extensively in the Eastern Cape to promote community health as well as to establish community groups to engage with the BCM.<sup>104</sup> In 1976, Ramphela was one of the first people to be detained under section 10 of the Terrorism Act, and she was banned and banished to isolation in Northern Transvaal/Limpopo in 1977.

BCM influenced many other organisations, one of which was the Black Women’s Federation (BWF). The idea for the BWF was formed under the leadership of Fatima Meer in Natal in

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<sup>99</sup> South African History Online, “Black Consciousness Movement,” 20 March 2011, available at <http://www.sahistory.org.za/article/ideology-black-consciousness-movement>, accessed on 1 August 2017.

<sup>100</sup> South African History Online, “Stephen Bantu Biko,” 18 September 2017, available at <http://www.sahistory.org.za/people/stephen-bantu-biko>, accessed on 15 October 2017.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> South African History Online, “Dr Mamphela Aletta Ramphela,” 7 September 2017, available at <http://www.sahistory.org.za/people/dr-mamphela-aletta-ramphela>, accessed on 17 October 2017.

<sup>104</sup> Ibid.

1973, and it was formally launched in 1975. The BWF was short-lived, with the apartheid government banning Meer in 1976, a BWF protest, and finally, the BWF itself in 1977.<sup>105</sup>

On 16 June 1976, 15 000 students participated in a SASO-led march to Orlando Stadium in Johannesburg's Soweto township.<sup>106</sup> The march was against the 1974 law that sought to make Afrikaans the primary language of instruction for black schools in addition to English. The police intercepted the marchers on their way and opened live fire upon the unarmed youth, killing and arresting a number of students. This triggered a series of uprisings against the apartheid state across the country for the next year.<sup>107</sup> It also drove young people into exile – largely to MK – in order to participate in the armed struggle. The Soweto Uprising also sparked the attention of the international community (largely in the United Kingdom) due to the international coverage of the events.<sup>108</sup> This was further entrenched when Biko was killed in 1977 while in the custody of the police as a result of a brain injury caused by torture. Moving into the 1980s, levels of violence against apartheid began to increase, particularly through collective action. In the global context of the end of the Cold War, this also meant that the alliance between the National Party, Western Europe and America was strained as the human rights normative framework, decolonization and the rights to self-determination were mainstreamed in the West.

### *United Democratic Front*

The United Democratic Front (UDF) was an umbrella organisation for a number of civil society organisations, such as women's, churches, civic associations, and student movements that were united against the apartheid state. It was launched in 1983 in protest of the Tricameral Parliament, which sought to give limited political powers to Coloured and Indian people, but not to the black African population. The apartheid government had declared a partial state of emergency in 1984, and a full one in 1988. This led to the UDF working together with the Congress of South African Trade Unions (COSATU), and launching the Mass Democratic Movement (MDM) in 1989. The UDF, COSATU, and ANC were in an informal alliance, which was a significant means for ensuring the ANC remained relevant within South Africa while in exile and imprisoned.<sup>109</sup> MDM launched a defiance campaign in August 1989 with the objective of making South Africa ungovernable for the minority government. The mass defiance of petty apartheid laws made it unenforceable – a protest logic akin to that of the anti-pass marches in that led to the Sharpeville Massacre. The mobilisation of workers cannot be understated as a pressure point on the apartheid state. The backbone of South Africa's economy was undermined by mass stay-aways and strikes, further contributing to the economic unsustainability of apartheid.

### *Economic Context*

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<sup>105</sup> South African History Online, "Black Women's Federation," 24 October 2016, <http://www.sahistory.org.za/organisations/black-womens-federation>, accessed on 17 October 2017.

<sup>106</sup> Price, "Cracks in the Monolith," 46.

<sup>107</sup> *Ibid.*, 47.

<sup>108</sup> Clark and Worger, *South Africa*.

<sup>109</sup> Stephen Zunes, "The role of non-violent action in the downfall of apartheid," *The Journal of Modern African Studies* 37, no. 1 (1999): 153.

The very nature of apartheid created and fashioned the conditions for its own end. Mining and agriculture had been the key economic sectors under British rule and the initial apartheid period. These sectors were extractive and required low-skilled labourers. The migrant labour system and Bantu education system arose in response to the needs of this system. In addition to an emphasis on extractive primary industries, like that of gold mining, the apartheid state sought to industrialise its manufacturing sector through import substitution industries – heavily subsidised by the low costs of production in the extractive industries. These low costs of production were not because of the rapid mechanisation of mining, but rather because the labour costs were artificially lowered through the grand apartheid agenda. The subsidies did not only benefit the manufacturing sector, but also the agricultural sectors where the National Party's Afrikaans support base was rooted. But across these three industries the productivity of the labour force was consistently and intentionally undermined as a form of resistance.

Not only were there boycotts and stay-aways but, furthermore, the organisation of the political economy would prove unsustainable in the long run. The basic tenets of capitalism require a large consumer base to create economies of scale and enable profit maximisation. In other words, white-owned production needed a bigger market to sell their products to than the minority white market. This led to the state amending some of its laws in order to develop a small black middle class that would be able to afford the manufactured goods.<sup>110</sup> Arguably, this led to market expansion and presented the challenge of a skills shortage in the labour force. This presented a dilemma for the state: as it made slight adjustments to enable a small skilled black elite, the risk for apartheid resistance and mobilisation increased. This increased risk must be understood in conjunction with the other factors to be discussed. The small black middle class's restricted access to economic participation fuelled the desire for fuller economic and political rights. It aggravated and highlighted the inequalities between black and white people. Black people were occupying positions and spaces that had previously been reserved exclusively for white people, but were paid significantly less in addition to the other apartheid restrictions that they had to endure. Pressure increased on the state during the 1970s' recession, which caused the retrenchment of many jobs for black labour, increased costs of living, and the relinquishment of passes that allowed black Africans to live outside the Bantustans. Furthermore, there was a housing crisis in black areas because the state had paused its development of urban housing for black people at the same time that there was an increase in urbanisation.<sup>111</sup>

### Regional Factors

#### *Independence in Southern Africa*

The independence of Mozambique and Angola in 1975, as result of the 1974 coup in Portugal, was significant in two key ways. Symbolically, it brought the decolonisation process that had been happening throughout the African continent since the mid-1950s closer to South Africa.<sup>112</sup> This caused alarm for the apartheid state that had hitherto enjoyed Namibia, Angola, former Rhodesia, and Mozambique as a buffer zone between itself and the

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<sup>110</sup> Ibid.

<sup>111</sup> Price, "Cracks in the Monolith," 55.

<sup>112</sup> Ibid., 39.

decolonisation processes, and served as a barrier to the ANC exile mission's efforts to infiltrate South Africa.<sup>113</sup> The political struggles in Angola and Mozambique also destabilised the borders of former Rhodesia and Namibia, which eventually created new points of vulnerability near South Africa's borders, and increasing the apartheid state's perception of threat.<sup>114</sup>

### International Factors

#### *The End of the Cold War and Sanctions*

The international community did little to intervene in South Africa at the early stages of apartheid. Sanctioning South Africa while Western powers were in the midst of the Cold War would have meant losing an important ally in the struggle against communism, bearing in mind that South Africa had deliberately presented itself to the West as the bulwark against communism in southern African.<sup>115</sup> In the midst of apartheid, newly independent African countries criticised and condemned the segregationist laws, and were backed by the United Nations (UN). Yet in its early days, apartheid did not incur tangible condemnation and pressure from the international community. The Western allies of the apartheid state prevented the UN from intervening in South Africa by arguing that apartheid was a domestic issue.<sup>116</sup> Furthermore, in response to the growing number of UN Resolutions deploring the apartheid state, it adopted UN rhetoric, arguing that the apartheid philosophy of "separate but equal development" was consistent with the right to self-determination.<sup>117</sup>

Between 1960 and 1990, South Africa faced a number of UN Resolutions that isolated it from the international community.<sup>118</sup> The impact of the UN boycotts and sanctions were undermined by the tacit support the NP government received from the Western powers (particularly the US and UK).

Parts of the Western countries' private sector challenged their home governments by lobbying investors and businesses to end investments and any activities with the South African government and businesses. By the end of the 1980s, South Africa has experienced a massive removal of multinationals due to the reputation of the country and the financial risks that investing in it would entail.<sup>119</sup> Although, it should be noted that not all multinationals withdrew from South Africa, and many gained profits at the expense of black people's freedom. The complicity of international business in apartheid was challenged in

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid., 42-3.

<sup>115</sup> Kevin Hopkins, "Assessing the World's Response to Apartheid: A Historical Account of International Law and Its Part in the South African Transformation." *Miami Int'l & Comp. L. Rev.* 10 (2001): 241.

<sup>116</sup> Ibid.

<sup>117</sup> Hopkins, "Assessing the World's Response to Apartheid", 252.

<sup>118</sup> Such as the 1962 UN Resolution on South Africa's Violation of its Obligations; UN Special Committee against Apartheid; the 1963 UN oil embargo; 1980 UN Resolution asking foreign artists not to work with South Africa; exclusion of South Africa from the 1964 and 1970 Olympics Games; and the 1985 UN International Conventions Against Apartheid in Sports (Catherine Barnes, "International isolation and pressure for change in South Africa." *Powers of Persuasion: Incentives, Sanctions and Conditionality in Peacemaking*, ACCORD 19 (2008): 36-9).

<sup>119</sup> Barnes, "International isolation and pressure for change in South Africa".

the post-apartheid period through progressive legal action by a South African organisation named Khulumani Support Group, which will be discussed further in this paper.

The final blow to both the ANC and NP government was the end of the Cold War in 1989. This meant that each side had lost its primary international backer. The ANC had aligned itself with the USSR (through its alliance with the SACP). The fall of Communism meant that the global order had fundamentally changed in favour of the Western powers. The West no longer needed the apartheid state as the protector of capitalism in southern Africa, and finally yielded to the pressure their domestic civil society put on them to boycott the apartheid state. Therefore, the West stopped standing in the way of international boycotts and sanctions.

The abovementioned internal, regional, and international factors cumulated to make the country ungovernable and the apartheid regime unsustainable. Both the ANC and NP found themselves in a stalemate. Neither had a significant advantage over the other, which paved the way for a series of negotiations during the late 1980s between NP and ANC leaders.

### **2.3. Path dependencies**

The apartheid state entrenched the segregationist policies and racist ideologies that emerged in South Africa during colonialism. It ensured that South African society was defined by race and class in order to divide and rule the majority black population.

The apartheid state embedded racism in South African society and deliberately sought to prevent interracial harmony, thus presenting a crucial challenge confronting the transition period and post-apartheid state.

Its use of state institutions, especially the legislative system and security apparatus, to subjugate the majority of the country meant that there was a fraught civic-state relationship that had to be addressed after apartheid ended. It also meant that extensive institutional and legal reform would be necessary for a sustainable National Democratic Revolution, a term that underpinned the alliances of the negotiation period, in lieu of inherently repressive systems. There was significant censorship maintained by the apartheid state. Journalists that spoke out against the apartheid state were targeted by the state.

Interestingly, the judiciary had a fair amount of formal independence from the executive under apartheid.<sup>120</sup> The state prosecutors and magistrates were more directly seen as politically aligned and acting under political instruction. However, overall, the legal system was seen as a terrain where some battles could be won. Judges were generally not pressured to resign and some judges managed to build a reputation as progressive or at least independent. That said, the racial and gender profile of judges was a big problem, and has remained a matter of slow transformation under the new regime.

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<sup>120</sup> Paul Gready and Lazarus Kgalema, "Magistrates Under Apartheid: A case study of professional ethics and the politicisation of justice," Research report written for the Centre for the Study of Violence and Reconciliation, August 2000. Available at <http://www.csvr.org.za/docs/trc/magistratesunderapartheid.pdf>, accessed on 17 October 2017.

