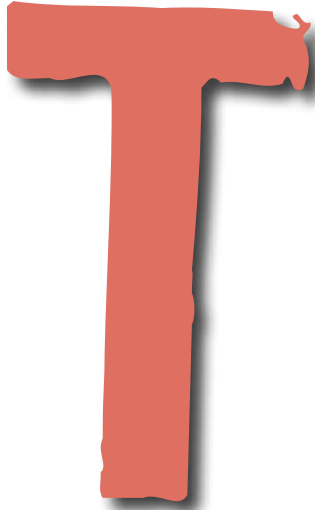


Apartheid's Legal Legacy

South Africa's successful hosting of the World Cup seemed to render apartheid's evils a distant memory.

But for victims of the era's human rights violations, the pain remains fresh – and they still want the government to prosecute the offenders.

BY JOHN RYAN



The excitement over the World Cup was hard to miss when traveling around South Africa in late May and early June. Billboards and radio campaigns pumped *Bafana Bafana*, the Zulu term for “the boys,” which was the rallying cry and nickname for the national squad that qualified for the tournament as host team. Outdoor craft markets, street vendors and indoor malls all carried a colorful array of official FIFA and counterfeit soccer gear. Taxi drivers, among the most important resources for visitors, were eager for the anticipated business of ticketholders.

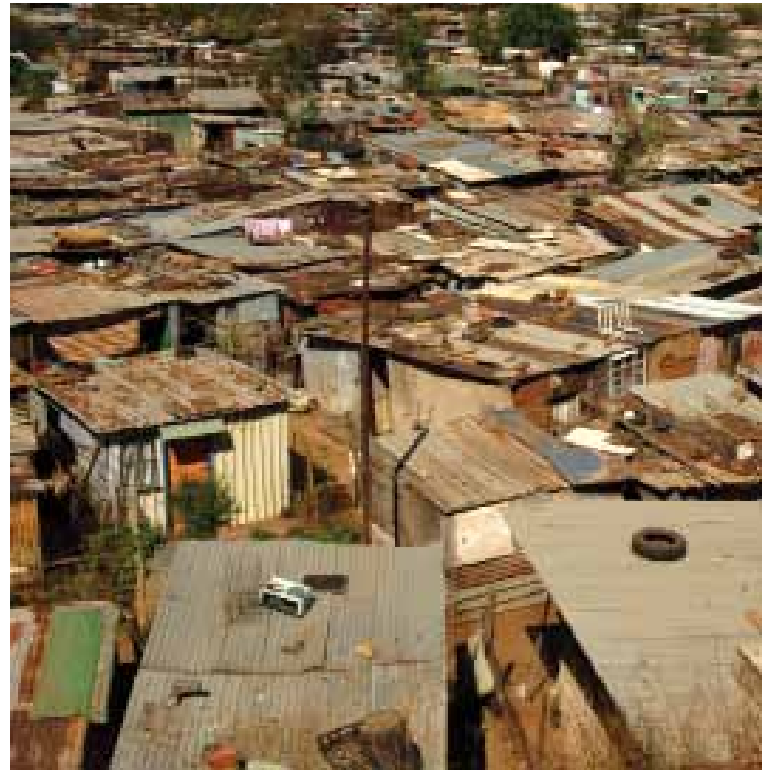
Taking a more historic view, the South African government touted the Cup – the first-ever hosted in Africa – as a symbol of national pride and proof to the world of the nation’s competence, as well as its successful transition from apartheid.

South Africa is often thought of as a miracle nation for the relative peace and calm it has enjoyed since the first full democratic elections in 1994 brought closure to more than four decades of enforced legal segregation along racial lines. That year, Nelson Mandela and the party of the liberation movement, the African National Congress (ANC), replaced the long-ruling National Party and its leader, F.W. de Klerk, after a protracted period of civil war and political negotiations. The election was followed by the establishment of South Africa’s Truth and Reconciliation Commission, the TRC, which beginning in 1996 held public hearings to document the gross human rights violations of the apartheid era. In one version of this miracle story, the World Cup serves as another symbolic milestone in the successful building of a “Rainbow Nation,” the term of national unity used by TRC chair Archbishop Desmond Tutu and other leaders.

For many victims of apartheid’s crimes, however, this version is just that – a story – and one that does not resolve the era’s complex legal legacy. Many victims and their families are still waiting for the government to prosecute people responsible for the torture, murders, disappearances, detentions, kidnappings and other violence that characterized the apartheid regime’s brutal oppression. And others want justice for the victims of violent acts committed by the liberation movement as it fought to overthrow the apartheid state.

“This dream of the miracle nation is a myth,” Tshepo Madlingozi, an advocate for victims, said in an interview in May. “The victims have not moved on.”

Madlingozi was in his office at the University of Pretoria, a boisterous, sprawling campus where he taught courses in law and human rights while serving as the national advocacy coordinator for the Khulumani Support Group, a membership organization of 58,000 victims of apartheid-era human-rights violations. (He has since relocated to London and now serves



on Khulumani’s board as its advocacy advisor.) At the time, the World Cup was less than two weeks away. Madlingozi described the government’s investment of billions of dollars in preparations as an insult to victims who have not received justice, either in the form of criminal trials or sufficient reparations. He cautioned against describing apartheid crimes as “old.”

