

**THE UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**Has the failure to conduct post-Truth and Reconciliation  
Commission prosecutions in South Africa contributed to a culture of  
impunity for economic crimes?**



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<b>TABLE OF CONTENTS</b>	i
<b>Key words</b>	iv
<b>Acronyms</b>	v
<b>Abstract</b>	vi
<b>Dedication</b>	vii
<b>Declaration</b>	viii
<b>Acknowledgments</b>	ix
<b>CHAPTER ONE: INTRODUCTION AND OVERVIEW OF STUDY</b>	
1 Introduction	1
1.1. Theoretical assumptions and research question	4
1.2. Research Methodology	4
1.3. The South African Truth Commission	5
1.4. The Argentinian Truth Commission	8
1.5. The Chilean Truth Commission	11
1.6. The amnesty clause in the TRC Act	12
1.6.1. The conditions for granting amnesty	12
1.6.2. The public attitude to the amnesty clause	15
1.6.3. The significance of the amnesty question in present day South Africa	15
1.7. Overview of Chapters	16



## CHAPTER TWO: PROSECUTION EFFORTS FOLLOWING TRUTH COMMISSIONS

2	Introduction	18
2.1.	A South African Narrative	18
2.1.1.	The Human Rights Investigative Unit (The HRIU)	19
2.1.2.	The Priority Crimes Litigation Unit (The PCLU)	21
2.1.3.	The National Prosecuting Authority (The NPA)	22
2.1.4.	The case of Nokuthula Simelani: <i>Nkadimeng v NDPP</i>	26
2.1.4.1.	Background	26
2.1.4.2.	The legal challenge	27
2.2.	The Latin American Narrative	29
2.2.1.	Argentina	31
2.2.1.1.	Obstacles to prosecution	33
2.2.2.	Chile	35
2.2.2.1.	The arrest and detention of Augusto Pinochet	35
2.2.2.2.	The Pinochet effect	36
2.2.3.	Conclusion	39

## CHAPTER THREE: POLITICS AND THE NATIONAL PROSECUTION AUTHORITY

3	Introduction	40
3.1.	The rise and fall of the ‘Scorpions’	41
3.2.	The duty to establish an anti-corruption unit	45
3.3.	The operational and structural independence of the ‘Hawks’	46
3.4.	Corruption and the Independence of the NPA	48
3.5.	Conclusion	51

## **CHAPTER FOUR: THE RULE OF LAW AND ACCOUNTABILITY**

4	Introduction	53
4.1.	The importance of the rule of law	53
4.2.	Accountability	54
4.2.1.	Argentina	56
4.2.2.	Chile	58
4.3.	Recommendations	59
4.4.	Conclusion	60
	<b>BIBLIOGRAPHY</b>	<b>64</b>



## KEY WORDS

Accountability

Amnesty

Corruption

Impunity

Latin America

Post-TRC

Prosecutions

Rule of Law

South Africa

Transition



## ACRONYMS

ANC	African National Congress
CONADEP	National Commission on the Disappearances of People (Comisión Nacional sobre la Desaparición de Personas)
COSATU	Congress of South African Trade Union
DA	Democratic Alliance
DPCI	Directorate of Priority Crime Investigation
DSO	Director of Special Operations
EFF	Economic Freedom Fighters
HRIU	Human Rights Investigative Unit
NDPP	National Director of Public Prosecutions
NGO	Non-governmental Organisation
NPA	National Prosecuting Authority
PCLU	Priority Crimes Litigation Unit
POCA	Prevention of Organised Crime Act
SAPS	South African Police Services
TRC	Truth and Reconciliation Commission
UNTOC	United Nations Convention against Transnational Organised Crime



## ABSTRACT

The end of Apartheid and the transition to a new constitutional democracy in South Africa was ushered in by the Truth and Reconciliation Commission (TRC). The purpose of the TRC was to promote a dialogue between victims and perpetrators of gross human rights violations to try and achieve reconciliation in the country. To this end, the TRC was given the power to grant conditional amnesty to those who came forward to reveal the full truth to the country about the crimes that they had committed. Those who refused to apply for amnesty or who did apply but were denied amnesty were supposed to be prosecuted. A number of years have passed since the final TRC report was submitted and hardly any prosecutions have taken place. This paper argues, by comparing the transitions in Argentina and Chile to the one in South Africa, that the lack of post-Truth Commission prosecutions in South Africa has contributed to nurturing a culture of impunity for acts of corruption in high offices of state. It argues that in countries transitioning from repressive and authoritarian regimes to democratic governments, prosecutions of gross human rights violations are necessary for the creation and strengthening of the rule of law and a human rights culture. Therefore, the impunity for economic crimes such as corruption is detrimental to democracy.

## DEDICATION

To my beloved parents Calvin and Sarah Mabunda for the unconditional love and support which has added immeasurable value to all that I am.

A special dedication to Mr Sanele Sibanda without whom, this journey would never have even begun.





## DECLARATION

I, Sagwadi Mabunda, declare that *“Has the failure to conduct post-Truth and Reconciliation Commission prosecutions in South Africa contributed to a culture of impunity for economic crimes?”* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Student..... Date.....

Signed.....



Supervisor..... Date.....

Signed.....

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## CHAPTER ONE

### INTRODUCTION AND OVERVIEW OF STUDY

#### 1. Introduction

At the end of Apartheid, the question that South Africa was confronted with was what was to be done about the perpetrators of the gross human rights violations committed under the repressive Apartheid regime. The choice that South Africa had to make was one that would either bring peace to the country or hurl it into a devastating civil war. South Africa chose to pursue peace by establishing a Truth and Reconciliation Commission (TRC) and granting conditional amnesty to the perpetrators of gross human rights violations.