Access to education, jobs, healthcare, housing and land, and other resources were all determined by race. Furthermore, the apartheid state deliberately gave a degree of preferential treatment to Coloured and Indian groups, thereby creating inequality (and disharmony) within the black population in addition to inequality between black and white people. The apartheid state's manipulation of racial identities and ethnic divisions toward its political objectives was significant not only during apartheid, but also during the transition years. In particular, between the ANC and the Inkatha Freedom Party (IFP).

The apartheid regime built upon and exacerbated the physical and structural violence path dependencies that emerged in the end of the colonial period. The use of physical violence by the apartheid state to repress opponents of the regime manifested in different forms and by different agencies of the state. The torturing of political prisoners, violent repression of (peaceful) protests, and assassinations of anti-apartheid campaigners like Ruth First are just a few examples. The anti-apartheid liberation movements also utilised physical violence to aid their efforts, as seen in the Sabotage Campaign's targeted bombing of apartheid symbols. Structural violence was ensured through a vast array of anti-black legislation that deliberately restricted the movement, education, living areas, jobs, relationships, incomes, amenities and so on that black South Africans could access. The combination of petty and grand apartheid not only continued the limitations upon black people's prospects that began in the colonial period, but also compounded institutional and social racism that continue to affect the social, economic, and political relationships within South Africa in the post-apartheid regime era. Furthermore, patriarchy was largely undisrupted in the apartheid period by apartheid and anti-apartheid proponents alike. The emphasis on violence and hyper-masculinities can be argued to be a root cause of the extremely high levels of violence against women that permeates South African society, across race and class divisions.

The apartheid state made extensive use of banning orders (of individuals and organisations) to push anti-apartheid activists out of the country and apart from one another. Relatedly, torture and intimidation were also tools in the apartheid kit to repress black resistance. Winnie Mandela's experiences highlight many of the effects and forms of these laws. Her access to visitation hours with Nelson Mandela were severely restricted and complicated. She was banned, spied on and betrayed, harassed and raided by police, and isolated.<sup>121</sup> The apartheid state's targeting of Winnie Mandela was because of the threat she posed as an anti-apartheid activist. In 1969 she was arrested, kept in solitary confinement for 18 months, and tortured. After being banned and harassed throughout the next two decades, Winnie Mandela was banished to live in isolation in Brandfort in an (unsuccessful) effort by the apartheid state to try to isolate the relentless activist.<sup>122</sup> It is clear from this description that the apartheid state utilised laws, state apparatus like the police and security forces, and informal spy networks in addition to its anti-black segregationist laws, to try to secure power for a white minority.

There were many divisions about what liberation entailed and how best to achieve this. This gave rise to differences within black liberation movements around the relationship between non-racialism, liberation, and nationhood. The prominence of the ANC at the end of the apartheid meant that its eventual promotion of non-racialism was embraced as the

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<sup>121</sup> South African History Online, "Winnie Madikizela-Mandela."

<sup>122</sup> Ibid.

definitive feature of the post-apartheid nationhood it envisioned. However, as has been discussed, this was not always that case within the ANC nor was it universally supported, which created tensions and difficulties during the transition.

Ultimately, the apartheid state institutionalised racism and inequality – two key challenges that the defined the transitional needs of the country and remain issues to date.

### **3. Transitional Factors and Societal Factors**

This section explains the nature of the political settlement that ended apartheid, discusses the negotiation period and its outcomes, outlining the key intra- and inter-group relationships at the time, the key nation-building aims of the post-apartheid government, and the role played by civil society and the international community during this time.

The ANC Exile Mission had worked on presenting itself as a viable alternative government to the apartheid government.<sup>123</sup> This was evidenced in part by their formal structures while in exile, such as schools in Morogoro, diplomatic offices and personnel across the world, as well as an Information and Publicity Department, and Youth and Women's Sections.<sup>124</sup> The emphasis placed upon this image as an alternative government was clear at the 1985 Kabwe Conference. Tambo argue in favour of meeting with representatives from the business sector in South Africa for talks about a negotiated settlement.<sup>125</sup> This was a contentious point because there was not consensus that the ANC should enter a negotiated settlement. Tambo received permission from the ANC leaders at the Kabwe Conference to meet with various groups for talks, including, business institutions, civil society, and opposition political parties.<sup>126</sup>

The first of these meetings took place in Lusaka on 13 September 1985. The ANC delegation, led by Tambo and Mbeki, met with thirteen business executives and journalists. "The ANC delegation also included Chris Hani, Jordan, Maharaj, and James Stuart (a member of the ANC's national executive). Relly's delegation included Peter Sorour (an executive at the South Africa Foundation), Zach De Beer (an executive director at Anglo American), Tony Bloom (the chairman of Premier Group), Hugh Murray (the editor of Leadership), Harald Pakendorf (the former editor of Die Vaderland) and Tertius Myburg (the editor of the Sunday Times)."<sup>127</sup> This meeting was an important tipping point. Its success, and subsequent publicity, opened the doors to further talks between the ANC and non-ANC aligned South African civil society.<sup>128</sup> Eighteen talks occurred from 1985 to 1987 between the ANC and representatives from South African civil society, including academia, student movements, unions, churches, and even the chair of the Broederbond.<sup>129</sup>

The combination of these meetings, rather than any single meeting, were significant for popularising the idea of negotiations with the ANC among groups that had not previously been pro-ANC. This was an important step as it divided the white elite, raised the ANC's esteem within these circles, and also exposed some of the NP's political weaknesses.<sup>130</sup> Four key issues were prevalent from these talk: the armed struggle; when negotiations would begin; the relationship with the SACP, and, relatedly, the ANC's economic vision.<sup>131</sup>

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<sup>123</sup> Jolobe, "Getting to CODESA," 135.

<sup>124</sup> Tom Lodge, "State of exile: The African national congress of South Africa, 1976–86." *Third World Quarterly* 9, no. 1 (1987): 4-5.

<sup>125</sup> Jolobe, "Getting to CODESA," 134.

<sup>126</sup> *Ibid.*, 136.

<sup>127</sup> *Ibid.*, 137, footnote 456.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, 138-9, Table 5.1.

<sup>130</sup> *Ibid.*, 140.

<sup>131</sup> *Ibid.*, 139-40.



Furthermore, there were two important international and regional shifts that also affected the pull toward negotiations for the ANC. Firstly, in 1984, the southern African states from which the ANC had been operating, and were reliant upon, were in favour of their negotiating a settlement.<sup>132</sup> Secondly, by 1985 a direct line of communication between the US and ANC had commenced. The US favoured a negotiated settlement to end the apartheid conflict.<sup>133</sup> Although the Cold War had not yet officially ended, by this time the US was already relatively more powerful than the USSR, to whom the ANC had aligned itself.

The need for reform, at least formally, was already in discussion within the NP in the mid-1980s – increased pressure through the Special Cabinet Committee reported to then-President Botha that serious reform was necessary in 1986. Unbeknownst to many, the head of the National Intelligence Services, Niel Barnard, and the Minister of Justice, Kobie Coetsee, had secretly begun negotiations with Mandela in 1986.<sup>134</sup>

F.W. de Klerk took over presidency in 1989 from Botha when the latter resigned after having a stroke. On 2 February 1990, de Klerk announced the unbanning of the ANC and release of Mandela from Pollsmoor Prison<sup>135</sup> in order to publicly begin negotiations between the NP and the ANC. The unbanning of the organisations saw the ANC, SACP, and COSATU enter into the Tripartite Alliance. The Alliance was united behind the goals of achieving a National Democratic Revolution (NDR), but each member retained its independence. The NDR was, at best, an oxymoron – aiming to achieve revolutionary change but through the mechanism of democracy. The revolution was described through relatively conservative terms, such as “the establishment of a democratic and non-racial South Africa, economic transformation and continued process of political and economic democratisation.”<sup>136</sup> Though at the time non-racialism represented a significant shift in formal policies, there was collective support for it as a normative framework for the post-apartheid era. However, democracy and its processes had been a key feature of the apartheid system that was afforded to white people. The NDR presented the assumption that a non-racial democracy would transfer political and economic power, in favour of the largely black working class. It failed to take into consideration, whether deliberate or not, that political power transferred through universal suffrage would not challenge the structures of a capitalist economic system that required class divisions. As will be discussed later, non-racialism as promoted by the NDR and its consequences thus translated into economic diffusion for the elite, but did not result in significant relative economic gains for the black majority. The democratic revolution, therefore, toed a line of centre-left and centre-right politics, but through the awkward pairing of the communist, labour movement with what was becoming of the ANC: a leftist party by words, but a capitalist one by actions.

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<sup>132</sup> Ibid., 141.

<sup>133</sup> Ibid.

<sup>134</sup> Pádraig O’Malley, “Vula: Getting Started,” in *Shades of Difference: Mac Maharaj and the Struggle for South Africa*. USA: Penguin Books, 2008: 243.

<sup>135</sup> He had been transferred there from Robben Island in 1982.

<sup>136</sup> COSATU, “Tripartite Alliance,” available at <http://www.cosatu.org.za/show.php?ID=2051>, accessed on 15 October 2017.

In July 1990, the Inkatha Freedom Party (IFP) was launched by Chief Buthelezi in Kwa-Zulu. It started as a “National Cultural Liberation Movement” in 1975 under the name Inkatha yeSizwe. The IFP sought to secure political support for itself as a viable alternative to the ANC and SACP, and its main constituencies were in the KwaZulu/Natal and Transvaal regions.<sup>137</sup> These regions were the sites of the most serious violence between ANC and IFP rivals, and saw the highest number of deaths that had been thus far in the conflict. The NP government called the clashes “black-on-black” violence, and capitalised upon this to undermine international and white people’s perceptions of the ANC during the pre-negotiation and negotiation period. Counter to the rhetoric surrounding the “miraculous” and “peaceful” transition in South Africa, the 1990s marked South Africa’s highest bloodshed during the conflict as a result of both political and criminal violence.<sup>138</sup>

### *Pre-Negotiations: Groote Schuur Minute and Pretoria Minute*

During the negotiations, each party had a list of demands that they wanted to secure ahead of formal negotiations, leading to two sets of official pre-negotiation talks.

The first of these talks occurred on 4 May 1990 at the Presidential home in Cape Town, thus earning the name the Groote Schuur Minute. The ANC had a list of key demands informed by their 1989 Harare Declaration: (1) release of political prisoners; (2) immunity for exiled political organisation members; (3) end state of emergency; and (4) amend security legislation. The NP demanded that the armed struggle be suspended. The ANC agreed to pause the armed struggle while the terms and conditions for the release of political prisoners and amnesty agreement for political offences were deliberated.<sup>139</sup>

Violent clashes between IFP and ANC supporters in the KwaZulu region and Johannesburg preoccupied the ANC leadership. There were divisions within the ANC about how to respond to this violence, especially as the IFP was trying to appeal to ANC Zulu-speaking supporters to widen their (IFP) support base.<sup>140</sup> Beyond creating internal divisions for the ANC, the commitment to an armed struggle and the IFP-ANC clashes were affecting public debates about the best way to govern the negotiation period – specifically about whether or not a Constitution should be drafted before or after elections.<sup>141</sup> The ANC had concluded that they were unlikely to win political power through the armed struggle, but also recognised that it was an important symbol of hope for their constituents.<sup>142</sup> The ANC unilaterally suspended the armed struggle. This enabled the stalemate from the Groote Schuur Minute to be overcome and strategically gained their favour in international and domestic eyes.<sup>143</sup>

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<sup>137</sup> Pdraig O’Malley, “From Buthelezi IFP to Third Force Theory,” available at <https://www.nelsonmandela.org/omalley/index.php/site/g/03lv02424/04lv03275/05lv03294/06lv03299.htm>, accessed on 1 August 2017.