“These are continuing violations when people are disappeared and the cases are not resolved,” Madlingozi said.

The TRC, however important to the nation’s transition, was never meant to replace prosecutions. The commission could only grant criminal and civil amnesty to perpetrators who provided a full accounting of their politically motivated crimes. The reality is that most people suspected of committing crimes on behalf of the apartheid regime – including government officials and members of the army, police and security forces, particularly those in senior positions – did not participate in the TRC. When completing its work, the TRC referred 300 cases to South Africa’s National Prosecuting Authority, the NPA, for possible prosecution. But these cases, aside from a few exceptions, have not moved forward since the TRC published its final reports in 2003.

The “why” is rooted in a complex mix of legal, social and political factors. The NPA has intermittently cited the challenges of prosecuting decades-old cases, and some South Africans worry that controversial trials could enflame racial tensions. Nevertheless, at first glance, an outside observer might assume that members of the ANC, which has essentially governed South Africa as a one-party system since 1994,



The festivities of the 2010 World Cup contrasted with the poverty that remains in South Africa – a legacy of apartheid’s brutal oppression.

would want to prosecute their former oppressors. But the ANC committed its own share of human rights violations through armed campaigns that claimed the lives of innocent civilians. This means that an aggressive prosecution policy for apartheid-era crimes might end up targeting not only former apartheid actors but also high-level members of the ANC. The result is a peculiar dynamic in which former apartheid actors and anti-apartheid forces from the past conflict share an interest in avoiding prosecutions.

Howard Varney, an attorney with the Cape Town office of the International Center for Transitional Justice, which has advocated for prosecutions, said he was hesitant to speculate about the political factors at play. However, he added that “the longer the NPA drags its feet,” the more obvious it becomes that “legal or technical complications” are not the primary reasons for a lackluster prosecution policy.

“There appear to be forces at play that simply don’t want these cases to see the light of day, and the way things are going they won’t see the light of day,” Varney said.

Three interest groups, including Khulumani Support Group, the International Center for Transitional Justice and the Centre for the Study of Violence and Reconciliation, joined with individual victims and their families to sue the NPA over its failure to prosecute apartheid-era crimes. Specifically, the groups challenged the NPA’s proposed policy allowing it to

reach non-prosecution agreements with perpetrators in exchange for information that could bring closure to unresolved crimes – and thus help finish some of what is often referred to as the TRC’s “unfinished business.” Despite a favorable court outcome in 2008, including a ruling that invalidated the proposed policy and held that the NPA had a duty to investigate and prosecute cases when it had sufficient evidence, the ultimate decision to move forward with specific prosecutions remains with the agency – which is why victims’ advocates expect a continuation of the de facto amnesty enjoyed by past human-rights offenders.

Mthunzi Mhaga, a spokesperson for the NPA, provided limited responses to written questions submitted by email, explaining that it is “not the policy of the NPA to comment on ongoing investigations.” Mhaga said only that “cases arising from the conflicts of the past have been referred to the South African Police Force for investigation,” and that the NPA “will decide in respect of each matter whether or not a prosecution should be instituted.”

As time drags on, evidence gets old or disappears and witnesses die, making such cases more difficult – in some situations, impossible – and leaving many victims and their families stuck in apartheid’s tragic past.

“Everyday for the victims, the past is present,” Madlingozi said.

ON A LIST OF PROBLEMS FACING South Africa, the controversy over TRC-related prosecutions may not rank very high. Though regarded as its continent’s strongest economic power, South Africa has an unemployment rate of 25

percent, which climbs to 35 percent when including people who have stopped looking for work. The nation's income gap between rich and poor has been among the very highest in the world, and about half of its citizens live below the poverty line. The ANC's economic policies, most notably Black Economic Empowerment, a program aimed at improving the business ownership and employment opportunities for the long-impooverished black majority, are often criticized as having only created relatively small black upper and middle classes without bringing the type of broad socio-economic reforms that most Africans had expected after the transition. (It is nevertheless not uncommon in South Africa to hear whites refer to ANC policies as reverse discrimination that is causing a brain drain of educated whites.)

South Africa suffers not only from an intractable poverty rooted in the apartheid system but also an HIV/AIDS epidemic, with approximately 18 percent of all adults between the ages of 15 and 49 infected, and an HIV prevalence rate even higher among pregnant women. The country has high rates of violent crime and low conviction rates for serious offenses. While it's hard to overstate the importance of apartheid's collapse,

the day-to-day lives of many South Africans have not much improved since the transition. In this context, Madlingozi was not alone in his criticism of World Cup preparations: Many community leaders and interest groups wrestling with South Africa's myriad socio-economic problems viewed the construction of new stadiums as offensive and wasteful.

But these conditions might also create a questionable environment for prosecuting apartheid-era crimes that are 20 years or more old. Should the government focus public resources on past crimes when the present has so many pressing concerns? Pursuing justice for victims is an important legal and moral principle, but is doing so practical or constructive in an emerging country?

Jan Wagener, an attorney in Pretoria who has represented apartheid security forces before the TRC and in criminal proceedings, said he was less concerned about the financial

costs of prosecutions than their broader effects on South African society as it attempts to move on from its past.