International human rights norms and international experience show that in order to achieve unity and morally acceptable reconciliation, it is necessary that the newly-established government deal with gross human rights violations in a way that ensures that the following requirements for truth-finding are met. The first is that the truth must be established by an official investigation unit that uses fair procedures. The second is that the truth must be acknowledged fully and unreservedly by the perpetrators, and lastly, the truth must be made known to the public.<sup>1</sup>

The emergence of truth commissions and amnesty laws in Latin America in the 1980s has shown that amnesty laws can be problematic and undesirable, as they can be abused for political purposes. Argentina provides an example of the strengths and weaknesses of early truth commissions, while the case of the Chilean truth commission shows how the granting of amnesty can be used to shield members of the repressive regime from prosecution, thus

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<sup>1</sup> The Promotion of National Unity and Reconciliation Bill No. 30 of 1995, explanatory memorandum to the Parliamentary Bill.

resulting in impunity. South Africa's transition was not identical to that of other transitioning nations, as it was not the result of a revolution, but of intense negotiations. This implied necessarily that there would be no relentless criminal prosecutions of officials of the former Apartheid regime who were alleged to have committed gross human rights violations.<sup>2</sup> Twenty-one years into democracy, there is one issue which dominates public discourse in South Africa Today: corruption in the upper echelons of government.<sup>3</sup>

Another issue which flares up now and again, but only for a few days and then it subsides again, is the issue of why post-truth commission prosecutions did not take place, despite the fact that most of the applications for amnesty were declined by the Truth Commission. The applications came from people who had appeared before the human rights committee of the Truth Commission, as well as those who did not appear before it because they were already in prison, serving a sentence for some other offence, not related to human rights, of which they had been found guilty. But there was another group of people, the number of which cannot be established, who looked upon the Truth Commission with disdain, and who simply did not bother appearing before it, even though they were suspected of having been complicit in the torture, death and disappearance of Apartheid opponents in the past. Yet, to date, hardly any prosecutions have been instituted against those who were denied amnesty.<sup>4</sup>

It is not as though the issue of non-prosecutions is something that crops up in daily conversations, but when it does, as happened in 2015 in the case of Nokuthula, which is

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<sup>2</sup> Fernandez L 'Post-TRC Prosecutions in South Africa', in Werle G (ed.) *Justice in Transition- Prosecution and Amnesty in Germany and South Africa* vol. 29 BWV Verlag (2006) 76.

<sup>3</sup> 'Why is corruption getting worse in South Africa?' *Corruption Watch* available at <http://www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/> (accessed 12 August 2015).

<sup>4</sup> Bubenzer O *Post-TRC Prosecutions in South Africa: Accountability for political crimes after the Truth and Reconciliation Commission's Amnesty Process* Martinus Nijhoff (2009) 14.

dealt with below; it provokes anger and frustration among the victims. What annoys them is that, although they have received reparations, which consisted of paltry sum money, the fact that no prosecutions have taken place deprives families and relatives of an opportunity to know where the remains are of their loved ones or friends who were killed or disappeared. From their point of view, and from that of considerable segments of society, failure to prosecute means that there are some people who are indeed above the law and who are immune from prosecution.

The second concern in South Africa today is that the promises made by politicians during the political transition that a new government would be transparent and accountable, is undermined by unending allegations of corruption and misappropriation of public funds in the highest echelons of government. Many, if not most, of these allegations are not investigated by the criminal justice authorities and followed up with prosecutions. In the few instances where investigations do take place, for example, by the public protector, the National Prosecuting Authority (NPA) seems hesitant to go into action.

It is therefore difficult to escape the impression that corruption is not punishable when committed by those in high state offices or at the local government level. The principles of honest and ethically wholesome governance, fought for by many who were murdered, torture or disappeared by the agents of Apartheid, and for the sake of whom the Truth Commission was established, have given way to corruption and moral decay in offices of state. But corruption is not only a crime; it is a human rights issue as well, and the effects of certain corrupt acts impair the enjoyment of socio-economic, civil and political rights. To have to pay a bribe in order to gain access to a school, a clinic, employment, housing, or to obtain a passport are examples of how bribery can have an impact on human rights.

### **1.1. Theoretical assumptions and research question**

The basis of this paper is that the high prevalence of corruption within the South African government at present, which is eating away at the moral principles enunciated in the TRC's recommendations, is in part due to the political lethargy and absence of a strong political will to pursue post-TRC prosecutions. The assumption made here is that if corrupt state officials are aware of the fact that there have been no prosecutions in respect of gross human rights violations perpetrated under Apartheid and which resulted in the torture, disappearances and killings of hundreds of people, what would make them think that they will not enjoy impunity for embezzling taxpayers' money – a mere economic crime? To determine whether indeed a connection can be argued, this paper will compare South Africa to two Latin American countries, namely, Argentina and Chile, which had truth commissions also during their transition from dictatorship to democracy. Although both Argentina and Chile have encountered different challenges and outcomes in their transition, they make for good comparative cases because both post-TRC Chile and post-TRC Argentina played a major role in helping South Africa to set up its TRC.

In the light of what is stated above, the question that this research paper seeks to answer is this: Has the failure to conduct post-TRC prosecutions in South Africa contributed to the weakening of the rule of law and the start of a drift towards a state of affairs where government officials can commit acts of corruption with impunity?

### **1.2. Research methodology**

The study begins by discussing the truth commissions of South Africa, Argentina and Chile, and, thereafter, it deals with how each of the countries has gone about the amnesty question of prosecuting perpetrators of gross human rights violations under the respective

predecessor regimes. Each country is dealt with individually, and thereafter the comparisons are drawn. This study will rely on library research and will make use of both primary and secondary sources.

### **1.3. The South African Truth Commission**

The Epilogue of the Interim Constitution<sup>5</sup> expressed very eloquently the philosophy of national unity and reconciliation that would guide the drafting of the final Constitution as underpinned by the constitutional principles. The parliament of the new democratic South Africa, in response to the gross human rights violations committed during the Apartheid era, enacted a law that established the TRC.<sup>6</sup> The TRC was created to promote national unity and reconciliation in the spirit of an understanding that transcends the conflicts and divisions of the past. To achieve this goal, gross human rights violations were to be investigated to establish as complete a picture as possible of the nature, causes and extent of such violations.<sup>7</sup> More than this, the TRC was charged with the task of making recommendations on how such gross injustices could be avoided in the future.