<sup>138</sup> Brandon Hamber, (1998). Dr Jekyll and Mr Hyde: Violence and transition in South Africa. In Bornman, E., Van Eeden, R. & Wentzel, M. (eds.), Violence in South Africa, Pretoria: Human Sciences Research Council. Available: <http://www.csvr.org.za/publications/1712-dr-jekyll-and-mr-hyde-violence-and-transition-in-south-africa.html>. Accessed on 2 February 2018.

<sup>139</sup> Thula Simpson, "Toyi-Toyi-ing to Freedom: The Endgame in the ANC's Armed Struggle, 1989–1990." Journal of Southern African Studies 35, no. 2 (2009): 516.

<sup>140</sup> Zwelethu Jolobe, ‘Getting to CODESA: An Analysis on Why Multiparty Negotiations in South Africa Began, 1984-1991’ (University of Cape Town, 2014), 264-5.

<sup>141</sup> Jolobe, “Getting to CODESA,” 266.

<sup>142</sup> Ibid., 267.

<sup>143</sup> Ibid., 268.

However, this decision also saw them being accused of being “sellouts” by many ANC members and leadership.<sup>144</sup> For example, Winnie Madikizela-Mandela was strongly against halting the armed struggle.

The NP and ANC agreed to meet in August 1990 for a second round of pre-negotiations, called the Pretoria Minute. The Pretoria Minute secured dates for the release of political prisoners, indemnity for them, the suspension of the armed struggle, and the lifting of the state of emergency in Natal. However, the fulfilment of these agreements was fraught once it came down to the semantics of key points. For example, the parameters of what could be understood as an “armed struggle” (i.e. arms collection or only outright combat), and who could receive indemnity (all political prisoners or only those needed for negotiations).<sup>145</sup> All the while, the violence between IFP and ANC supporters continued unabated, causing Mandela to criticise the de Klerk government for failing to intervene to manage the violence. Suspicions had increased the state security were involved in the violence by providing arms to IFP combatants.

The official negotiation period commenced on 21 December 1991 with the Convention for a Democratic South Africa (CODESA I). A Declaration of Intent was signed but ultimately these talks fell apart because consensus about the structure of the government-to-be could not be reached. CODESA II resumed the talks on 15 May 1992 but had limited the participation to a much smaller group in order to enable consensus-making. However, this was short-lived. A month later the ANC withdrew from CODESA II once the Boipatong Massacre revealed that the NP had sponsored a “third force” to fuel the tension between the ANC and IFP.<sup>146</sup>

Cyril Ramaphosa (ANC) and Roelf Meyer (NP) continued to meet to facilitate negotiations. The Bisho Massacre in September 1992 served to encourage both the ANC and NP to resolve their issues, and saw the signing of the Record of Understanding on 26 September.<sup>147</sup> This named the ANC as the NP’s partner, and thereby ended the relationship between the NP and IFP. In April 1993, negotiations between the NP and ANC were resumed in the Multiparty Negotiation Process, which finally saw the drafting of an Interim Constitution and an agreement to establish a power-sharing government called the Government of National Unity (GNU).<sup>148</sup> Notably, the Bill of Rights that was developed during these negotiations constitutionalised socioeconomic rights.

The first democratic elections of South Africa took place on 27 April 1994. The ANC won 63% of the vote, while the NP and the IFP secured 20% and 11% respectively. The ANC therefore led the GNU. The GNU committed itself to building a united South Africa that promoted equality, dignity, non-racialism, and non-sexism. This commitment was embodied in the Constitution of the Republic of South Africa, which was adopted in 1996. The nation-building effort of the GNU confronted the task of trying to overcome a society defined by centuries of racial, ethnic, class, and linguistic divisions. This task was made trickier by the need to

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<sup>144</sup> Simpson, “Toyi-Toyi-ing to Freedom, 520; and Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid* (New York: Norton, 1997), 166.

<sup>145</sup> *Ibid.*

<sup>146</sup> O’Malley, “Into the New South Africa,” in *Shades of Difference*, 392.

<sup>147</sup> *Ibid.*, 393.

<sup>148</sup> *Ibid.*

carefully balance promoting a united South African identity that did not subjugate or erase other sub-national identities. Thus, the idea of the Rainbow Nation was born. The Rainbow Nation epitomised the compromise between two nationalist programmes. It did not root nation-building on an ideology of identity (like Afrikanerdom or blackness), but on broader concepts under which all the different entities and groups present in South Africa can gather and create the foundations of one national identity. This also appealed to the international community because it confirmed the commitment of the ANC-led government to peace, reconciliation, and democracy. Another concept that was popularised by the new democratic government was the phrase “Ubuntu ngumuntu ngabantu,” translated to mean that a person is a person through relationship with others. As a southern African humanist philosophy, Ubuntu emphasises community. Along with the ideals of a Rainbow Nation, Ubuntu emerged as a guiding normative framework in the emerging social contract. The commitment to Ubuntu, human rights, reconciliation, and reparation was pledged in the Interim Constitution’s Epilogue, entitled “National Unity and Reconciliation”. Here, the foundations of the nation-building agenda for the post-apartheid period were clearly set out.

The ANC inherited a heavily indebted state following the years of sanctions, high security expenditure, and recession that the apartheid state had incurred. The ANC had popularised its plans for key macroeconomic policies under the Reconstruction and Development Plan (RDP) during its electoral campaign. The RDP aimed to redress the socioeconomic inequalities caused by apartheid. Its primary success was the establishment of a social welfare system. However, it enjoyed limited economic growth, and was replaced by the more explicitly neo-liberal Growth, Economic and Redistribution policy in 1996. This earned the ANC much criticism, especially from its Alliance partner, COSATU, because of the ANC’s departure from a socially-g geared policy. The ANC was under pressure to develop an economic policy that could see economic growth in an international economic order that was predominated by neo-liberal institutions, but also to redress the inequalities caused by apartheid. This challenge has remained throughout the ANC’s terms in office.

Habib has argued that South Africa’s civil society can be said to have been “...influenced and been molded [sic] by the political transition in South Africa.”<sup>149</sup> In the late 1980s, civil society was divided into pro- and anti-apartheid organisations. As noted earlier, it was during this period that the UDF rose as a critical civil society powerhouse. Additionally, anti-apartheid mobilisation enabled a racially diverse civil society to emerge and network. Post-1994, the state instituted two major reforms that directly affected civil society. Firstly, it adopted the Non-Profit Act, which formally recognised and regulated NGOs and community-based organisations (CBOs). The state developed a cooperative relationship with non-profits to promote policy development and service delivery – a major departure from the apartheid-style relationship between civil society and the state.<sup>150</sup> Secondly, the international donor community channelled funding that they previously allocated to anti-apartheid civil society toward the ANC regime. This saw the government create institutions like the National Lottery as a means to fund NGOs and CBOs.<sup>151</sup>

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<sup>149</sup> Adam Habib, "State-civil society relations in post-apartheid South Africa," *Social Research* (2005): 674.

<sup>150</sup> Habib, "State-civil society relations in post-apartheid South Africa," 678.

<sup>151</sup> *Ibid.*

Neocosmos argues that there was a notable shift in the role that civil society gave itself once the apartheid regime had ended. He explains that the establishment of the South African National Civic Organisation (SANCO) in 1992 saw the delegation of national politics to the ANC, and the repositioning of civil society as interest groups and “non-partisan democratic watchdog.”<sup>152</sup>

Thus, the TJMs that were selected by the democratic regime must be understood in the context of a US-hegemonic, neoliberal global order; a heavily indebted state that had to appease this order due to the fall of communism; a society that was racially, ethnically, spatially, and economically divided but for the first time were formally equally before the law; a period of institutional and legal reform; a transitional government that had emerged from a negotiated settlement; predominantly white-owned capital and business; the repositioning and reimagining of civil society in light of the ANC’s position as a ruling party, and a nation- and state-building effort that pledged itself to Ubuntu and the Rainbow Nation.

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<sup>152</sup> Neocosmos, “From people’s politics to State politics,” 211.

## 4. Choices in Transitional Justice

This section seeks to explain the TJ policy choices that decision-makers had, as well as the impact of CSOs and the path dependencies identified in sections 1 and 2 on the TJ policy decisions. The implementation of the TJ policies will be discussed and the institutions responsible for its implementation mapped. The framing of TJ in relation to the nation-building project will also be outlined.

### 4.1. Transitional Justice Policy Considerations

There are contending explanations for why the TRC was chosen as the key TJ process by the post-apartheid regime in South Africa. Generally, the TRC is explained as a response to a range of factors the ANC-majority GNU confronted once they secured a victory in the 1994 democratic elections, as summarised in the previous section.

The interim Constitution had been agreed upon by the ANC and NP by November 1993, with the exception of a provision for amnesty. The clause for this provision was tasked to Mac Maharaj (ANC) and Roelf Meyer (NP). “This occurred outside the official consultative process, in the hiatus between the end of the formal constitutional talks and the Constitution going to parliament in December 1993.”<sup>153</sup> This is important because the amnesty provision was decided upon in private, exclusive consultations – defended by Meyer on the grounds that they were a prerequisite for the interim Constitution’s approval.<sup>154</sup> The post-amble to the interim Constitution provided that amnesty be granted for political offences:

“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.”<sup>155</sup> [Emphasis added].

This prescription was relatively open-ended, with the only real guidance being the type of offences that were eligible for amnesty and a rough guide about the cut-off date that amnesty measures would cover. This meant that the democratic state was required to develop a TJ policy that, at the very least, attended to the agreement to grant amnesty during the negotiations. Then-Minister of Justice, Dullah Omar, confronted the task of legislating this agreement, which was perceived to primarily benefit the perpetrators of past human rights abuse, while trying to promote the rule of law and commitment of the new government to human rights. He acknowledged this in a speech that introduced the TRC, wherein he stated: “I could have gone to Parliament and produced an amnesty law - but this

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<sup>153</sup> Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001), 8.

<sup>154</sup> *Ibid.*

<sup>155</sup> Epilogue of the Interim Constitution of 1993.

would have been to ignore the victims of violence entirely. We recognised that we could not forgive perpetrators unless we attempt also to restore the honour and dignity of the victims and give effect to reparation.”<sup>156</sup>

Explanations have included a discussion of what TJM options the ANC government could reasonably have explored. The above makes clear that amnesty was a necessity. It shows the pressure to address survivors’ needs (especially since this was largely an ANC, or at least black, constituency). Prosecutions are considered to have been implausible for reasons other than the amnesty agreement in the interim Constitution. Van Zyl identifies four key reasons for this unviability. The South African criminal system was considered incapable of managing large-scale prosecutions given its struggle to respond to and investigate ongoing criminal matters satisfactorily.<sup>157</sup> This brought doubt about the criminal system’s ability to successfully and meaningfully investigate past crimes. There was a shortage of appropriate professionals to perform such investigations (detectives, prosecutors), which had resulted in delays with matters under investigation at the time.<sup>158</sup> The state would not have been able to afford the prosecution process, especially considering that the state would be liable to cover the legal costs of former state employees – who would make a majority of the people likely to be prosecuted.<sup>159</sup> Lastly, van Zyl explains that the prosecution approach is extremely time-consuming wherein both financial and time resources invested may only result in low convictions.<sup>160</sup> Unmentioned by van Zyl, but significant for his point, is also that the apartheid government destroyed massive collections of its records.<sup>161</sup> The destruction of apartheid records further undermined the viability of prosecutions.

However, these explanations – that the TRC was the middle ground between the amnesty requirements and victim needs and prosecutions were unviable – seems insufficient.

Firstly, it does not explain why an ad hoc court was not used – modelled upon the International Criminal Tribunals for Rwanda and former Yugoslavia – to overcome the domestic inability to pursue a prosecutorial approach. This suggests that the desire for prosecutions were possibly absent among government and/or the international community.