"We are in a democracy that is very fragile," Wagener said. "We have a peace that is very fragile. Prosecutions will put us right back where we were with racial and political divisions. I don't say forget the past, or forget the plight of victims, but let's close the book on the past regarding prosecutions."

Wagener acknowledged that a non-prosecution policy violates the legal rights of victims. But he said this infringement is the steep and tragic price that must be paid for the sake of the country's future. The only fair and honest way to pursue cases, he said, would be to aggressively pursue all former leaders of the apartheid regime as well as the liberation movement.

"I can tell you our country will not survive that," Wagener said.

Victims' advocates have more confidence in the nation's ability to withstand controversial cases. Madlingozi said it was fair to question whether pursuing prosecutions was a good use of public resources. But he stressed that the importance of doing so goes far beyond abstract legal principles. In addition to violating the rights of victims, a failure to prosecute will "perpetuate a culture of impunity" that has very practical effects on society, he said. South Africa suffers not only from violent crime but also a political corruption that has not often faced criminal prosecution.

"[An ANC] party member will say, 'Why should they prosecute me for corruption when they didn't prosecute people for something as serious as crimes against humanity during apartheid?'" Madlingozi said. "Then other members of society will say, 'Why should I obey the law when the government can break the law without consequence?'"

South Africa is not alone in such dilemmas. Whether prosecuting past crimes is an essential step in a nation's post-conflict transformation – or a major hindrance to such efforts – is a question that faces most nations hoping to emerge from a difficult period in which rule-of-law principles were abused. It is one of the core debates within the field of transitional justice,



Tshepo Madlingozi and his organization, Khulumani Support Group, have pushed for new prosecutions of apartheid-era human rights violations.

which involves the use of justice mechanisms in post-conflict situations to address serious human rights violations from a period of armed conflict or oppression. Most organizations involved in human rights issues, ranging from advocacy groups to the United Nations, typically encourage nations emerging from conflicts to employ transitional-justice mechanisms to account for wrongdoing and foster a rule-of-law culture. (Varney's group, the New York-based International Center for Transitional Justice, or ICTJ, is among the most prominent groups that promote accountability measures around the globe.)

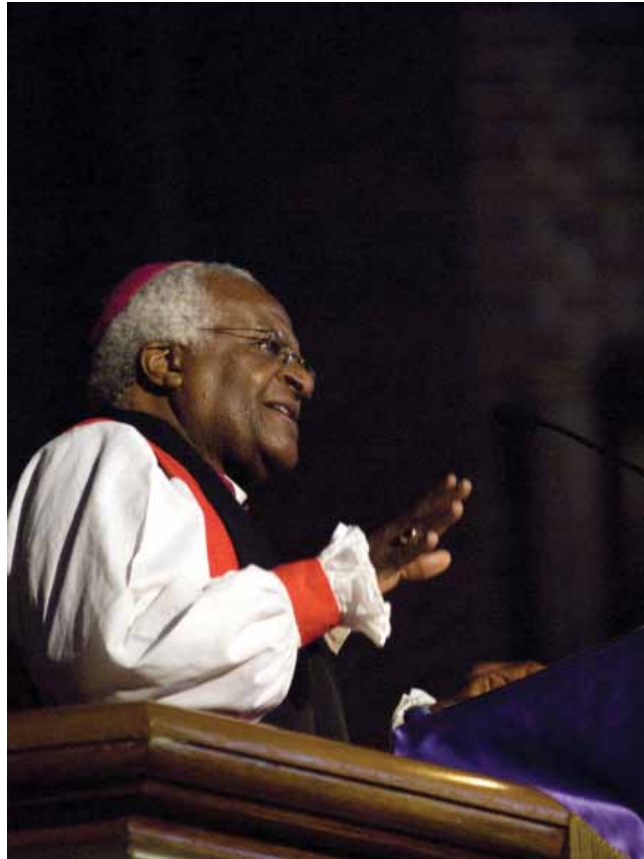
"Justice" in this area of human rights scholarship and advocacy is defined broadly, allowing for a range of mechanisms to be considered: They can include formal prosecutions as well as truth commissions, reparations for victims, programs for purging political parties or officials from governments, the use of traditional reconciliation rituals (most relevant in remote villages less connected to formal court systems) and even the building of museums and memorials. As result, a failure to prosecute wrongdoers is not always equated with a failure to provide or promote justice; some mechanisms may be more appropriate than others depending on a particular nation's history, culture or level of stability.

As is often pointed out in the academic and advocacy literature, prosecutions have not been very common in post-conflict settings since the start of the Cold War. Scholars therefore view the lack of criminal cases in South Africa as less surprising in the broader context of transitional or international justice. Amnesties – and not formal criminal proceedings – have accompanied the end of most modern conflicts, whether they were international or internal in nature. Though the Allied nations established the Nuremberg and Tokyo tribunals to prosecute Axis-power war crimes and aggression after World War II, a prosecutorial approach did not take hold in the decades that followed. The researcher Louise Mallinder, in *Amnesty, Human Rights and Political Transitions*, catalogs 500 amnesties since the end of World War II in various conflicts around the globe. Mallinder's work is one of many to

discuss the tension between the broad use of amnesties and the legal obligations of nations who are party to international treaties relevant to international humanitarian law. The "grave breaches" provision of the Geneva Conventions, which regulate the conduct of combatants during conflicts, requires parties to prosecute or extradite offenders, and the

Convention Against Torture and the Convention Against Genocide impose similar legal responsibilities. The use of amnesties in many post-conflict settings has undoubtedly run afoul of these principles.