In October of 1998, the TRC presented its final five-volume report of its findings to then President Mandela.<sup>8</sup> The report documents comprehensively the Apartheid structure and the roles played by key state functionaries of the state in implementing the policies of the apartheid regime. It catalogues the heinous human rights violations committed under the

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<sup>5</sup> Constitution of the Republic of South Africa Act 200 of 1993 (The interim Constitution).

<sup>6</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 (The TRC Act).

<sup>7</sup> Hamber B "‘Ere their story die”: truth, justice and reconciliation in South Africa’ *Race and Class* Vol. 44(1) (2002) 62.

<sup>8</sup> A sixth volume containing the Amnesty Committee’s final report, and a seventh volume summarizing the victim findings were released in 2001.

Apartheid legal order, and these include torture, abductions, judicial and extra-judicial killings and the unjustified use of deadly force.<sup>9</sup>

The final report emphasised that Apartheid was indeed a crime against humanity and that although the Apartheid government was responsible for most of the human rights violations between 1960 and 1994, the resistance movements that fought against Apartheid were also guilty of gross human rights violations.<sup>10</sup> The TRC was empowered to grant conditional amnesty to perpetrators of gross human rights violations that came forward with full details about the crimes that they committed, as provided for by the TRC Act.<sup>11</sup> This was accompanied by the understanding that those who did not apply for amnesty or those who were denied amnesty would be liable for criminal prosecutions in the post-TRC period. The TRC handed over to the National Prosecuting Authority a list of some 640 prosecutable cases and stated in its recommendations that in the interests of pursuing national reconciliation, it was necessary that prosecutions be instituted. The information gathered by the TRC had effectively laid down the ground work for such prosecutions.<sup>12</sup> To date, hardly any prosecutions have taken place.

#### **1.4. The Argentinian Truth Commission**

In March of 1976, Argentina was taken over by a series of military juntas which were a result of a coup. This led to a seven-year armed struggle between the military dictatorship and the opposition, the so called 'subversives'.<sup>13</sup> The dictatorship was characterised by disappearances which allowed for the most extreme forms of torture to take place without

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<sup>9</sup> Graybill L *Truth and Reconciliation in South Africa: Miracle or Model?* Lynn Rienner Publishers (2002) 145.

<sup>10</sup> Graybill (2002) 145.

<sup>11</sup> Section 20(1) of the TRC Act.

<sup>12</sup> Inter-American Court of Human Rights: *Almonacid Arellano v Chile*, Judgment of 26 September 2006.

<sup>13</sup> <http://www.usip.org/publications/truth-commission-Argentina> (accessed 07/10/2015)



any political or legal interferences or prohibitions.<sup>14</sup> Although there were thousands of reports filed with international bodies and organizations such as the Inter-America Court of Human Rights and the United Nations Human Rights Division; and from bodies such as the Permanent Assembly for Human Rights, the dictatorship managed to offset all allegations. When President Raul Alfonsín came to power in 1983, he created a Commission called the National Commission on the Disappearances of People (*Comisión Nacional sobre la Desaparición de Personas*: CONADEP) by presidential decree. It was headed by the highly acclaimed Argentinian novelist Ernesto Sábato. The commissioners were prestigious people from different professions, including law, journalism, science and religion. Its mandate was to “inquire into the fate of the disappeared, locate abducted children, report to the court any attempt to conceal or destroy any evidence, and, lastly, to issue a final report”.<sup>15</sup> Human rights organisations opposed the Commission initially, but their resistance ebbed when they realised that it offered them the best opportunity of uncovering the truth about people who were made to disappear (usually referred to as the ‘disappeared’).<sup>16</sup> This change of mind helped to disabuse critics of the idea that the Commission existed merely to receive accusations, which it would then channel to the courts for prosecution. It became clear that this Commission was indeed a real truth commission.<sup>17</sup> The Commission’s investigations led ultimately to the discovery of hundreds of previously unknown, clandestine detention centres where atrocities had been perpetrated on opponents of the

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<sup>14</sup> Crenzel E ‘Argentina’s National Commission on the Disappearances of Persons: Contribution to Transitional justice’ *International Journal of Transitional Justice* vol. 2 (2008) 174.

<sup>15</sup> National Executive Decree 187, 15 December 1983.

<sup>16</sup> Crenzel (2008) 179.

<sup>17</sup> Crenzel (2008) 181.

former junta regime. This finding was a major breakthrough, and was covered widely by the media.<sup>18</sup>

The Commission submitted its full report, entitled *Nunca Más (Never Again)*, to the President nine months after starting its work. A shorter, version of the report was produced and published as a book by a private publishing house, in co-operation with the government. It became a best seller in no time, with 40 000 copies sold on the first day it appeared on the bookstands, and 150 000 copies in the first eight weeks. It is the bestselling book in Argentinian history, and can be found, today still, in many kiosks around Buenos Aires.<sup>19</sup>

President Alfonsín's civilian government then moved quickly to repeal the amnesty that the military had granted itself. The Commission turned over the evidence it had collected to the state prosecutor and this resulted in criminal trials in which five of the former junta military generals were found guilty and sentenced to terms of imprisonment.<sup>20</sup>

### **1.5. The Chilean Truth Commission**

In September of 1973, the Chilean civil government was overthrown by General Augusto Pinochet in a coup. The Pinochet dictatorship lasted 17 years and was characterised by brutal repression of all political opposition.<sup>21</sup> Over a thousand people were killed or disappeared and thousands more unlawfully detained or tortured. There was a conspicuous lack of judicial prosecutions, and in 1978 Pinochet decreed an amnesty law (Decree Law No.

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<sup>18</sup> Crenzel (2008) 181.

<sup>19</sup> Hayner (2001) 34.

<sup>20</sup> Hayner (2001) 34.

<sup>21</sup> Hayner (2001) 35.