Secondly, it does not appreciate the instrumentalism of a commitment to the global human rights discourse. The emphasis on human rights in the nation-building project of the ANC government was not a coincidence nor was it neutral. According to Wilson, this discourse served pragmatic purposes during talks and negotiations between the ANC and NP because

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<sup>156</sup> Dullah Omar, “Introduction by the Minister of Justice” speech, available at <http://www.justice.gov.za/trc/legal/justice.htm>, accessed on 2 August 2017.

<sup>157</sup> Paul Van Zyl, “Dilemmas of transitional justice: The case of South Africa's Truth and Reconciliation Commission.” *Journal of international Affairs* (1999): 651-2.

<sup>158</sup> *Ibid.*, 652.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*, 653.

<sup>161</sup> Paragraph 1, Chapter 8 of Volume 1 of the TRC Report; and Pretoria News, “Destruction of apartheid files means many secrets will never be told”, 29 July 2007, available at <http://www.khulumani.net/khulumani/in-the-news/item/200-destruction-of-apartheid-files-means-many-secrets-will-never-be-told.html>, accessed on 17 October 2017.

it offered an ideology/tool that could circumvent the race and ethnic divisions in the country through its inclusive rhetoric.<sup>162</sup>

Wilson's observations about the links between a human rights discourse, nation-building, and the global prevalence of a human rights-based approach are useful for understanding the pragmatic reasons for committing to human rights, and how this shaped the TRC, but does not explain *why* a truth commission was selected.

Thirdly, Adam Sitze's 2013 publication, *The Impossible Machine*, challenges the esteem awarded to the South African TRC as "unprecedented" in TJ literature by highlighting that this description is ahistorical since South Africa's indemnity history shows patterns that recurred in the final amnesty provisions under the TRC. Sitze argues that it is necessary to understand the genealogy of indemnification jurisprudence in South Africa, traced to colonialism and apartheid, in order to recognise patterns and trends:

"Under apartheid, indemnity thus no longer served...as the keystone of parliamentary sovereignty [as it had under colonialism]. It morphed into the juridical form with reference to which the apartheid state granted its security forces informal but definite *carte blanche* to use whatever means necessary to win their "total war" against individuals and populations opposed to apartheid. It became a redoubled version of what it always already was in the first place: a technique for suppressing anticolonial rebellions."<sup>163</sup>

Thus, Sitze argues that amnesty, and the form that it took under the TRC, was a continuation of indemnification conventions that had roots in colonialism, but more specifically took its particular shape, in apartheid.

Furthermore, Sitze also demonstrates that the use of commissions of inquiry were tools used by colonial powers and the apartheid state to "...to explain the "necessary evil" or "lamentable necessity" of state repression" in response to anti-colonial and anti-apartheid uprisings.<sup>164</sup> He argues that the TRC should be understood within this history of commissions of inquiry. This approach lead Sitze to argue that the TRC was an instance wherein the post-apartheid state used an age-old mechanism (commission of inquiry) but for the opposite outcome of its historical use: "to signify emancipation from a repressive state—to produce a "historical catharsis" in which the unethical basis of the apartheid state itself would become self-evident to one and all."<sup>165</sup> Hamble and Kibble agree that such commissions have been used for public relations management – with particular reference to the NP's Harms Commission of Enquiry in the early 1990s – but also note "...most truth commissions have emerged during periods of political transition as mechanisms for demonstrating a genuine change in human rights practice, promoting respect for the law, or legitimising the new

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<sup>162</sup> Richard A. Wilson, "Introduction," in *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, 2001), 5.

<sup>163</sup> Adam Sitze, "Introduction," in *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission.*, 1st ed. (University of Michigan Press, 2013), <https://muse.jhu.edu/book/25316>, 9.

<sup>164</sup> Sitze, "Introduction", 15-17.

<sup>165</sup> *Ibid.*, 17.



regime or for a combination of these reasons.”<sup>166</sup> Hamber and Kibble’s more positive depiction of possible motives for a political regime’s use of truth commissions, while plausible, may understate or neglect the significance of Wilson’s point about how a human rights approach itself has instrumental value for political actors.

This historical contextualisation therefore helps one make sense of the calls by civil society for commissions of inquiry into the human rights violations committed by the apartheid state. Similarly, calls were made by the NP (as well as other sects of society) for similar investigations into the human rights abuses committed by ANC in its exile camps.<sup>167</sup> The ANC responded to these calls by noting that it already had appointed three internal commissions of inquiry into these allegations: the Stuart (1984), Skweyiya (1992), and Motsuenyane (1993) Commissions of Inquiry. However, the ANC argued that the violations that occurred therein could not be likened to those committed by the apartheid state, since the ANC was waging a just war.<sup>168</sup>

Interestingly, the Stuart Commission, which was established by the ANC’s NEC to investigate the “disturbances” that had taken place within the ANC’s Angolan camps.<sup>169</sup> It was found that there was a divide between administration and rank-and-file members in the camps, whereby the former was enjoying elite privileges that far surpassed the conditions the latter had to endure, such as access to better food, alcohol, and an abuse of authority to get foot soldiers to conduct chores for administration.<sup>170</sup> Another dimension of this abuse of power saw leadership “use their positions to seduce women comrades. This even affected married women and lovers. The boy-friends are harassed and if need be, transferred to other camps... here is a widespread belief that women are sex objects and that they do not develop politically and militarily.”<sup>171</sup> This is interesting because already in 1984 there was evidence of problematic gendered assumptions and abuses taking place within the ANC camps. This is not to say that similar abuses were not occurring within NP structures. Rather, the point is that despite evidence of gendered abuse, a gender-sensitive interpretation of the human rights abuses investigated and redressed under the TRC was not prominent. Without exaggerating the prevalence of one investigation of inquiry, it is noteworthy that it was known that gendered abuses and relations had occurred in exile and during apartheid, but had not been meaningfully incorporated into the South African TRC process despite precedent existing in the Stuart Commission Report.

Internationally, the transitions from the authoritarian governments in Latin America in the 1980s had mainstreamed the use of truth commissions as a means to unveil the history of

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<sup>166</sup> Brandon Hamber and Steve Kibble, (1999). From Truth to Transformation: The Truth and Reconciliation Commission in South Africa. Catholic Institute for International Relations Report, February.

<sup>167</sup> Patricia J. Campbell, “The Truth and Reconciliation Commission (TRC): Human Rights and State Transitions-- The South Africa Model,” *African Studies Quarterly* 4, 3 (2000): 42.

<sup>168</sup> Ibid.

<sup>169</sup> Stuart Commission Report, “Introduction,” March 1984, available at <http://www.anc.org.za/content/stuart-commission-report>, accessed on 16 October 2017.

<sup>170</sup> Ibid., “Administration”.

<sup>171</sup> Ibid., “Womanising”.

the conflicts that occurred, address human rights violations, and circumvent the time, institutional, and financial constraints posed by a prosecution process.<sup>172</sup>

The above paragraphs have sought to show the different explanations for what is likely to have shaped the decision to utilise a truth commission as the primary TJ process in South Africa. It has shown that the emphasis on a human rights rhetoric was symptomatic of a broader nation-building agenda that saw pragmatic uses of a human rights-based approach both domestically and internationally. It also showed that the form of amnesty that was ultimately decided upon (to be discussed further in the next section) had precedent in a history of indemnity jurisprudence in South Africa. Lastly, it also suggested that the use of commissions of inquiry was not unusual, and so the call for a truth commission by ANC politicians like Kadar Asmal, and civil society organisations like IDASA, is not baseless. Additionally, it is likely that such calls were also shaped by the use of truth commissions in Latin America's transitions from authoritarian governments. This combination of factors seems to give a fair explanation for the decision to use a truth commission as the key mechanism for the TJ process.

Furthermore, the aforementioned factors contributed not only to the choice of a truth commission, but the nature of that commission. For example, it is interesting to note that the points of contention during the pre-pre-negotiation talks, pre-negotiations, and negotiations discussed in the previous section were not about how to address human rights violations, structural violence, and gendered and racial inequality. These issues were relegated to the constitutional and nation-building process. Structural violence, gendered violations, and race-motivated crimes were substantively absent from the TJ process.

#### **4.2. Transitional Justice Policy Implementation.**

The TRC was established by the Promotion of National Unity and Reconciliation Amendment Act 34 of 1995, known as the "TRC Act". The TRC Act set the parameters of which violations would be investigated by the TRC to "gross violations of human rights", which was defined as:

"...the 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 the cut-off date within or outside the Republic, and the commission of which was carried out, advised, planned, directed, commanded or ordered, by any person acting with a political motive."<sup>173</sup>

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<sup>172</sup> Brandon Hamber, and Steve Kibble, "From Truth to Transformation: The Truth and Reconciliation Commission in South Africa," Catholic Institute for International Relations Report, February, 1999. Available at <http://www.csvr.org.za/publications/latest-publications/1714-from-truth-to-transformation-the-truth-and-reconciliation-commission-in-south-africa>, accessed on 2 August 2017.

<sup>173</sup> Section 1, Chapter 1, TRC Act.

The term “gross human rights violations” did not have a clear definition in international law before the South African TRC. In fact, the TRC set the precedent for how it would become popularly defined. The TRC recognised that “severe ill-treatment” in the above definition could be broadly interpreted and include the structural violence experienced by black people as a result of the anti-black racist laws passed by the regime.<sup>174</sup> However, the TRC concluded:

“While taking these submissions very seriously, the Commission resolved that its mandate was to give attention to human rights violations committed as specific acts, resulting in severe physical and/or mental injury, in the course of past political conflict. As such, the focus of its work was not on the effects of laws passed by the apartheid government, nor on general policies of that government or of other organisations, however morally offensive these may have been.”<sup>175</sup>

The decision to focus on what the TRC termed “bodily integrity rights”<sup>176</sup> could be understood when considering that the TRC had to be responsive and complementary to the amnesty provisions in the interim Constitution’s post-amble. The post-amble named the conditions for amnesty: “acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.” For amnesty to be granted, it was necessary to show political intent and thereby that the crime committed was one that could be considered illegal under apartheid law. Forced removals, limitations on freedom of movement, and other structurally violent and racist apartheid laws were technically legal, therefore amnesty was unnecessary because state officials upholding these laws were not considered as acting illegally. However, they were liable if they acted in a way that was illegal under apartheid law – such as murder, torture, kidnapping and so on. Thus, the focus on bodily integrity rights by the TRC could arguably be seen as pragmatic and shaped by the amnesty clause.

The definition of gross human rights violations received criticism for its narrow focus. Mamdani notes: “The paragraph contains three limitations... The first and most obvious is the time limitation: it limits the mandate of the Commission to investigating “gross violation of human rights” during the period from 1 March 1960 to 10 May 1994. The next two are limitations of scope: that these violations have “emanated from conflicts of the past,” and that they have been committed “with a political motive.” The limitation in time was unambiguous. But the limitations in scope were not: they would have to be interpreted by the Commission.”<sup>177</sup>

The focus on physical violence was determined problematic because it overlooked the structural violence and socioeconomic deprivation caused by the apartheid regime, which every black person experienced. “Furthermore, the narrow interpretation of ‘gross violations of human rights’ does not identify women as victims, even though they bore the brunt of

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<sup>174</sup> Paragraph 54, Chapter 4, Volume 1, TRC Act.

<sup>175</sup> Ibid., Paragraph 55.

<sup>176</sup> “These include the right to life, the right to be free from torture, the right to be free from cruel, inhuman, or degrading treatment or punishment and the right to freedom and security of the person, including freedom from abduction and arbitrary and prolonged detention.” Ibid., Paragraph 56.