But the end of the Cold War and the growth of the global human rights movement have contributed to an increased use of prosecutions to account for gross human rights violations, which has helped shape the analysis of South Africa's handling of crimes from the apartheid era. The United Nations Security Council established the International Criminal Tribunal for Former Yugoslavia (ICTY) in 1993 and the similarly structured ICTR (for Rwanda's genocide) in 1994. The ICTY and ICTR have been followed by a handful of hybrid domestic-international tribunals – set up in places such as Cambodia, Sierra Leone and East Timor – which are based in



Archbishop Desmond Tutu saw the TRC as a superior vehicle for truth-seeking but also voiced support for prosecutions of non-participants.

nations affected by conflicts and staffed by a mix of local and international professionals. In addition to these ad hoc tribunals, the international community, through the 1998 Rome Statute treaty, created a permanent International Criminal Court (ICC) that became operational in 2002 and now has a handful of cases and investigations. The result has been an emerging consensus among legal experts that both treaty and customary international law require states to punish a core set of crimes, including war crimes, crimes against humanity and genocide.

South Africa's transition in the mid-1990s took place at the outset of this trend, which has not been without controversy. Stakeholders in ongoing or recently concluded conflicts often contend that criminal cases – whether brought in an international tribunal or domestic court – are backwards-looking, disruptive to fragile political and social relationships and

thus a poor use of valuable resources that could be spent elsewhere. In this sense, skeptics of prosecutions in South Africa have echoed arguments made against the UN's ad hoc tribunals or the ICC's cases in Uganda and Sudan. They question why a pursuit for justice should ever compromise peace or humanitarian efforts. These critics tend to favor justice mechanisms commonly seen as "restorative" – such as truth commissions, reparations and other less punitive measures – over the more retributive trial-justice approach.

“Forget the foot soldiers. International law is clear. They must go as high as the evidence goes.”

– TSHEPO MADLINGOZI

Of course, unlike many situations that required a UN tribunal or, more recently, ICC involvement, South Africa was (and remains) stable enough to forge and execute its own transitional justice strategy. There is little doubt that many members of the ANC had always hoped for Nuremberg-style prosecutions of the apartheid regime, whenever it was finally toppled. The world had condemned apartheid's systematic use of illegal detentions, torture, murders and other forms of violence as crimes against humanity, and some of the military's operations outside of South Africa likely constituted war crimes.

The regime, however, was not completely overthrown; instead, Mandela and de Klerk negotiated a complex political settlement that incorporated the interests of the ANC and the outgoing National Party. The NP would never agree to a comprehensive prosecutorial dissection of apartheid's evils, and it was clear that the new government would need much of the existing administrative structure to avoid a collapse of services. There was an obvious danger in purging and criminalizing the well-armed police and security forces. The negotiated result was an addendum to the 1993 Interim Constitution that called for an amnesty for political crimes of the apartheid era, which was consistent with indemnity laws that had been passed in the years leading up to the transition. However, the addendum also empowered the forthcoming Parliament to legislatively construct “the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty will be dealt with.”

In 1995, the new ANC-controlled Parliament passed the Promotion of National Unity and Reconciliation Act, which created the TRC in the hopes of establishing “as complete a picture as possible of the nature, causes and extent” of the gross human-rights violations during the apartheid era. The South African process was innovative and, at least initially, highly lauded for incorporating a prosecutorial threat. Most truth commissions that had come before, including high-

profile examples in Latin American countries, had come with either legal or de facto “blanket” amnesties for perpetrators. South Africa, by contrast, established a conditional amnesty that set up a truth-for-amnesty exchange – participants who provided “full disclosure” of politically motivated crimes to the commission could be granted amnesty. Those who did not would risk criminal prosecution.

Nevertheless, many victims were upset that amnesty would be used at all. The political group Azanian People's Organization (AZAPO) and the families of victims, including Steve Biko, an anti-apartheid activist and much-admired founder of the Black Consciousness Movement who was tortured to death in police custody in 1977, filed a lawsuit to invalidate the act's amnesty provision on the basis that it violated their constitutional rights to the courts. The Constitutional Court (South Africa's highest) rejected the case in 1996, but did so with great sympathy to the victims and their claims. In the much-analyzed AZAPO ruling, Justice Mahomed DP portrayed the TRC's limitation on the victims' constitutional rights as necessary for the “historic bridge” needed to complete a difficult transition, and as a tool necessary to uncover the truth that would benefit the greatest number of apartheid-era victims.

THE TRC MOVED FORWARD IN 1996 AND, AT least at first, so did some high-level prosecutions of suspects who were already caught up in investigations. An aggressive prosecutor in the Transvaal region, Jan D'Oliveira, headed a large investigation into the notorious Vlakplaas death squad unit. He successfully prosecuted, among others, former squad commander Eugene de Kock, who in 1996 was sentenced to more than 200 years in prison. De Kock later cooperated with prosecutors and implicated colleagues from the security forces. A number of these colleagues later applied for amnesty with TRC, which showed the positive effect that criminal cases could have on the TRC process – especially given that participation from apartheid actors was slow in coming. Under the TRC legislation, any defendant implicated in a criminal or civil case could apply for amnesty before a Sept. 30, 1997, deadline.