2.191), which barred prosecution for almost all crimes that had occurred since the coup and which violated human rights.<sup>22</sup>

In 1988, Patricio Aylwin was elected to be President of Chile and assumed office in 1990. Pinochet, however, had ensured, through an amendment of the constitution, that he would retain his autonomy and his political position as the commander in chief of the army and a position as senator for life. Six weeks after President Aylwin assumed office, he created the National Commission on Truth and Reconciliation through presidential decree commonly known as the Rettig Commission, and named after its chairman Raúl Rettig, a former ambassador under President Salvador Allende. It quickly became clear that it would be impossible to nullify Pinochet's amnesty provision and pursue prosecutions for the human rights abuses of the predecessor regime. Aylwin, therefore, opted for a policy of investigation and truth finding.<sup>23</sup> Aylwin elected eight people to serve on the Commission. Four were former supporters of Pinochet and the other four had been in the opposition. This was a deliberate choice by the administration to ensure that the Commission would not be perceived as being biased. This proved to be a wise decision because the Truth Commission report was unanimously supported by the members of the Commission.<sup>24</sup>

The Rettig Commission's mandate was limited to investigating "disappearances after arrest, executions, and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of the persons carried out by private citizens for political reasons".<sup>25</sup> Cases of torture that did not result in death were excluded. It is estimated that there are between 50 000 and 200 000 torture survivors who

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<sup>22</sup> Hayner (2001) 35.

<sup>23</sup> Hayner (2001) 35.

<sup>24</sup> Hayner (2001) 35.

<sup>25</sup> Decree Establishing the National Commission on Truth and Reconciliation, Supreme Decree No. 355, Chile, April 25, 1990, reprinted in Kritz, *Transitional Justice*, vol. 3, 102.

were identified by the Commission but were not included in the list of victims because of this strict mandate.<sup>26</sup> The Commission did not have any powers of subpoena and was therefore dependent on the co-operation of the public. This proved to be an impediment as it received very little co-operation from the armed forces. The report totalled 1 800 pages with over 95 per cent of the human rights violations, as defined by the Commission, attributed to state agents.<sup>27</sup>

The report of the Commission which was handed over to the President was publicized after several weeks, and President Aylwin gave an emotional apology on behalf of the state. In his apology, he begged for forgiveness from the people, recognising the suffering of the victims and emphasising the need for forgiveness and reconciliation, and also asked the armed forces to make reparations. The report, however, was not well received by Pinochet. He expressed “fundamental disagreement” by insisting that the army had saved the freedom of the country, although he did not question specific aspects of the report.<sup>28</sup>

The report was reproduced as a daily insert in the newspaper but only a few copies of the report itself were printed. An attempted assassination of a close associate and confidante of Pinochet in three attacks within only four weeks of the report having been released, shifted all focus from the report and effectively resulted in the abandonment of the reconciliation processes altogether.<sup>29</sup>

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<sup>26</sup> A second commission known as the Valech Commission was created by Supreme Decree No. 1040 in September of 2003 by President Ricardo Lagos. It had the mandate of investigating and documenting civil and political rights abuses perpetrated between September 11, 1973 and March 10, 1990. It was also mandated in accordance with Supreme Decree 1086 to identify victims for purposes of reparations as the strict scope of the Rettig Commission excluded a large number of victims. For purposes of this paper, this commission will not be discussed.

<sup>27</sup> Hayner (2001) 36.

<sup>28</sup> Hayner (2001) 37.

<sup>29</sup> Hayner (2001) 37.

Despite the lack of sufficient public attention to the TRC report, Chile made considerable gains in its reparations program for families of the killed and disappeared. This was because the report of the Commission resulted in the establishment of a follow-up Commission, the National Corporation for Reparation and Reconciliation. Its mandate was to continue investigations into outstanding cases, locating the disappeared and organizing the Truth Commission's report for public distribution.<sup>30</sup>

The Truth Commission did not create an environment for the free discussion of human rights violations as this was considered in to be in "bad taste". It was not until Senator Pinochet stepped down as commander-in-chief and was indicted by the Spanish Judge Baltazar Garzón, that Chile's domestic criminal justice authorities became active. Judge Garzón relied heavily on the report of the Truth Commission, even citing a part of the report in the arrest warrant against Pinochet.<sup>31</sup>

South Africa, Chile and Argentina have important common elements. Firstly, it can be seen that in all three countries widespread prosecutions of perpetrators during the transition were not possible. Although the underlying reasons for the inability to prosecute differ from one country to the next, it is undeniable that there was a need for a transitional justice mechanism that would usher the countries into democracy and make known the gross human rights violations committed by past regimes. Secondly, the truth commissions were not intended to be a substitute for prosecutions, but were intended to form the basis for prosecutions that would take place, as they created a reliable context to the atrocities. Therefore, the point of departure of this paper is that the truth commissions fulfilled the

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<sup>30</sup> Hayner (2001) 37.

<sup>31</sup> Hayner (2001) 37.

purposes for which they were created and that prosecutions are a crucial second stage of transition.

### **1.6. The amnesty clauses in the TRC Act**

The TRC Act was enacted for establishing as complete a picture as possible of the nature, causes and extent of the gross human rights violations that were committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution. This was to be done through investigations of the events that emanated from conflicts of the past and to determine the fate or whereabouts of the victims of such violations. It provided that amnesty would be granted to persons who would make full disclosure of all the relevant facts that related to the violations provided they were committed within the context of the conflict and were in furtherance of a political objective.<sup>32</sup>

The purpose of the Act was premised on the principle that reconciliation depends on forgiveness, which can only be achieved through the disclosure of all gross human rights violations. Reconciliation through nation-building was what was envisioned.<sup>33</sup>

#### **1.6.1. The condition for granting amnesty**

An application for amnesty could be granted only when it was made in relation to the commission of a crime that constituted a gross human rights violation. A gross violation of human rights was defined as meaning the violation of human rights through acts such as the killing, abduction, torture or severe ill-treatment of any person.<sup>34</sup> It included in the

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<sup>32</sup> Preamble to the TRC Act.

<sup>33</sup> TRC Act (1995) Explanatory memorandum to the parliamentary Bill available at <http://www.justice.gov.za/trc/legal/bill.htm> (accessed on 05 June 2015).