<sup>177</sup> Mamdani, “Amnesty or impunity?” *Diacritics* 32, no. 3 (2002): 37.

oppression through forced removals, pass arrests and other acts of systematic 'apartheid' violence."<sup>178</sup> This quote from Hamble and Kibble shows how the focus on physical violence in the TRC Act interacted with a failure on the part of the TRC to be gender-sensitive, and compounded to overlook significant patterns of structural and gendered violence under apartheid. Mamdani argues that the TRC's interpretation of the TRC Act's "gross violations of human rights" definition treated apartheid policies as "contextual information" rather than as examples of rights violations, which it could have done.<sup>179</sup> He further criticised the TRC's interpretation of "political motive" as misunderstanding apartheid's policies as legal, and not political, and thus not covered by the TRC's mandate. He argues further that this narrow interpretation was unacceptable given that legal hearings that concluded that apartheid could not be understood as a rule of law: "If the Commission had fully accepted the outcome of the legal hearings, it would have defined the very agenda of apartheid – and not just its defense [sic] – as political. But the Commission did not."<sup>180</sup>

The TRC was composed of 17 commissioners appointed by the President Mandela and his Cabinet. Nelson Mandela mandated the Chairperson (Archbishop Desmond Tutu) and the Vice-Chairman of the TRC (Dr Alex Boraine – former Methodist minister, former MP for the Progressive Federal Party, and co-founder of IDASA).<sup>181</sup> Thus, the chairmanship of the TRC had a strong Christian background, which was manifest in the rhetoric of the TRC over its lifespan, and especially conditioned the understanding of reconciliation, and later forgiveness.

One of the TRC's objectives was to uncover the truth about the gross human rights violations that occurred from 1 March 1960 to a cut-off date (later determined as 10 May 1994).<sup>182</sup> It also granted amnesty to persons that made full disclosure of their actions and could prove political motivation for their crimes. The TRC was responsible for identifying victims and recommending reparations that should be given to them. Lastly, the TRC had to compile a report of its activities and findings in an effort to deter future human rights violations.<sup>183</sup>

To achieve these objectives, three committees were established within the TRC. The Committee on Human Rights Violations (HRV Committee) was in charge of investigating gross human rights violations and submitting a report of its findings to the TRC.<sup>184</sup> The Amnesty Committee (AC) had the power to accept or reject amnesty applications based on whether the application satisfied the conditions for amnesty. It could consider written applications alone as well as hold hearings to determine an applicant's eligibility for

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<sup>178</sup> Hamber and Kibble, "From Truth to Transformation".

<sup>179</sup> Mamdani, "Amnesty or impunity?" *Diacritics* 32, no. 3 (2002): 37.

<sup>180</sup> *Ibid.*, 38.

<sup>181</sup> The other commissioners were Ms Mary Burton, Adv Chris de Jager, the Revd Bongani Finca, Ms Sisi Khampepe, Mr Richard Lyster, Mr Wynand Malan, the Revd Dr Khoza Mgojo, Ms Hlengiwe Mkhize, Mr Dumisa Ntsebeza, Dr Wendy Orr, Adv Denzil Potgieter, Dr Mapule F Ramashala, Dr Fazel Randera, Ms Yasmin Sooka and Ms Glenda Wildschut.

<sup>182</sup> This cut-off date's extension past the 1993 date in the Interim Constitution was a result of pressure from Afrikaner right wing groups (like the Afrikaner Weerstandsbeweging) as well as black liberation groups (like the PAC and Azanian Peoples Liberation Army) who had continued to use violence until the 1994 election and wanted to be considered for amnesty.

<sup>183</sup> Section 3 of the TRC Act.

<sup>184</sup> Section 14 of the TRC Act.

amnesty.<sup>185</sup> The conditions for amnesty were: full disclosure of the relevant facts; that the perpetrator's motivated had to be political; the context had to be political; the nature of the offence had to be political; and the offence had to satisfy proportionality standards.<sup>186</sup> These conditions were based on the Norgaard Principles that had informed the amnesty process that took place in Namibia. This was a breakthrough in TJ, introducing conditional amnesty (rather than blanket amnesty) as a TJM. Lastly, the Committee on Reparation and Rehabilitation (RRC) considered the list of victims that were identified by the HRV Committee and AC processes for reparations, as well as direct applications for reparation. The RRC was responsible for recommending the reparations that victims should receive to government. However, the RRC did not have binding powers on the state.<sup>187</sup>

The TRC was funded through President's Fund, which was established in consultation with the Minister of Finance and the Minister of Justice and relied on contributions from Parliament and private donors, including Nelson Mandela. Donations were received from Norway, Sweden, Denmark, the German Republic, Portugal, France, and the Swiss Confederation.<sup>188</sup> A sore point in this process was the lack of donations from white-owned businesses that had profited under the apartheid regime. Christo Wiese (Shoprite), Johann Rupert, D.E. Cooper (Barlow Rand Director), and Bertie Lubner (PG Glass executive chairman) were just some examples of individual businessmen that not only profited during apartheid, but also have been revealed to have made financial donations to the NP during its apartheid regime.<sup>189</sup>

The TRC and its members worked jointly with CSOs and CBOs that were committed to the healing and reconciliation process. Human rights organisations, trauma healing practices, and religious bodies aligned themselves to the TRC process to complement and strengthen its work.

The TRC was mandated to run from 1996 to 1998. However, the amnesty process was given an extension, and only concluded its work in 2003. Thus, the TRC's Final Reports were delivered in two phases. The first five volumes of the Final Report were presented to Mandela on 29 October 1998, and included the initial human rights violation findings and provisional reparation recommendations. Volumes six and seven were presented to Mbeki on 21 March 2003.

### 4.3. Transitional Justice Framing

Rama Mani defines restorative justice as a form of justice that is primarily concerned with addressing the direct physical violence committed and experienced during past conflict.<sup>190</sup> It

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<sup>185</sup> Section 19 of the TRC Act.

<sup>186</sup> Raylene Keightley, "Political Offences and Indemnity in South Africa," *South African Journal on Human Rights* 9, (1993): 345.

<sup>187</sup> Section 27 of the TRC Act.

<sup>188</sup> Paragraph 57 of Volume 1 of the Final Report of the South African Truth and Reconciliation Commission.

<sup>189</sup> Open Secrets, "Declassified: Apartheid profits – Who funded the National Party?" 1 August 2017, available at <https://www.dailymaverick.co.za/article/2017-08-01-declassified-apartheid-profits-who-funded-the-national-party/#.WeSwi2iCzIU>, accessed on 16 October 2017.

<sup>190</sup> Rama Mani, "The Three Dimensions of Justice in Post-conflict Peacebuilding," in *Beyond Retribution: Seeking Justice in the Shadows of War*, (Cambridge: Polity Press, 2002), 7.

is important to note that in her conceptualisation, she identifies three dimensions of justice that she sees as complementary within peacebuilding. Thus, she categorised structural violence and socioeconomic redress to the dimension called distributive justice.<sup>191</sup> The distinction between restorative and distributive justice is useful, as they speak to slightly different, albeit related, goals under peacebuilding. However, the distinction also mirrors a problem embedded in the dominant understanding of restorative justice, which focuses on physical violence – as seen by South Africa’s TRC. This is not a necessary element of the distinction between restorative and distributive justice. It is plausible that restorative justice measures could include mechanisms that take socioeconomic rights violations into account. For example, a truth commission’s mandate could investigate forced removals and still be considered a restorative justice mechanism.

The restorative justice discourse lent itself well to the nation-building project. Restorative justice emphasises the need to try to repair the harms of the past and fissures in a country or nation’s social fabric caused by conflict. It seeks to recognise the importance of victims’ and survivors’ experiences within and after conflicts, as well as to create mechanisms that are centred upon their needs. At the same time, restorative justice allows for mechanisms that incorporate traditionally retributive mechanisms to aid its goals of ‘restoring’ justice and deterring future crimes. While there are strong arguments that the TRC did not live up to the restorative justice promises it made, it certainly did make use of the restorative justice rhetoric. Arguably, this was because the rhetoric was one that served to justify and support its nation-building effort and TJ choices.

The TRC complemented the broader nation-building efforts of the new democratic state. The TRC made use of slogans to popularise the connection between truth and reconciliation. This is evident from the slogan apparent at its public hearings: “Truth. The Road to Reconciliation” and posters that read “Revealing is Healing” and “The Truth Hurts but Silence Kills”. This captures the TRC’s pursuit of restorative over retributive justice. The very legislation of the TRC – the Promotion of Reconciliation and Unity Act – aligned it to the state’s Rainbow Nation vision captured in the Constitution.

Furthermore, the emphasis on human rights and nation-building appealed to the international community. Using restorative justice rhetoric allowed the government to claim to be fulfilling both justice and peace simultaneously while building an inclusive nationhood.

The TRC hearings were publicly broadcasted to ensure national and international access to the procedures. The visibility of the TRC can be seen as a key component of the ANC’s nation-building enterprise. Providing national broadcast thus enabled the ANC to “manufacture legitimacy” by occupying the front stage in the reconciliation process and by publicly emphasizing the commitment of the new leadership towards healing and unity.<sup>192</sup> The use of the TJ process to embolden the nation-building agenda of the ANC is apparent from its linking reconciliation between cultural and identity groups in South Africa as a way

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<sup>191</sup> Mani, “The Three Dimensions of Justice in Post-conflict Peacebuilding,” 8-9.

<sup>192</sup> Richard Wilson, *The politics of truth and reconciliation in South Africa: Legitimizing the post-apartheid state*, Cambridge University Press, 2001: 19.

to deter future gross human rights violations.<sup>193</sup> This sees the marriage of nation-building rhetoric and restorative justice normative assumptions.

Furthermore, decision makers used Africanist values for they served their interests. The link between the human rights discourse and concept of ubuntu saw human rights expressed as “compromised justice” through “unity and community” (or ubuntu).<sup>194</sup> Politicians’ language posited the importance of restorative transitional justice mechanisms and argued for the legitimacy of restorative mechanisms by creating a schism between ‘African’ ideas of justice, upheld by the concept of ubuntu, and international (or Western) ideas of justice, embodied by punishment.<sup>195</sup>

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<sup>193</sup> Ibid.

<sup>194</sup> Ibid., 11.

<sup>195</sup> Ibid.

## **5. Determinants of Transitional Justice Policies**

The aim of this section is to develop an understanding of what factors determine and shape the TJ policies undertaken in South Africa post-apartheid. The first sub-section links the path dependencies identified in sections 1 and 2 with the decisions made regarding TJ in South Africa. The resistance to and criticisms of the TJMs will be noted. The second sub-section considers the implementation of the TJ process in terms of: who the TJ process is accountable to, how the TJ process reframed apartheid in the new public discourse, the consolidation of socioeconomic and political power enabled by the process, and the reasons why particular interest groups condoned or condemned the TJ process.

### **5.1. Opportunities and Constraints for Transitional Justice**

Colonialism, apartheid, and the transitional period handed down dynamics of structural and unequal power around which the South African society evolved. Such dynamics affected the way leaders used the opportunities resulting from those periods of time and framed the choice of a specific transitional agenda, the latter aimed at supporting leaders in their strategies. From the colonial era to transition, the dynamics that produced a certain sequence of events generated a specific order and balance of power that are distributed among the leading actors of the transition. As such, the dynamics on identity, power, and nationhood visible during colonialism, apartheid, and post-apartheid eras heavily impact the dynamics between and of one another and shape the discourses of the leaders at the moment.

A key constraint on the possibilities for TJ in South Africa was the fact that the end of apartheid was the result of a negotiated settlement. There was no single victorious party, and decision-making had to appease both the ANC and NP's constituencies and political interests.<sup>196</sup> Additionally, the country did not have the finances, time, and personnel to run trials.<sup>197</sup> At the same time, the new government needed to assert the rule of law (before the international community's eyes as well as for the sake of internal governance) and demonstrate that impunity was not going to be permitted under the new regime. This meant that some kind of action was required, but the action was limited by the negotiation agreements embodied in the Interim Constitution – namely, the provision of amnesty. The constitutional obligation upon the government to grant amnesty for “...acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past”<sup>198</sup> perhaps shaped the TRC's definition of gross human rights violations as the “the killing, abduction, torture or severe ill-treatment of any person” or plan to do so.<sup>199</sup> This definition limits the understanding of gross human rights violations to physical/bodily terms, and excludes the deprivation of socioeconomic rights from the TRC mandate. Consequently, the colonial subjugation and exclusion of black people that was continued and built upon during apartheid were not addressed by the TRC. Rather, the violence that was incurred in response to it was the subject of investigation.