The opposite effect, however, followed the failed case against former Defense Minister Magnus Malan, who along with other defense personnel was accused of orchestrating the 1987 massacre of 13 people active in the anti-apartheid group United Democratic Front. In 1996, the judge presiding over the case, Justice JH Hugo, acquitted Malan and the defendants of all charges. Critics blamed the result on a lackluster performance by prosecutors and possible judicial bias. According to a critique of the case co-authored by the ICTJ's Varney in 1997 for the *South African Journal of Criminal Justice*, people in the military – who were watching the trial to see if they should apply to the TRC's amnesty committee – now “had less incentive to do so.”

As it turned out, the TRC hearings would prove to be dramatic and memorable mostly because of the testimony of the victims, not because a great many perpetrators stepped forward to express remorse or provide new information about their crimes. The *Malan* case also raised the question of whether the mostly white prosecutorial and judicial ranks left over from apartheid had much interest in pursuing these cases. Varney, who at the time served on the civilian board overseeing the investigative unit responsible for the case, and his co-author, Jeremy Sarkin, observed that the result “strengthened the opinion of many South Africans that the existing system of criminal justice is deeply flawed because of its heritage as an apartheid institution.”

The TRC presented its first five volumes in 1998 after taking verbal or written testimony from about 22,000 victims and witnesses. The reports cataloged a large number of gross human rights violations, most of which were committed by the apartheid regime. (Many were also committed by the Inkatha Freedom Party, or IFP, a party of Zulu nationalists that worked with the apartheid state to commit violence against the ANC and its allies.) The commission concluded that apartheid was a crime against humanity and that the ANC and the Pan Africanist Congress, or PAC, which had split from the ANC in the late 1950s, were “internationally recognized liberation movements” engaged in a just struggle. The report added, however, that the armed wings of the parties used certain unjust means that constituted gross human rights violations. The final two volumes of the TRC report were eventually published in 2003, after the TRC’s amnesty committee had finished reviewing amnesty applications. In total, the committee granted amnesty to about 15 percent of the roughly 7,100 applicants, most of whom were from anti-apartheid forces.

Though Mandela in 1999 called for prosecutions to take place “within a fixed timeframe” for those who did not seek or were not granted amnesty through the TRC, these prosecutions did not materialize. Ole Bubenzer, the German author of *Post-TRC*

Prosecutions in South Africa, provides a detailed account of the administrative changes and delays that characterized the government’s handling of apartheid-era cases after the failure of the *Malan* case. According to his book, the government centralized TRC-related cases within a newly structured NPA unit but refused to support the new unit’s efforts. Bubenzer, who interviewed former and present NPA attorneys, writes: “Whereas the D’Oliveira Unit [which successfully prosecuted de Kock] had been well-staffed and well-equipped, the resources allotted to post-TRC prosecutions after 1998 were absolutely minimal.”

The biggest pending case at the time that eventually reached conclusion targeted Dr. Wouten Basson, who ran the military’s biological and chemical weapons program. He was acquitted in 2002 of many charges, including 229 murders, after a 30-month trial. As with *Malan*, interpretations of the case were divided along racial lines, and the outcome seemed to signify the futility of criminal prosecutions. Archbishop Tutu even commented in his “Chairperson’s Forward” to the final TRC volumes in 2003 that the Basson case showed “how inadequate the criminal justice system can be in exposing the full truth” and “how unsuccessful prosecutions lead to bitterness and frustration within the community.” In his view, the TRC was a superior vehicle for truth-seeking even though “by and large, the white community did not take advantage of the ... process.”

However inconvenient criminal cases might be, opposing them publically would put the ANC in an awkward position. The liberation movement and its supporters around the world had always contended apartheid was a crime against humanity, a conclusion supported by the TRC. In addition, South Africa had in 1996 adopted one of the most progressive and human-rights oriented constitutions in the world, and one that explicitly recognized customary international law. Victims have thus felt well-grounded in contending that international and domestic law required the NPA to prosecute apartheid-era cases. (These positions were eventually



National hero Nelson Mandela called for prosecutions “within a fixed timeframe” in 1999 after the publication of the initial TRC reports.

strengthened as a result of the *Basson* case, which the NPA had appealed after losing. In 2005, the Constitutional Court held that apartheid practices constituted both crimes against humanity and war crimes, and that the state was obligated under international law to punish the offenses. Though some charges were reinstated against Basson as result of the appeal, the NPA decided not to retry him, apparently fearing that doing so might constitute double jeopardy.)

In Varney's view, there should have been an "umbilical cord" between truth-seeking and criminal justice, with the prosecutorial threat serving as the "stick" to entice perpetrators into participating with the TRC. Instead, the NPA held off developing a strategy for apartheid cases until the amnesty committee finished its work, which included the referral of 300 cases for possible prosecution.

In April 2003, three weeks after the publication of the final two TRC volumes, Mandela's successor, President Thabo Mbeki, gave a speech to Parliament in which he addressed the tension between amnesties and prosecutions. He said that the government could not design another amnesty process because doing so would suspend the "constitutional rights of those who were at the receiving end of gross human rights violations." He said control of the issue rested with the head of the NPA, who could identify individuals willing to "divulge information" and "enter into arrangements that are standard in the normal execution of justice." Mbeki appeared to be indicating his preference for plea deals, which would result in lenient sentences and fewer trials – and thus create a middle way that recognized the human-rights concerns of victims without heated and lengthy court proceedings.