<sup>34</sup> Section 1(a) of the TRC Act (1995).

definition “any attempt, conspiracy, instigation, command or procurement to commit” any of these acts.<sup>35</sup>

In order for the amnesty to be granted, the person applying for amnesty must satisfy the amnesty committee that the act, omission or offence was, firstly, associated with a political objective, secondly, that it falls within the specified time frame and, thirdly, that full disclosure has been made.<sup>36</sup> Full disclosure was required in terms of the interim Constitution and demanded an inquiry into the state of mind of the applicant. It was therefore necessary that the Commission be chaired by a judge<sup>37</sup> because the enquiries also included the weighing and judging of evidence.<sup>38</sup>

The Norgaard principles, laid down by the Norwegian professor Carl A. Norgaard, were used as guiding principles for the conditions of granting amnesty. These principles were provided for in Section 20(3) of the TRC Act, and would be used to determine whether the political objective requirement was satisfied. The first principle was that the motive of the person, such as the act,<sup>39</sup> omission or offence should not have been committed for personal malice of financial gain.<sup>40</sup> The second principle related to the context of the act, such as whether it was committed in the course of a political uprising, disturbance or event, or in reaction thereto.<sup>41</sup> The third principle required a determination of the legal and factual nature of the act, as well as its gravity. The fourth principle involved the determination of the object or objective of the act, particularly whether it was directed at a political opponent, state

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<sup>35</sup> Section 1(b) of the TRC Act (1995).

<sup>36</sup> Explanatory memorandum (1995).

<sup>37</sup> Section 17(3) of the TRC Act (1995).

<sup>38</sup> Explanatory memorandum (1995).

<sup>39</sup> The word ‘act’ will be used throughout this paper to include “act, omission and offence” as contemplated in the provisions of the TRC Act.

<sup>40</sup> Section 3(f) (i) and (ii) of the TRC Act (1995).

<sup>41</sup> Section 3(b) of the TRC Act (1995).

property or personnel, or against private property or individuals.<sup>42</sup> The fifth principle sought to determine whether the act was committed in execution of an order or on behalf of an organisation, institution or liberation movement of which the person who committed the act was a member, supporter or agent.<sup>43</sup> The last consideration was the relationship between the act and the political objective pursued, particularly the directness, the proximity and the proportionality between the act and the political objective.<sup>44</sup>

During the TRC process, the Commission received roughly 20 000 statements from victims and their families. The Commission also received about 7 000 applications for amnesty, of which only 849 were granted. Many of the applications were rejected because they did not meet the requirement of acts committed with a political objective.<sup>45</sup> A list of about 300 names was submitted to the National Prosecution Authority with recommendations from the TRC that prosecutions take place.<sup>46</sup>

Section 20(8) of the TRC Act provided that if any person who was standing trial, or had been convicted of the act and was serving a sentence, was granted amnesty, all proceedings would be void and the sentence would lapse. The person who was granted amnesty was exempt from both criminal and civil liability, which extended to precluding civil claims against anyone who may have been vicariously liable, such as the government.<sup>47</sup> Amnesty also had the effect of expunging from any official documents, any entry or record of the person's conviction.<sup>48</sup>

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<sup>42</sup> Section 3(c) of the TRC Act (1995).

<sup>43</sup> Section 3(d) of the TRC Act (1995).

<sup>44</sup> Section 3(f) of the TRC Act (1995).

<sup>45</sup> Gibson J 'Truth, Justice and Reconciliation: Judging the fairness of amnesty in South Africa' *American Journal of Political Science* 46 (2000) 542.

<sup>46</sup> Bubenzer (2009) 18.

<sup>47</sup> Section 20(7)(c) of the TRC Act (1995).

<sup>48</sup> Section 20(10) of the TRC Act (1995).



If amnesty were refused, then the court that had any suspended matter before it against the applicant would have to be notified of the outcome and no adverse inference could be drawn from it.<sup>49</sup>

### **1.6.2. The public attitude to the amnesty clause**

Between November of 2000 and February of 2001, Gibson interviewed 3 727 people to determine what their attitudes to the TRC process were. The survey found that, in general, South Africans were not opposed to the granting of amnesty. A 57.3 % majority of the people approved of amnesty, at least to some extent. The survey found also that race played a significant role in the answers given, with 71.6 % of black people approving of amnesty, whereas in the case of whites, coloureds and Asians, it was less than the majority.<sup>50</sup> However, the approval expressed for amnesty was not tantamount to its endorsement as being fair, for 72.7 % South Africans found it to be unfair to those who died in the struggle and 65.2 % believed it to be unfair to the victims. Only 33.5 % of South Africans found it to be fair in general. The disparity between public approval and the perception of fairness indicated that the amnesty provisions were seen as being a necessary evil for ensuring a peaceful transition to democracy.<sup>51</sup>

### **1.6.3. The significance of the amnesty question in present-day South Africa**

One of the tenets of justice is the concept of retribution. Retribution is defined as a “passionate reaction to the violation of a rule, norm or law that evokes a desire for punishment of the violator”.<sup>52</sup> Retribution is considered to be an older, more primitive and

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<sup>49</sup> Section 21(2) (a) and (b) of the TRC Act (1995).

<sup>50</sup> Gibson (2000) 545.

<sup>51</sup> Gibson (2000) 545.

<sup>52</sup> Sanders *et al.* ‘Justice and Legal Institutions’ in Joseph, Sanders and Hamilton (eds.) *Handbook of Justice Research in Law* Kluwer Academic/Plenum Publishers (2001) 6.

more socially recognised feeling by individuals who are dissociated from the victim.<sup>53</sup> The primary assumption of the amnesty provision is that for the victims to lose their right to their day in court, also means that the society as a whole loses its right to retribution. Because the victims themselves fail to receive justice, society as a whole also fails to receive justice.<sup>54</sup> If this assumption is true, then the failure of the NPA to prosecute those who were denied amnesty, not only affects the victims, but also everyone in the country, including both present and future generations.

Furthermore, a transition cannot begin and end with the work of a truth commission; it is ultimately dependent on the government to give effect to the recommendations made by the truth commission. Implementing measures that undermine prosecutions in spite of the TRC recommendations is tantamount to a dereliction of duty.