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<sup>196</sup> Paragraphs 21 and 22 of Volume 1 of the Final Report of the TRC.

<sup>197</sup> Paragraph 23, vol.1 of TRC Report

<sup>198</sup> Epilogue of the Interim Constitution.

<sup>199</sup> Section 1 of the TRC Act.



The matter of amnesty was highly contentious. The constitutionality of the amnesty law was taken directly to the Constitutional Court of South Africa in *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa*. The applicants challenged it on the grounds that it deprived individuals of their right to the justiciable settlement of disputes. However, the court unanimously found that the Interim Constitution's Epilogue that provided for amnesty was an appropriate legal limitation on the right to justiciable dispute settlement.

Addressing the constructions of nationhood and race during the colonial and apartheid eras was a priority on the post-apartheid regime's agenda. As the preceding section on TJ Framing explained, this took the form of the state-led commitment to unity under the Rainbow Nation. Societal division was prevalent during colonisation and had been defining the South African society since then. As such, policing a divided society in a transitional context was challenging as the leaders ought to dissipate the "societal antagonisms" in order to set the rules of a new polity.<sup>200</sup> However, to dissipate does not mean eradicate, and the choice of this term reflects the dynamics of the opportunities and constraints for policymakers during the transition period. Decision-makers based their discourse on societal reconciliation and engaged the new public institutions to the realisation of this goal. The TJMs chosen by the leaders sought to end social divisions and intended populations to cohere around the legacy of apartheid and the identity and cultural norms that needed to be addressed.<sup>201</sup> The pressure to ensure inclusion of all races under the new South Africa was both internal and external. There were fears that the economic would crumble if there was the mass flight of white-owned capital (as had occurred in Zimbabwe) and the international community's role as a "watchdog" has already been recognised. Furthermore, the alienation of the Afrikaner people under the British colonialists as a factor that gave rise to the oppressive apartheid regime was perhaps not unthought-of. This framing of nationhood offered opportunities for the new political leaders to implement transitional justice policies that would legitimate their power and the social contract established. The TJ process also consolidated the state power in the hands of the ANC by strengthening the monopoly of those narratives at the national level.

The ANC had proclaimed it was seeking two dimensions of liberation: political and economic. The downfall of Communism saw the ANC revise its strategy (or, perhaps, rhetoric) and instead present itself as the liberation movement that achieve political liberation for black people in South Africa, and that the second liberation would be an economic one. Thus, the liberation goals were presented as sequenced matters. Section 3 explained that the ANC government confronted the task of improving the living standards of South Africans while needing to service the debts it inherited from the apartheid state. The ANC's initial commitment to both political and economic liberation was a direct recognition of the structural violence and economic exclusion of black people under colonialism and apartheid. These dimensions were critical areas for redress. However, the TRC was conceived of as one mechanism in a much larger process of transformation in South Africa. It was intended to be a mechanism that operated for a short time to address a particular set of crimes, and that other government institutions would supplement and build upon this work.

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<sup>200</sup> Hennie Kotzé and Pierre Du Toit, "The state, civil society, and democratic transition in South Africa: A survey of elite attitudes," *Journal of Conflict Resolution* 39, no. 1 (1995): 28.

<sup>201</sup> *Ibid.*

In its final Report, the TRC referred to the atrocities committed during the colonial era.<sup>202</sup> It linked the atrocities committed during apartheid to the dynamics of colonialism. Indeed, the birth and purpose of apartheid was understood as the legacy of colonialism, the “climactic phase of a conflict that dated back to the mid-seventeenth century”. However, the Report did not expend on colonialism and especially on its interconnection and influence on apartheid legislation and transitional justice policies.

The international community can be argued to have placed another set of implicit constraints on the possible action the ANC government could have taken to address violations committed during apartheid. Liberal peacebuilding predominated as the approach to post-conflict reconstruction and development in the 1990s given the hegemonic power enjoyed by the US and Europe within global politics with the downfall of the USSR and its allies.<sup>203</sup> The prevailing belief among peacebuilding practitioners in the 1990s was that democratisation and marketization were (1) mutually reinforcing, and (2) self-perpetuating.<sup>204</sup> Mac Ginty and Richmond refer to this generally as ‘liberal peace’, which they define as: “an increasingly formulaic synthesis of Western-style democratisation, “good governance”, human rights, the rule of law, and developed, open markets.”<sup>205</sup> The late 1990s and early 2000s were characterised by a shift within the UN’s approach to peacebuilding in light of a series of shortcomings experienced during this interventions in the early to mid-1990s. This shift was toward increasing the capacity of government institutions to facilitate more sustainable peace, or ‘statebuilding’.<sup>206</sup>

The TJ decisions made by the ANC government in the mid-1990s should be understood within this context, whereby there was significant emphasis in both phases of liberal peacebuilding upon the rule of law as part of democratisation and statebuilding processes. The pressure to demonstrate a commitment to the rule of law was both internal and external for the new government. This pressure may explain why the ANC did not pursue selective prosecutions against state perpetrators of gross human rights violations. Selective prosecutions would have avoided some of the resource constraints mentioned in the previous section, as well as avoided implicating ANC combatants in the prosecutorial process. However, this would have risked undermining the legitimacy of the courts as well as the perceived commitment of the ANC to the rule of law, statebuilding, and peacebuilding.

## **5.2. Elements of the Transitional Justice Mechanisms**

The TRC was an independent institution. Its independence was ensured by the fact that it had secured a financial allocation from government and its ability to fundraise for itself. It therefore was not accountable to anyone in a traditional/financial sense.

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<sup>202</sup> Chapter 2 of Volume 1 of the Final Report of the TRC.

<sup>203</sup> Roland Paris, "Saving liberal peacebuilding." *Review of international studies* 36, no. 2 (2010): 337.

<sup>204</sup> *Ibid.*, 341.

<sup>205</sup> Roger Mac Ginty and Oliver Richmond, "Myth or reality: Opposing views on the liberal peace and post-war reconstruction." *Global Society* 21, no. 4 (2007): 491.

<sup>206</sup> *Ibid.*, 342.

The TRC presented itself as a victim-centred mechanism – a claim made pertinent by the amnesty process in order to mitigate some of the discontent it provoked. Thus, it could be said that the TRC was morally accountable, first and foremost, to victims/survivors of gross human rights violations committed during apartheid. The TRC was also committed (and mandated) to create a social history about apartheid. Thus, it was morally accountable to the South African public. However, in reality, survivors had no real means to hold the TRC accountable.

The TRC declared apartheid to be a crime against humanity – a label it was attributed by the UN in 1966.<sup>207</sup> This could be said to be a way that the apartheid regime was reframed by the TRC within post-apartheid South African society. However, it was also deeply criticised for its mechanisms being an inappropriate response to such a crime. Mamdani points out that the TRC individualised the experiences of group-based discrimination and human rights violations.<sup>208</sup> He argues that this process of individualisation is a result of the adherence of the new South African government to liberal approaches to human rights, and undermines the impact of defining apartheid as a crime against humanity. Furthermore, it creates two tiers of exclusion. Firstly, those that did not conform to the TRC's definition of a "victim" did not qualify for reparations from or participation in the TRC. Secondly, the TRC used a closed-list approach to identifying victims, which meant that those who were not on the TRC list did not qualify for reparations. This proved massively controversial since the TRC process was short, it occurred in a political and social context that had just transitioned from the violence of the 1990s, and wherein people were still developing a trust of state institutions. Furthermore, many people lived in rural regions, lacked transport, literacy skills, or simply learned about the TRC process once it was too late. This has resulted in some 80 000 people, represented by Khulumani Support Group, arguing that they conform with the TRC definition of victim and deserve to be added to the list – an ongoing issue in present-day South Africa. Thus, while the TRC claimed to be victim-centred, it has been criticised for excluding many potential participants from its processes.

Relatedly, the TRC was criticised for prioritising perpetrator's interests. The TRC's attaching conditions to the amnesty process was a deliberate effort to reduce the sentiments of impunity for apartheid crimes. Its provisions for the full disclosure of the human rights violations was packaged as being in the interests of victims and the public because it would help establish the truth about the past. While this was a commendable achievement, the TRC's amnesty process was seen by some as giving undue preference to perpetrators. The extension of the AC's mandate to 2003 was met with disdain because the victims' statement-taking process was concurrently not extended. This coupled with the concerns raised around accessing reparations for victims of apartheid, undermined the TRC's claims to be a victim-centred process.

To make matters worse, the actual payments of the reparations were delayed by the Mbeki regime, and significantly less than the amounts recommended by the TRC. While this was

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<sup>207</sup> John Dugard, "Introductory Note: Convention on the Suppression and Punishment of the Crime of Apartheid," 30 November 1973, available at <http://legal.un.org/avl/ha/cspca/cspca.html>, accessed on 2 August 2017.

<sup>208</sup> Mamdani, "Amnesty or impunity?" *Diacritics* 32, no. 3 (2002): 35.

not the fault of the TRC, it tarnished the memory of the TRC – adding further to sentiments that the TRC process was not truly victim-centred.

Despite the discourses on reconciliation and redress, new conflicts emerged following the implementation of transitional justice mechanisms. Indeed, the assimilation of several identities and needs under one common identity and social policy did not consider the multiple tensions and the diversity of interests of communities and civil society organisations after the establishment of transitional justice.<sup>209</sup> Not considering the divisions of the society intensified the social inequalities already pre-existent during apartheid, and individuals' expression of their democratic rights appeared to be limited to elections, for their demands in the post-transitional era were not heard. Civil society organisations and community victims of apartheid sought to form the "social basis" of the new democratic state, yet faced a hegemonic state that enacted holistic norms seeking to reconcile all fragments of the South African society, without considering the "antagonistic" wishes and needs of the different components of such a divided society.<sup>210</sup> The emphasis on the Rainbow Nation distracted from other societal issues in South Africa. Trying to regulate and implement all-encompassing social policies in an effort to dissimulate the divisions of the society maintained nameless violent conflicts within communities. Gang violence and vigilantism within communities highlighted the frustration of the absence of support from the post-transition state and the rising inequalities between the wealthy and the rich.<sup>211</sup>

Economic power was in the hands of white people during colonisation and apartheid, and remained so in the transitional and post-transition period. The meagre amount of reparations granted to victims did not provide change in the socioeconomic status its recipients. This was timed with the emerging black middle class who benefitted from the implementation of a neo-liberal economy, which exacerbated the tensions and resentment. In its Final Report, the TRC recommended that a scheme be established by the government to which beneficiaries of apartheid could donate money toward poverty alleviation.<sup>212</sup> This recommendation came in response to submissions to the TRC that had suggested a wealth tax be imposed on apartheid beneficiaries. It also recommended that the private sector contribute toward economic redress by contributing to fund for economic opportunities for disadvantaged South Africans.<sup>213</sup> These recommendations were not implemented by government.

In its explanation of its mandate, the TRC states: "...the Commission as but one of several instruments responsible for transformation and bridge-building in post-apartheid South Africa."<sup>214</sup> This was part of its justification for not addressing the structural violence waged under apartheid. This position could be fair given that a time-bound process like the TRC could not realistically tackle socioeconomic inequality. However, it could have interpreted its mandate differently if it had sought to address structural violence within its limits more meaningfully. The socioeconomic path dependencies that began during colonialism

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<sup>209</sup> Kotzé and Toit, "The state, civil society, and democratic transition in South Africa".