In 2005, the NPA announced such a policy in the form of amendments to the Criminal Procedure Act. The policy gave suspects a chance to avoid prosecution by providing a written statement that fully disclosed their politically motivated crimes. In addition to weighing the nature of the disclosure before deciding whether to prosecute, the NPA was to consider whether a prosecution "may contribute, facilitate or undermine our national project of nation-building through transformation," and whether it may traumatize "victims and conflicts in areas where reconciliation has taken place." The NPA was required to consult with victims before making its decisions, and these decisions had to be made public. However, unlike the TRC process, the review of evidence was to be done in private, and the NPA was not required to publish the information or testimony given by the offenders.

Victims' groups were outraged and sued the NPA director and several government officials over the policy in 2007 in the case *Nkadimeng and others v. The National Director of Public Prosecutions*. The plaintiffs included Khulumani Sup-

port Group, the International Center for Transitional Justice and the Centre for the Study of Violence and Reconciliation, as well as the widows of the "Craddock Four" (four liberation activists murdered in 1985), and the sister of Nokuthula Aurelia Simelane, who disappeared after an abduction by the state security forces in 1983. The plaintiffs described the new policy as a repeat of the TRC's amnesty process that unfairly extended an "effective indemnity" to those who had refused to participate in the TRC. They alleged that the new policy violated international law and domestic constitutional rights to life, dignity and equal protection under the law.

In response, the NPA contended that there was no extension of indemnity because the victims could still bring private prosecutions, which is allowed under South African law, as well as civil cases against the alleged perpetrators.

"I don't say forget the past, or forget the plight of the victims, but let's close the book on the past regarding prosecutions."

– ATTORNEY JAN WAGENER

This was a dubious argument given that victims could not realistically afford the costs to investigate such complicated cases. In his December 2008 ruling, Judge MF Legodi of the South Africa High Court in Pretoria agreed with victims that the new guidelines were "a copy or duplication" of those in the TRC and that the NPA had a duty to investigate and prosecute cases when "there is sufficient evidence." Legodi concluded that the policy was contrary to the NPA's "constitutional obligation to ensure that those who are alleged to have committed offences are prosecuted." He said that the policy was not only unconstitutional but also "a recipe for conflict and absurdity."

The case was a success, but the legal relief was limited to an invalidation of the policy amendments; prosecutorial discretion remained with the agency. The result has been more inaction by the NPA. Since the TRC finished its work in 2003, the NPA has only reached a resolution in a few cases involving apartheid-era political crimes. The one major case that led to a plea deal targeted Adriaan Vlok, a former Minister of Law and Order, and Johan van der Merwe, a former police commander, as well as three lower-level officers involved in the 1989 attempted assassination of Frank Chikane, a UDF member and former head of the South African Council of Churches (they had attempted to kill Chikane by poisoning his underwear). In 2007, Vlok and van der Merwe received 10-year sentences for the assassination attempt, with the remaining defendants receiving five years each. All of the sentences were suspended. Criticism

came from multiple sides: Those in the pro-prosecution camp felt that the sentences were much too lenient, especially for Vlok, given that he did not provide information to implicate more colleagues or superiors, while Afrikaner groups contended that the failure to bring similarly high-profile cases against ANC leaders was unfair. As with earlier attempts, the *Vlok* case revealed the political challenges of resolving apartheid-era cases in the courts.

Wagener, who defended Vlok and van der Merwe, said he supported the NPA's attempted policy amendments, which would have induced clients such as his to come forward and provide valuable information without fearing prison sentences. (The plea deal for his clients, who were charged and set for trial before pleading guilty, was not reached under the NPA's proposed plan.) Wagner believes that the successful legal challenge by victims' groups will result in less "unfinished business" being solved through the participation of perpetrators.

"I think we missed a very good opportunity," he said.

REALISTICALLY, THE NPA DOES NOT HAVE THE resources to prosecute a wide number of apartheid-era cases. The best-case scenario for victims is a smaller number of symbolic prosecutions of crimes that are typical of the worst human rights offenses. While old cases bring evidentiary challenges in any justice system, advocates believe there is sufficient evidence to move forward in several high-profile cases. One is the matter at issue in the *Nkadimeng* suit – the disappearance and torture of Simelane, who is presumed dead – a crime for which the TRC rejected amnesty applications by the white policemen involved. Lawyers have continued to press the NPA to pursue this case. However, Varney said the agency told him that the original investigator's docket has been lost.

Madlingozi believes that excuses over a lack of prosecutorial resources or evidentiary difficulties are "red herrings," and that the issue boils down to politics. He said the ANC is fearful of apartheid-era cases because they have the power to contradict two powerful "meta-narratives." One is the narrative of the "Rainbow Nation" that has miraculously moved on from its turbulent past. The other is the narrative of the liberation movement. If the NPA winds up prosecuting ANC members for their human-rights violations, he said, it could "destroy the myth of the pure liberators." His organization supports "symbolic and meaningful cases that target those with greatest responsibility," regardless of political affiliation – which he said is the approach consistent with South Africa's obligations under international law.