### **1.7. Overview of chapters**

Chapter two discusses the actions taken by the respective governments to deal with the issue of prosecutions. In the case of South Africa, it will discuss the special units established for post-TRC prosecutions. In the case of Argentina and Chile, it will discuss the challenges and successes of the prosecutions.

Chapter three will focus on South Africa and will discuss the political influence exerted upon institutions that are meant to act without fear or prejudice. This chapter will establish and justify the link that exists between the failure to pursue comprehensive prosecutions and the derogation of the rule from law in South Africa.

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<sup>53</sup> Hogan *et al.* 'Retributive Justice' in Lerner M and Lerner S (eds.) *The Justice Motive in Social Behaviour: Adapting to Times of Scarcity and Change* Springer Science & Business Media (1981) 131.

<sup>54</sup> Gibson (2000) 546.

The fourth and final chapter draws together the main findings through a discussion of the principle of the rule of law and accountability. It will engage with the experiences of Argentina and Chile and draw from them lessons for South Africa.



## CHAPTER TWO

### PROSECUTION EFFORTS FOLLOWING TRUTH COMMISSIONS

#### 2. Introduction

This first part of this chapter discusses the various special units which were created under the NPA to manage the post-TRC prosecutions. The second part looks at how Argentina and Chile have responded to the need to institute prosecutions. The chapter will conclude by comparing the approaches in the three countries.

##### 2.1. South Africa

In the build-up to the first democratic elections in 1994, South Africa was plagued by unprecedented waves of violence and intimidation, as a result of which the then President F De Klerk established the Goldstone Commission (named after its chairperson) to investigate the violence.<sup>55</sup>



When the Goldstone Commission ended its task in 1993/1994, the task of investigating gross human rights abuses was assigned to the then Attorney-General of Pretoria Dr Jan D'Oliveira.<sup>56</sup> At the end of 1998, when the work of the team of D'Oliveira came to an end, the prosecution service had been restructured completely. A new and centralised National Prosecuting Authority (NPA) had been created and D'Oliveira became one of the first deputy National Directors of Public Prosecutions (NDPP) under the national Director of Public Prosecutions, Bulelani Ngcuka. The members of his previous unit were incorporated into the

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<sup>55</sup> Section 7(1) (d) of Prevention of Public Violence and Intimidation Act 139 of 1991.

<sup>56</sup> Fernandez (2006) 65.

newly-created Directorate of Special Operations (DSO), the so-called “Scorpions,” established in September 1999.<sup>57</sup>

### **2.1.1. The Human Rights Investigative Unit (HRIU)**

In early 1999, the then Minister of Justice, Dullah Omar, established the Human Rights Investigative Unit (HRIU) headed by an attorney, Vincent Saldanha. Its mandate was to “review, investigate and possibly prosecute all cases falling within the ambit of the TRC Act for which amnesty had been refused or had not been applied for”.<sup>58</sup> According to Saldanha, the unit adopted a human rights and victim-oriented approach, as many of the unit’s members had been involved in the work of the TRC and had worked for human rights NGOs. During this time, Ngcuka said that he was unsure whether it was justified to dedicate state resources into chasing Apartheid era human rights abusers. But he said that in the interests of national reconciliation prosecutions should not be abandoned completely.<sup>59</sup> Ngcuka acknowledged that he was obliged by the law to prosecute Apartheid-era crimes and would do so where he had enough evidence, but, by the same token, he was concerned about pursuing perpetrators of gross human rights violations with resources meant to combat other crimes. He added that the HRIU had studied the TRC Report and had identified cases that it could pursue, but at that stage, he could not say whether they would be able to gather enough evidence to prosecute such cases.<sup>60</sup> In short, while the NPA acknowledged its duty to prosecute human rights violators, it was hesitant to do so.

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<sup>57</sup> Bubenzer (2009) 24.

<sup>58</sup> Bubenzer (2009) 24.

<sup>59</sup> This is a view that has been expressed a number of South Africans including former Human Rights Commissioner Barney Pityana.

<sup>60</sup> ‘Ngcuka not sure if TRC cases worth cost’ *IOL* available at <http://www.iol.co.za/news/south-africa/ngcuka-not-sure-if-trc-cases-worth-cost-1.10666?ot=inmsa.ArticlePrintPageLayout.ot> (accessed in 16 August 2015).

Some of the cases before the HRIU were high-profile cases, including those of persons implicated in the murder of Steve Biko,<sup>61</sup> who was tortured in police custody and later died as a result in 1977.<sup>62</sup> The TRC had rejected five applications for amnesty that had been made in connection with Biko's death.<sup>63</sup> Saldanha said that nobody was charged because there were complexities relating to the case. The NPA, on the other hand, said that there was not enough evidence to sustain a prosecution, as it could not prove the charges relating to the murder, apart from the fact that one other charge had since prescribed. It stated furthermore that many of the other cases were still at that time being handled by the Amnesty Commission and needed meticulous preparation.<sup>64</sup>

Thereafter, the cases were handed over to a unit called the Special National Projects Unit, which was a part of the Scorpions, headed by Advocate Chris Macadam. Macadam considered the amnesty proceedings a barrier to prosecutions, with the result that no prosecutions were instituted.<sup>65</sup> The NPA claimed that it did not want to commit resources to cases that had the risk of potential collapse due to amnesty applications. This is despite the fact that D'Oliveira had prepared about 20 charge sheets, and a number of them were significantly potential cases which did not have amnesty applications pending, such as the case of General Krappies Engelbrecht,<sup>66</sup> who was the former commander of Eugene de Kock who was attached to the counter-insurgency unit headquartered at a farm called

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<sup>61</sup> Stephen Bantu Biko was a popular political activist and founder of the Black Consciousness Movement.  
<sup>62</sup> See TRC Report vol 2 Chap 3 paras 184-5; TRC Report vol. 4 Chap. 5 para 12; TRC Report vol. 3 chap. 2 para. 120.

<sup>63</sup> Decision no. AC/99/0020. See Bubenzer (2009) 214, note 166.