<sup>210</sup> *Ibid.*, 34.

<sup>211</sup> *Ibid.*

<sup>212</sup> Paragraph 14, Chapter 8, Volume 5, TRC Report.

<sup>213</sup> *Ibid.*

<sup>214</sup> Paragraph 55, Chapter 4, Volume 1, TRC Report.

remained largely uninterrupted, and the TJ process did not see substantive measures in place to address these matters as a combination of its own narrow interpretation of its mandate, its limited time-scope, and the fact that its recommendations were non-binding.

## **6. Effectiveness of Implemented Transitional Justice Policies**

This final section of the study evaluates the effectiveness of the TRC and proposes what lessons can be learnt from the South African experience. The first sub-section examines how the TJ processes were implemented by assessing their effectiveness in realising the aims and objectives of the TRC (i.e. an internal critique). However, much criticism has been levelled against TRC's narrow mandate. Therefore, criticisms of the matters that fell outside of the mandate but were pertinent issues confronting the citizens of South Africa in the aftermath of apartheid will also be briefly discussed with reference to the path dependencies identified earlier in the study. The second sub-section offers the lessons that can be learnt about the impact of contextual factors on the TJ process, the relationship between TJ and nation-building, and the scope for CSOs to engage TJ policymakers in the decision-making and implementation stages of the TJ processes.

### **6.1. Internal Critique: Fulfilment of Mandate**

Section 3 of the TRC Act states the TRC's primary goal: "...to promote national unity and reconciliation." Mamdani argues that the way that "victims" was defined by the TRC reduced the type of reconciliation that was pursued in reality was political reconciliation between politically affiliated actors (including resistance activists and state agents).<sup>215</sup> He argues that this was not conducive to the mandate's pursuit of social reconciliation that would promote national unity. Significantly, the South African TRC's emphasis on reconciliation as an objective caused a deeper engagement with what was meant by the concept, how it could be measured, and what its relationship was with other transitional justice mechanisms, such as truth.<sup>216</sup> This has been a poignant issue within transitional justice since the South African experience.

It goes on to identify four subsidiary functions for the TRC to enable it to realise its primary objective: establish a historical account of the gross human rights violations of the past ("truth-seeking"); grant of amnesty; identify a list of victims that qualified for reparations and the recommending a reparations programme to government ("reparations"); and publish a report of the activities and findings of the TRC ("TRC Final Report"). This section evaluates how successfully these objectives were met.

#### **Truth-seeking**

The objective of truth-seeking rested primarily with the HRV Committee, although the AC also had a truth-seeking component. The cut-off date for submissions by victims to the HRV Committee was 14 December 1997. The HRV collected testimonies from about 21 000 victims; 2000 of whom testified in "windows cases" at public hearings. The HRV Committee sought individual accounts of past gross human rights violations, and also held institutional and incident hearings. Examples of institutional hearings were political party; children's;

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<sup>215</sup> Mamdani, "Amnesty or impunity?" 34.

<sup>216</sup> Kate Lefko-Everett, Rajen Govender, and Donald Foster, "Measuring Social Change in South Africa," in *Rethinking Reconciliation: Evidence from South Africa*, Human Sciences Research Council Press, 2016:6-10; James L. Gibson, "Overcoming apartheid: Can truth reconcile a divided nation?." *The Annals of the American Academy of Political and Social Science* 603, no. 1 (2006): 82-110.

health sector; prison; women's; and business hearings. In-depth investigations into particular incidents – the Caprivi, Mandela United Football, and Trojan Horse hearings. These were an attempt to recognise sectoral experiences within apartheid as well as develop a deeper understanding of some key events.

The HRV Committee made use of trained statement takers to capture the reports from victims/survivors of their gross human rights violations. Statement takers were based at the TRC's regional offices in order to take walk-in testimonies; at the TRC hearings so that they could capture statements from people who were prompted by the official events to submit their testimonies; and through the designated statement taker programme.<sup>217</sup> The latter involved collaborations with CBOs to increase the reach of the TRC, particularly in rural communities. Statement takers operated from the offices of the CBOs so that community members' access to the TRC process was improved. The statement takers had to functions: (1) to capture reports on gross human rights violations; and (2) to serve a therapeutic function for victims/survivors by "...listen[ing] sympathetically."<sup>218</sup> The appropriateness of using statement takers for therapeutic ends is questionable because it risks re-traumatisation for the victims/survivors and secondary trauma for the statement takers. While the statement takers were trained, there was a very short space of time in which this occurred before they were operating in the field. Indeed, a number of operational issues were incurred, which is indicative that these concerns are valid.

A system was developed to corroborate the reports received to ensure that the information shared was accurate. However, this system was only fine-tuned and fully adopted in the fifth version of the protocol developed to this end. The Final Report does not provide information about the timelines for this, but holds that its findings were robust despite the issues include with developing a knowledge management system.<sup>219</sup>

An important, perhaps academic, contribution that the truth-seeking component of the TRC achieved was the delineation of different types of truth: factual; personal; social; and healing. Factual (or forensic) truth refers to the type of evidence that is able to stand up before a court of law.<sup>220</sup> It has to be corroborated and go through processes to be deemed impartial. Personal (or narrative) truth, as the name suggests, is about an individual's experience as they see it.<sup>221</sup> The process of telling these experience was expected to be cathartic for the teller. Social (or dialogue) truth refers to the version of that past that emerges from a confluence of accounts interacting together and eventually giving rise to a shared history (of sorts).<sup>222</sup> Healing (or restorative) truth holds that there is a reparative dimension to an official acknowledgement of past atrocities being placed in the public domain.<sup>223</sup> The TRC's investigations were hindered by the destruction of the apartheid regime's records by the National Intelligence Agency up until 1996,<sup>224</sup> which undermined some of the prospects for forensic truth.

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<sup>217</sup> Paragraph 16 of Volume 1 of the Final Report of the TRC.

<sup>218</sup> Paragraph 15 of Volume 1 of the Final Report of the TRC.

<sup>219</sup> Paragraph 13 of Volume 1 of the Final Report of the TRC.

<sup>220</sup> Paragraph 30 of Volume 1 of the Final Report of the TRC.

<sup>221</sup> Paragraph 36, *ibid.*

<sup>222</sup> Paragraph 40, *ibid.*

<sup>223</sup> Paragraphs 43-45, *ibid.*

<sup>224</sup> Paragraph 1 of Chapter 8, *ibid.*

The TRC's historical record of the past events provides a useful archive for researchers (and whoever else) to draw upon that is a wealth of primary and secondary accounts – although these are provided in English on the website.<sup>225</sup> Posel captures the significance of this historical account of the past the TRC was mandated to investigate well: "Enough detail about the fact and prevalence of gross human rights violations has been exposed to debunk any lingering attempts either to sanitise apartheid or romanticise the struggle against it."<sup>226</sup> However, the account that was produced was descriptive rather than explanatory. It consequently does not assign responsibility for apartheid nor does it offer an analysis or explanation for the causes of rampant racism in South Africa.<sup>227</sup> These are significant shortcomings, especially when considering the emphasis the TRC placed upon truth as a means to healing and deterrence.

### Granting of Amnesty

The AC was mandated to consider applications for amnesty for perpetrations of gross human rights violations between 1 March 1960 and 11 May 1994. The final date for amnesty application submissions to the AC was 30 September 1997,<sup>228</sup> which was extended from the original date – 14 December 1996. The AC received 7 112 applications in total, of which 849 were successful applications. 5 392 were rejected – many of which were applications for crimes that were not covered by the definition of "gross human rights violations" for which amnesty could be granted. The remainder of the applications were withdrawn. The AC continued operating until 2003 – five years after the TRC had official finished its operations in 1998. This was as a result of the volume of applications received as well as initially miscalculating the time requirements of processing the applications and amnesty hearings.

The extension for the submission of amnesty applications and the operations of the AC was not met with an extension of the cut-off date for victim/survivor submissions and the HRV Committee's operations. This challenged the presentation of the TRC as a victim-centred process since it seemed that perpetrators were being awarded more allowances than the victims/survivors.

The majority of the perpetrators that were identified were black.<sup>229</sup> There are a number of explanations for why this is the case. The height of the violence during the time scope that the TRC investigated occurred in the early 1990s between the ANC and IFP, as explained by the TRC.<sup>230</sup> However, it is also known that many of the key apartheid state agents did not approach the AC for amnesty because it seemed safe to assume that there would be no need for it. In other words, it was anticipated that there would be no prosecutions or other

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<sup>225</sup> <http://www.justice.gov.za/trc/index.html>.

<sup>226</sup> Deborah Posel, "The TRC Report: What kind of history? What kind of truth?." (1999).

<sup>227</sup> Ibid., 29-30.

<sup>228</sup> Paragraph 65 of Chapter 6 of Volume 1 of the Final Report states 10 May 1997 as the extension date, however, on the official TRC website and footnote 11 in Paragraph 10 of Chapter 1 of Volume Six of the Final Report records the date as 30 September 1997. The latter is taken to be the accurate date because it is cross-referenced and because Volume Six of the TRC Report was published with completion of the AC's work.

<sup>229</sup> Mamdani, "Amnesty or Impunity?" 36.

<sup>230</sup> Ibid.



penalties for the crimes of the past. This has been seen to have contributed to impunity in the post-apartheid regime era.

### Reparations

The RRC identified 22 000 victims that were eligible for reparations based on the HRV Committee and AC's investigations, as well as applications for reparations. The RRC was mandated to recommend a reparations programme for the Presidency's consideration. The TRC's "Reparation and Rehabilitation Policy" (henceforth, "the Reparation Policy") recommended and explained five components of reparations: redress, restitution, rehabilitation, restoration of dignity, and reassurance of non-repetition.<sup>231</sup> The benchmarking of the Policy against international standards can be seen to be a positive achievement. It showed an active engagement with and commitment to international human rights norms.

Furthermore, it recommended a range of differing forms of reparation that could arguably help to address different dimensions of the atrocities of apartheid.<sup>232</sup> The Policy recommended that urgent interim reparation be granted to victims with urgent need to access services and facilities. An individual reparation grant scheme was also recommended. The victims were to receive instalments twice a year over a six-year period. It was recommended that the amount vary depending on the particularities of the recipient but be up to R23 023 per year. The symbolic reparations recommended included exhumations, memorials, and the renaming of streets. It was recommended that community-based services and programmes be developed to assist individuals and communities that were affected by human rights violations, such as demilitarisation services and psychosocial support. Lastly, the TRC had recommended institutional reform that was aimed at ensuring non-recurrence of the gross human rights violations.

A major obstacle to the gravity of these extensive recommendations was that the RRC did not have binding powers on government, and so when the Mbeki regime delayed and reduced the reparations that were eventually granted, there was little the TRC could do. The Mbeki regime issued once-off payments of R30 000 to the 22 000 victims in 2003 – significantly less than the scheme that the RRC had devised. It should be noted that while the once-off payments for individual reparation have been deeply criticised, it also has given some relief to recipients. In 2014, the Zuma regime published draft regulations for the community rehabilitation reparations and for education reparations. However, these were both mired in suspicion if the way that the President's Fund was being spent on these "reparation" programmes was appropriate. Again, this showed a major challenge resulting from insufficient powers being granted to the RRC to ensure that its recommendations were implemented, and reparations given were appropriate.

A membership-based organisation of over 100 000 TRC-defined victims formed the Khulumani Support Group. Khulumani has challenged the closed-list approach used by the TRC for identifying victims. The closed-list meant that the victims that the TRC identified was considered final and additionally names could not be added, even if they were technically

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<sup>231</sup> Paragraph 8 of Chapter 1 of Section 2 of Volume 6 of the TRC Final Report.