"There can't be scapegoating or the shifting of responsibility," Madlingozi said. "Forget the foot soldiers. International law is clear. They must go as high as the evidence goes."

Not surprisingly, the ANC, which in 1980 declared that it would abide by the Geneva Conventions (a rare move for a non-state entity), has always been sensitive to criticism that

some of its anti-apartheid campaigns violated international law. Though it set the TRC process in motion, the ANC unsuccessfully sued to block the publication of its reports after learning the group would be cited for gross human rights violations, which according to the commission included the killing of suspected dissidents within their ranks, the use of landmines and other terroristic violence that claimed civilian lives. Party members were outraged that they could somehow be placed on the same footing as the apartheid regime. They contended that they had taken steps to minimize civilian deaths and that some ANC supporters had committed violence in acts not planned by party leadership.

Nevertheless, sympathetic observers have suggested that any NPA unit devoted to TRC-related cases should focus most of its efforts on former actors of the apartheid regime – not the ANC – given that the majority of gross violations were committed by the state. In addition, tens of thousands of anti-apartheid activists were already prosecuted and imprisoned (or detained without trial) in South Africa for their activities before the transition. Under this theory, a focus on apartheid government crimes would bring a corrective balance.

Of course, members of the former security forces disagree. In Wagener's view, there are three options: prosecute everyone on both sides, going up the chain of command; prosecute nobody; or prosecute select cases. Unlike Madlingozi, Wagener believes the first approach would tear the country apart. The last option, he said, is unfair because it violates the fundamental concept of equality before the law and is akin to drawing names out of a hat. He concludes that the best course is the second option – prosecute no one – however unfair it may be to the victims.

Even a single case against former apartheid actors is likely to bring retaliation and embarrassment for the ANC. News stories have reported that Wagener's clients among the former security forces have compiled dossiers against senior ANC members, including Mbeki and current President Jacob Zuma, for alleged human rights violations, which they plan to use if the NPA only brings cases against former apartheid actors. The strategy would be to turn over the dossiers to the NPA and then launch a private prosecution if the agency does not file cases.

"I can't speak on behalf of my clients, but I would think they would not sit back and let a totally one-sided process develop," Wagener said. "Common sense tells me that would be a quite normal response."

Given this possibility, it is likely that victims' groups will have a hard time getting the NPA to move forward with any cases. So far, advocates have not threatened their own private prosecutions, which would be expensive. One strategy that has been discussed is attempting to force the NPA's hand on a case-by-case basis. With the amendments already invalidated, the relatives of victims of a specific apartheid-era crime could file a suit against the NPA claiming that sufficient evidence existed for the violation and ask the court to order

the agency to bring a criminal case. Absent this approach, the *Nkandimeng* victory may be largely symbolic.

Victims' advocates have nevertheless succeeded in pursuing additional litigation involving the government's handling of apartheid-era crimes. The same plaintiffs' groups – Khulumani Support Group, the International Center for Transitional Justice and the Centre for the Study of Violence and Reconciliation – along with other members of civil society challenged a pardons process that President Mbeki established in 2007 for individuals who had already been prosecuted and convicted for political crimes related to the apartheid conflict. The new “special dispensation” system covered the apartheid era as well as the first five years of the transition, through May 1999, which witnessed some horrific violent acts, and was open to individuals who did not apply for amnesty with the TRC. A reference group composed of representatives from each political party was established to review pardon applications and make recommendations to the president. Victims' groups sued because the system did not allow for their participation, despite the fact that Mbeki had said that the process would be guided by the principles of the TRC – which itself was based heavily on victim participation. The Constitutional Court ruled unanimously in February of 2010 in favor of the plaintiffs on the grounds that that the president must hear from victims before deciding whether a crime was eligible for pardon.

In October, the government released the names of 149 people recommended for pardon, which included Vlok and van der Merwe from the attempted Chikane assassination but otherwise mostly included individuals convicted of offenses after 1994. As 2010 was drawing to a close, the various advocacy groups (together calling themselves the South African Coalition for Transitional Justice) were busy assisting victims and other interested parties in making submissions to the government over the proposed pardons.

WHATEVER PROSECUTION POLICY THE NPA adopts, most victims will never get their day in court – there are simply too many of them. This is true in South Africa as in most post-conflict states, which is one reason why human rights advocates and scholars have come to suggest a “package” or multifaceted approach to transitional justice, one that incorporates punitive and restorative mechanisms: Trials can uncover important truths, show a commitment to legal principles and hopefully punish some of the most serious offenders, but truth commissions help establish a more comprehensive account of systemic wrongdoing, and reparations along with broader economic reforms provide a more practical benefit by improving the day-to-day lives of survivors.

How has South Africa fared in these restorative goals? The TRC may very well be the most famous transitional-justice effort in history; it is the subject of many popular accounts as well as an incalculable number of scholarly articles and

books. By and large, the TRC is viewed favorably around the world, but more criticism has emerged about whether it has succeeded in two of its primary goals – promoting reconciliation and producing a satisfying and accurate truth about the apartheid era. These are complicated and emotional topics about which a visitor to South Africa would rightfully feel hesitant to draw conclusions. As Wagener said, the topic is less conducive to a straightforward journalistic interview than to an open-ended conversation over several hours, “preferably with two or three good bottles of wine.”