<sup>64</sup> Bubenzer (2009) 214.

<sup>65</sup> Bubenzer (2009) 26.

<sup>66</sup> General Krappies Engelbrecht was the commanding officer of Brixton murder and robbery unit. At the trial of Eugene De Kock, Engelbrecht was accused by De Kock of being involved in a Vlakplaas operation that resulted in the death of Sam Chandi, his wife and three sons in Botswana. Engelbrecht denied the accusations. Available at <http://www.news24.com/SouthAfrica/News/Vlakplaas-link-to-Zuma-raids-20050824> (accessed 21 September 2015).

Vlakplaas.<sup>67</sup> According to Macadam, the second reason for failure to institute proceedings was that the NPA was waiting for the public release of the final volumes of the TRC Report, although the TRC had already strongly recommended that prosecutions be pursued.<sup>68</sup>

### **2.1.2. The Priority Crimes Litigation Unit (PCLU)**

After the tabling of the final two volumes of the TRC report in Parliament, the then President Mbeki stated in a speech that it was up to the NDPP to act on the cases that they deemed prosecutable.<sup>69</sup> In 1999, a special unit within the NPA was established to determine which of the individuals who had not been granted amnesty should be prosecuted. The Special National Projects Unit was later restructured and renamed the Priority Crimes Litigation Unit (PCLU) in 2003.<sup>70</sup> Advocate Anton Ackerman was appointed Special Director of Public Prosecutions and the head of the newly created PCLU.<sup>71</sup> The responsibility for post-TRC prosecutions was transferred to this unit.

The mandate of the PCLU was to manage and direct the investigation and prosecution of crimes dealt with under the Rome Statute which, in the meantime, had been incorporated into South African domestic law.<sup>72</sup> The crimes included acts of terrorism and sabotage, high treason, sedition, mercenary activities and other priority crimes to be determined by the NDPP. These were determined to be serious national and international crimes.<sup>73</sup> The PCLU was not an investigative agency and depended, therefore, on the South African Police Services (SAPS) and the DSO to conduct the investigations. It also accepted the guidelines of

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<sup>67</sup> Bubenzer (2009) 27.

<sup>68</sup> Bubenzer (2009) 27.

<sup>69</sup> President Thabo Mbeki 'Statement to the National houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission' April 15, 2003. See Gianini et al. (2009) 51.

<sup>70</sup> Sarkin J *Carrots and Sticks: The TRC and the South African Amnesty Process* Intersentia (2004) 375.

<sup>71</sup> Presidential Proclamation No. 6 of 2003 (24 March 2003).

<sup>72</sup> Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002.

<sup>73</sup> Bubenzer (2009) 28.

the DSO that only serious human rights violations should be prosecuted, taking into account humanitarian considerations and the interests of reconciliation. A total of 167 investigations were opened but only a small number of those were identified as being prosecutable.<sup>74</sup> The total number of high priority prosecutable cases was reduced to about 16.

The PCLU focused on the cases in which amnesty had been denied, with priority being given to cases involving egregious violations of human rights and which resulted in death. Those involving lesser degrees of egregiousness were of secondary priority.<sup>75</sup> For the sake of credibility, it was important that the approach taken by the unit be strictly dependent on the evidence of how abhorrent the crime was regardless of the political affiliation of the perpetrator.<sup>76</sup> However, the PCLU was under-resourced personnel-wise, as it was also tasked with other investigations, such as those concerning trafficking of nuclear weapons. In fact, the TRC prosecutions constituted 30 to 50 per cent of the PCLU investigations.<sup>77</sup> It is not particularly clear why the government elected to overburden the PCLU with priority crimes of such a great magnitude as trafficking of nuclear weapons, as it surely could be foreseen that there would be competition for resources. This can be seen as evidence of a wavering political will to pursue seriously post-TRC prosecutions.

### **2.1.3. The National Prosecuting Authority (NPA)**

The National Prosecuting Authority was created under the Constitution of 1996.<sup>78</sup> The South African prosecution service was thus unified under one national prosecuting authority, headed by a National Director of Public Prosecutions, with “the power to institute criminal

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<sup>74</sup> Fernandez (2006) 67.

<sup>75</sup> Bebenzer (2009) 30.

<sup>76</sup> Bubenzer (2009) 30.

<sup>77</sup> Bubenzer (2009) 31.

<sup>78</sup> Section 179 of the Constitution of the Republic of South Africa, 1996.



proceedings on behalf of the state, and to carry out any necessary function incidental to instituting criminal proceedings”.<sup>79</sup> The NDPP has the authority to determine the prosecution policies of the country in consultation with the Minister of Justice and Constitutional Development.<sup>80</sup>

The NDPP has discretionary powers whether or not to pursue a prosecution after taking representations from the accused, the complainant and any other relevant parties.<sup>81</sup> This discretion also comes with a direction from the Constitution that the NPA carry out its work “without fear, favour or prejudice”.<sup>82</sup> The Constitutional Court in *S v Basson*<sup>83</sup> held that the NPA was a representative of the community and has the responsibility to prosecute Apartheid-era crimes. This responsibility stems from the international obligation to prosecute crimes against humanity and war crimes, which were clearly perpetrated by the Apartheid government.<sup>84</sup> The prosecution system of South Africa, like in many other common law states, is based upon the principle of expediency which gives the prosecutor the discretion to decide which cases to prosecute. The overarching consideration is whether it would be in the public interest to pursue such prosecution.<sup>85</sup>

When the TRC processes had finally concluded and the final two volumes of the report had been released, President Mbeki said in a speech to parliament that there was no room for yet another amnesty process and that the only way to move forward was for the NDPP to conduct prosecutions as a matter of normal practice, using its discretion to determine which

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<sup>79</sup> Section 179(2) of the Constitution (1996).

<sup>80</sup> Section 179(5) of the Constitution (1996).

<sup>81</sup> Section 179(5) of the Constitution (1996).

<sup>82</sup> Section 179(4) of the Constitution (1996).

<sup>83</sup> *S v Basson* 2007 (3) SA 582 (CC).