<sup>232</sup> Paragraphs 10 to 18, *ibid.*

eligible to be on it, and consequently, for reparations. This has often been contrasted with the exceptions and allowances granted to perpetrators during the amnesty process. The fight to reopen the list, albeit directed toward the government rather than TRC, continues to date. This is an important pursuit of the right to reparation and remedy, but also means that what is called the “unfinished business” of the TRC acts as an obstacle for the “healing” the TRC aimed to help victims realise.

### TRC Final Report

The TRC’s Final Report was published in two stages. The first five volumes of the initial findings were published in 1998. Both the ANC as well as former apartheid President de Klerk objected to the release of the Report, which suggests that it was a balanced account of the past. The ANC objected to being cast in a similar light as the apartheid regime with regards to gross human rights violations.<sup>233</sup> The sixth and seventh volumes were published on 21 March 2003, once the AC processes had concluded. The time lapse between the conclusion of the work of the TRC and the AC, and therefore between the publications of the Reports, perhaps can be said to have detracted from the impact of the Report because the second phase of publication no longer carried the same level of public attention.

While the submissions to the TRC could be in the home languages of the victims and amnesty applicants, the TRC Final Report was written in English, and there is no official abridged or children’s form of it. This limits the circulation prospects for the Report and diminishes its impact factor. It also replicates issues with the politics of language in South Africa. Years of colonialism and apartheid saw the subjugation of African languages, and failing to publish in at least the most widely spoken of these languages implicitly reifies the privilege bestowed upon the English medium.

For those with internet access and who read English, the Final Reports and transcriptions of the various testimonies are easily and freely accessible online on a webpage dedicated to the TRC from the Justice Department’s website.<sup>234</sup>

## **6.2. External Critique: Conflict Factors beyond Mandate**

### Transitional Justice and Consolidation of Power

The TRC can be seen as a mechanism that contributed toward the GNU’s nation-building project. While it was not explicitly established with this goal, its national unity and reconciliation objectives were consistent with the nation-building agenda. The body clearly had adopted the Rainbow Nation discourse. It is difficult to measure the extent to which one could argue that the TRC helped to contribute toward the stability in the late 1990s that followed the democratic elections. It is plausible that it did, at the very least, because the government was seen to be taking some form of action to respond to apartheid.

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<sup>233</sup> O’Malley Archive, “TRC Report Released,” November 1998, available at <https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv02730/05lv02918/06lv02951.htm>, accessed on 7 August 2017.

<sup>234</sup> <http://www.justice.gov.za/trc/index.html>.

Some of the issues that have divided the ANC relate to matters that the TRC did not address – such as land reform and economic redistribution. It would be inaccurate to claim that the TRC caused the factionalisation of the ANC. However, the TRC Act's narrow definition of gross human rights violations, and the TRC's superficial engagement with the underlying causes of apartheid, could be argued to have contributed toward the political salience and expediency of these issues that the political elite is able to capitalise upon when appealing to the public for support.

### *Socioeconomic Inequality and Colonial Legacies*

Perhaps one of the biggest criticisms of the TRC process is that it did not engage meaningfully with the socioeconomic dimensions of the colonial and apartheid regimes, which continue to be the points of tension in present-day South Africa. The country has seen only marginal success in overcoming the spatial segregation of the past. While there are no race-based legal obstacles to integration, there are financial as well as social ones. Archbishop Tutu says that the TRC cannot be seen in isolation and should be seen in conjunction with the government's Land Reform, Gender, and Human Rights Commissions in his Foreword to the TRC Final Report. While these bodies are not TRC committees, they can be seen as transitional justice processes.

The key policy for land reform in South Africa relied on a policy of 'willing buyer, willing seller' in an effort to avoid duplicating the racialized land reform tensions that occurred in Zimbabwe. The government would buy land from white owners and then redistribute the land to claimants that had been forcibly removed from their properties during apartheid. Monetary compensation was also given to claimants that could prove that they were forcibly removed. This process has been criticised for being slow-paced and insufficient. The distribution of agricultural land is complicated beyond the willing-buyer-willing-seller policy because the economy has shifted from an agrarian one, and therefore the income prospective of being involved in the agricultural sector are far less than the time of the land grabs by the colonialists.

The urban areas that were historically reserved for white people are financially inaccessible for the majority of black South Africans due to the property and rent costs, as well as familial inheritance of the properties. Additionally, because of the slow pace of transformation, these neighbourhoods tend to be largely white still, and this can be alienating and lack a sense of community for black families that had been excluded from these areas for so long. The social exclusion speaks volumes to questions about the extent to which the TRC can be said to have promoted social reconciliation. Issues of gentrification have been brought to the fore by CSOs and take on racial as well as economic meaning. For example, Woodstock and Bo-Kaap in Cape Town are anomalies because they are racially and economically diverse neighbourhoods near the city centre. This is a result of the incomplete enactment by the apartheid government of the forced removal policy in these areas. However, they are present areas of contestation. Families are being pushed out of their homes by increases in rates and taxes, and pressure from developers for the prime properties, as a result of gentrification. The lack of economic upliftment and wealth redistribution following apartheid means that these families are largely unable to resist the economic pressure to relocate.

Additionally, the rural regions of the former Bantustans were deliberately underdeveloped under apartheid, yet their present-day development is left to normal market processes. This not only neglects the root causes of this underdevelopment, but also means that this underdevelopment is compounded by a market bias in favour of urban centres.

Relatedly, the recent #FeesMustFall protests that occurred across South Africa in protest of the institutional racism and lack of transformation that has occurred in higher education is a testament to the lasting legacies of colonialism and apartheid. The protests also suggest that the transitional justice processes, together with the Rainbow Nation nation-building agenda, has failed to be meaningful to the post-apartheid generation. This is because the socioeconomic differences in South Africa remain racialized and racism persists. The protests especially highlighted how institutional racism has persisted in historically white universities. However, this is not limited to universities, as was showcased by issues raised about school hair policies at historically white schools. These protests exposed racist standards about 'neatness' by classifying afro hair as 'unacceptable' or 'messy'. The BCM raised concerns about these types of policies and standards in the 1970s, yet post-apartheid South Africa has failed to meaningfully engage with institutional and structural racism. The TRC's inadequate engagement with racism could be seen as a missed opportunity to do this.

### Gender and Violence against Women

The TRC held a Women's Special Hearing on 28 to 29 July 1997 in a response to a submission received in 1996 from the Centre for Applied Legal Studies at the University of the Witwatersrand. The submission argued that the TRC lacked a gender-sensitive approach in its mechanisms and thereby would miss significant gendered aspects of the apartheid regime. The absence of gendered considerations from the onset of the TRC's operations was not overcome by the Special Hearing. While most of the participants in the HRV Committee's processes were women, the majority of them did not speak about their own experiences. Rather, they spoke about the gross human rights violations that their loved ones had experienced. This suggests that the TRC failed to make itself a place that was accessible in felt terms for gendered issues to be discussed openly and directly.

Additionally, the definition of gross human rights violations did not explicitly include sexual assault and abuse and rape. However, it could have been interpreted to include these crimes. The failure to include these gendered crimes in the interpretation meant that stories of sexual and gender-based violence (SGBV) from across the political affiliations in the apartheid era were not sufficiently surfaced and tailored reparations packages were not recommended. Furthermore, SGBV is a pertinent issue that remains in South Africa presently. Transitional justice mechanism present an opportunity to help tackle inequalities during conflict. Colonialism and apartheid were both highly patriarchal regimes, and institutionalised patriarchal thinking. The fact that the key decision-makers in the negotiating parties were male and the lack of gender-sensitivity in the transitional justice process is no coincidence.

It is noteworthy that: "[i]t is only over the last three or four decades that women's role in the history of South Africa has, belatedly, been given some recognition. Previously the history of women's political organization, their struggle for freedom from oppression, for community

rights and, importantly, for gender equality, was largely ignored in history texts.”<sup>235</sup> The TRC contributed toward the public memory of the past, and its inadequate engagement with gendered issues can be argued to be a shortcoming of the record of the past that it was able to capture.

### Impunity and Pardons

The progressiveness of conditional amnesty and its prospects for diminishing the sense of impunity that is associated with blanket amnesty was undermined by the lack of prosecutions of individuals that were denied amnesty and known perpetrators of gross human rights violations who had not applied for amnesty. The TRC forwarded more than 800 cases for consideration to the National Prosecuting Authority. To date, there has been very limited follow through on these cases – about ten cases.<sup>236</sup> In contrast, Presidential Pardons have taken place. Again, this is an instance of the post-apartheid regime’s failure to act upon the recommendations and work of the TRC that has inadvertently diminished the work of the TRC.

### **6.3. Lessons Learnt**

This section summarises that can be learnt from the South African experience that have been captured in the preceding sections.

An important lesson to be learnt from the South African TRC is that of careful mandating and management of expectations. The promises of reconciliation and reparations raised the hopes and expectations of the public, and for the most part failed to deliver. The neglect of concerns such as gender-sensitivity (and sexual orientation discrimination) in the TRC’s investigations that intersect with race and socioeconomic standing to produce particular experiences of discrimination and gross human rights violations can be avoided by ensuring that mandates take such factors into account, or are not written to be exclusive of them. The objectives of transitional justice mechanisms should be measurable in order to reduce the issues of over-promising and inability to deliver.

The TRC was the first truth commission to operate publicly (with the exception of where sensitive hearings had to take place *in camera*).<sup>237</sup> This has a number of benefits. Firstly, it means that key findings of the TRC are instantly made public without having to wait for the final report of the body to be released. This has the added benefit of improving accessibility to a commission’s findings, especially for segments of the population that are illiterate. The public nature of truth commissions could promote state-building goals, such as transparency, inclusivity, and accountability. However, the social and political context matters, and there is a risk that instant access to hearings could be destabilising. The South African TRC’s public hearings were handpicked based on the testimonies that statement

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<sup>235</sup> South African History Online, “History of Women's Struggle in SA”. 2011. Available at <http://www.sahistory.org.za/article/history-womens-struggle-south-africa#contents-2>, accessed on 17 October 2017.

<sup>236</sup> Traces of Truth, “TRC Category – 3. Amnesty,” available at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=3](http://truth.wvl.wits.ac.za/cat_descr.php?cat=3), accessed on 7 August 2017.

<sup>237</sup> Paragraph 3 of Volume 1 of the Final Report of the TRC.

takers had gathered. These public hearings were treated as “windows” into patterns of gross human rights violations. This approach could help manage the pursuits of openness and stability (although, depending on the regime, it could also risk censorship).

Procedural lessons can be learnt from the TRC. There was a need for clearer knowledge management systems to be developed before the gathering of information. Perhaps pilots of these systems should also be instituted before the official launch of the processes. The structure of the RRC in particular was underdeveloped in comparison to the HRV Committee and AC. This resulted in delays in its activities from the onset, and further diminished the TRC’s claim to be victim-centred when its primary victim-focused Committee was ill-prepared.

Relatedly, the South African case shows the need for more binding powers to be granted to the transitional justice mechanisms. The TRC’s inability to hold the government accountable to prosecute and to deliver reparations damaged its reputation, as well as the transitional justice experience overall.

Lastly, the South African cases shows the importance of ensuring underlying causes of conflict are seriously prioritised in investigations and recommendations of transitional justice mechanisms. These are often socioeconomic and tend to remain points of contention in the post-conflict era. It is important to be sensitive to the delicate social and political situation of a country at the time of transition, and it can be appreciated that socioeconomic rights did not hold the international attention at the time of South Africa’s transition that it does presently. However, South Africa’s experience can inform other transitional justice efforts of the importance of ensuring that these issues are including the decision-making process and agenda setting for transitional justice. Additionally, it shows that there is a need for transitional justice mechanisms to include the impact of colonialism (if relevant) on the conflict and post-conflict circumstances of a case in their investigations and recommendations.