Nevertheless, it appears as though the TRC may have been more satisfying for people outside South Africa marveling at the “miracle nation” and its resilient citizens' apparent capacity for forgiveness than for the actual victims themselves. Aside from the amnesty provision, which was upsetting at the outset, Madlingozi said many victims felt forced to forgive despite the fact that most perpetrators did not apply for amnesty or express remorse. The lack of participation from offenders also meant that most victims or their relatives did not learn important new details of the crimes. Madlingozi added that the TRC's definition of “victim” was overly technical and legalistic – someone who suffered a gross human rights violation and made a statement about it, which totaled about 20,000 people, a fraction of apartheid's actual victims. These were the only people entitled to reparation payments of 30,000 RAND (worth about \$4,250 in today's currency), which were made in 2004 in addition to smaller interim payments made earlier to those most in need. Khulumani Support Group's membership of victims of gross human rights violations alone exceeds 58,000, and of course the number of South Africans victimized by apartheid's oppression includes many more millions.

Indeed, one of the most common critiques of the TRC is its treatment of the apartheid system as a whole. Under the legislation that created it, the commission was limited to investigating conduct that was illegal under apartheid – gross human rights violations such as murders, disappearances, torture – not the apartheid structure itself, in which segregation, forced land removals, job discrimination and other tools of oppression were legal. The 2008 book *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, draws some negative conclusions about this limitation. The book's editors, Hugo van der Merwe and Audrey Chapman, conclude in the final chapter that the focus on individual crimes led the TRC to focus on the conduct of foot soldiers tasked with carrying out the actual violence rather than senior leaders and planners (few of whom were subpoenaed to appear before the TRC) or the civilian white minority who benefited from apartheid's discrimination. In their view, by focusing on specific acts and perpetrators without going up the chain of command, the TRC failed to achieve “an unequivocal indictment of the apartheid system” as a means of socio-economic oppression. This likely provided a weaker foundation for future efforts to hold senior figures account-

able and to interpret reparations more broadly as the need to redistribute wealth on a greater scale.

In fairness, the TRC's recommendations on reparations were somewhat broader – more generous payments and community-based programs funded in part by a corporate tax – than what the government chose to implement. Also, the TRC did hold hearings and issue a report, Volume 4, dedicated to the role that key societal institutions played in apartheid, including the business sector. But the sad fact remains that most victims of apartheid continue to struggle in their day-

present government led by Zuma, however, has come out in support of the case. Madlingozi said his organization is motivated less by economic damages than by the principle of holding corporations accountable for supporting apartheid.

It is difficult to assess whether a more satisfying truth commission or reparations policy (or other economic reforms) would have lessened the demand for prosecutions. This is a tricky analysis in South Africa as in any post-conflict setting. Some victims will want criminal accountability regardless of the restorative mechanisms employed; some will refuse to

relive their experiences in court regardless of the alternative truth-seeking mechanisms available. The preference varies not only by nation and community but from person to person. And advocacy groups will continue to debate whether criminal trials threaten reconciliation or whether they are a crucial step to building a stable society based on the rule of law.

But the tension between truth-seeking and criminal accountability is heightened in South Africa because the TRC was structured around the conditional amnesty approach that traded immunity for truth. By law, amnesty could not be granted to those who did not participate. Some critics thus see the government's failure to prosecute non-participants as a serious threat to the legacy of the TRC. This is why supporters of

prosecutions have come to include individuals who believed in the commission's perceived superiority over criminal trials in accounting for the past, including Tutu, who noted in a 2004 interview that the TRC received its praise worldwide "precisely because it avoided a blanket amnesty."

The additional consequences of a non-prosecution policy are hard to predict. Many observers have echoed Madlingozi by suggesting that South Africa's culture of violent crime and political corruption are somehow related to a lack of a criminal accountability for apartheid-era crimes. Madlingozi also put forth a more tragic impact on the psychology of the citizenry: That those who were treated as less than human during apartheid will continue to feel that the state does not value their lives and the lives of their missing or dead family members. And what will later generations of whites conclude about apartheid if there are a dearth of high-profile cases on the books for the system's many crimes against humanity?

"Maybe people will eventually start to think, 'You know, maybe apartheid really wasn't that bad.'" ■



American attorney Michael Hausfeld is representing apartheid-era victims in New York federal court against corporations that allegedly assisted the apartheid state.

to-day lives while the beneficiaries of apartheid continue to lead lives of comfort. Madlingozi said these shortcomings are not too surprising given that the entire transitional framework of the mid-1990s, which included the TRC, was a negotiated bargain among political elites who have fared well in the new South Africa.

"The result is that there has been political reconciliation, but no social reconciliation," he said.

For its part, Khulumani Support Group is also seeking some measure of justice outside of South Africa. The group has pushed a lawsuit by victims and their relatives against defendant corporations, including General Motors, Ford, Daimler, IBM and Rheinmetall, in U.S. federal court in New York for allegedly providing the tools and means that allowed the apartheid regime to carry out its many forms of oppression. In that case, *Khulumani v. Barclays National Bank*, which remains pending, Khulumani is represented by Michael Hausfeld, a prominent antitrust and human-rights litigator based in Washington, DC. Mbeki, who instituted the 2004 reparation payments, was very critical of the suit. The