<sup>84</sup> *S v Basson* (2007) para 37.

<sup>85</sup> Fernandez (2006) 69.

prosecutions were worth pursuing.<sup>86</sup> In his speech Mbeki alluded to the fact that the prosecutions of Apartheid crimes would be conducted in a similar way to ordinary crimes that came before the NPA, meaning that they would follow the same criminal procedures, followed in other cases and would also be subject to the process of plea bargaining where the prosecutor considered this appropriate.<sup>87</sup> Mbeki's speech was an early indication that the government and the NPA were more in favour of expediency than relentless prosecutions. It is, however, unclear why prosecutions that were so crucial to the transitional process were made to appear so incidental to the criminal justice process, to the extent that they were relegated to the fringes of criminal justice. Towards the end of 2004, the NPA's prosecution policy was amended, with the NPA placing a moratorium on investigations and prosecutions of Apartheid crimes. This had the effect of precluding permanently certain cases from being prosecuted because many of them would be subject to prescription<sup>88</sup> during the moratorium, making them ineligible for prosecution after the moratorium was lifted.<sup>89</sup> Murder is not subject to prescription but other crimes such as the various forms of assault and crimes against the person are.

The guidelines were approved in December 2005 but were met with great criticism from civil society. The main criticism to the amended prosecution was that the NDPP's discretionary power to enter into plea bargains with the accused was not dissimilar to the amnesty process.<sup>90</sup> Civil society was of the view that the amended policy amounted to a repeat of the TRC process - a view that led ultimately to a constitutional challenge of the

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<sup>86</sup> President Thabo Mbeki 'Statement to the National Houses of Parliament, 15 April 2003. See Gianini *et al* (2009) 51.

<sup>87</sup> Giannini *et al. Prosecuting Apartheid-Era Crimes? A South African Dialogue on Justice*, International Human Rights Clinic at Harvard Law School (2009) 50.

<sup>88</sup> Prescription is pursuant to Section 18 of the Criminal Procedure Act 51 of 1977. The legal definition of "prescription" is the limitation of time beyond which a crime is no longer eligible for prosecution.

<sup>89</sup> Giannini *et al.* (2009) 51.

<sup>90</sup> Giannini *et al.* (2009) 51.

amendments in the case of *Nkadimeng and others v National Director of Public Prosecutions and others*, which is discussed below.<sup>91</sup>

The amended policy is an appendix to the original policy and begins with an outline of the context of and background to the adoption of the policy. It states that it would be undesirable to have a continuation of the amnesty process because that would amount to a violation of the constitutional rights of the victims to justice, and would go against the objectives of the TRC process.<sup>92</sup> This section of the policy refers to existing legislation, such as the Criminal Procedure Act,<sup>93</sup> which gives anyone an opportunity to enter into a plea agreement with the state in accordance with the ordinary prosecuting mandate of the NPA.<sup>94</sup> This plea agreement is available to anyone who wished to make any disclosures about the conflicts of the past, and if the court is of the opinion that the testimony on behalf of the State against the accused person's co-conspirators is satisfactory, then it may grant indemnity from prosecution.<sup>95</sup> In the case of Apartheid-crimes, a person may enter into a mutually accepted guilty plea and sentence agreement.<sup>96</sup>

Ngcuka's successor, Vusi Pikoli, emphasised that the amended policy came into force to give effect to Mbeki's speech in 2003. He also emphasised that the plea bargains were not a continuation of the TRC amnesty process because the opportunity still existed for interested parties to initiate private prosecutions or civil proceedings where the NPA declined to

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<sup>91</sup> *Nkadimeng and others v National Director of Public Prosecution and others* Case No. 32709/07 (2008) TPD.

<sup>92</sup> Appendix A Section A(1)(b) of the Prosecuting Policy and Directives Relating to Prosecution of Offences Emanating from Conflicts of the Past and Which Were Committed on or Before 11 May 1994, promulgated on 1 December 2005.

<sup>93</sup> Act 51 of 1977.

<sup>94</sup> Appendix A Sec A (1)(c), Sec A(3).

<sup>95</sup> Sec 204 of Criminal Procedure Act (1977).

<sup>96</sup> Sec 105A of the CPA; Appendix A, Section A (3)(b) of Prosecution Policy Directive (2005).

prosecute.<sup>97</sup> The amended policy was presented by the NPA as a way to gain previously unknown truths about the past. There was strong opposition to the amendments, especially with regard to the claim that the discretion not to prosecute still gave victims the option of instituting private prosecutions. This is problematic because, although in theory private prosecutions are possible, in practice they are hardly obtainable because they are expensive, which in effect means, that the NDPP's decision not to prosecute is for all intents and purposes the end of the matter.

#### **2.1.4. The case of Nokuthula Simelane: *Nkadimeng v NDPP***

In 2008, Thembisile Nkadimeng, the sister of Nokuthula Simelane, together with the widows of so called 'Cradock Four', brought a challenge in the Pretoria High Court in the case of *Nkadimeng v the National Director of Public Prosecutions*. The applicants were challenging the policy amendments to the prosecution policy on the grounds that they introduced a form of indemnity from prosecution, which violated the Constitution as it infringes on the rule of the law and is in violation of international law.<sup>98</sup>

##### **2.1.4.1. Background**

During the TRC process, the Amnesty Committee received eight applications in connection with the death of Nokuthula Simelani, a former ANC cadre who disappeared in 1983 after being brutally tortured by Apartheid-era security forces. The Amnesty Committee found strong indicators that parts of the testimonies of the amnesty applicants were false and

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<sup>97</sup> Giannini *et al.* (2009) 57.

<sup>98</sup> *Nkadimeng and others v NDPP and others* (2008) Para 9.

accordingly, they were refused amnesty for torturing her but granted amnesty for abducting her.<sup>99</sup>

The PCLU said that the case was being considered for prosecution, pending the amnesty hearings. But the NPA did not take the case further when the applicants were denied amnesty in 2001. The prospects for a successful prosecution now appear to be limited due to the period of prescription set out in Section 18 of the Criminal Procedure Act. Before 2013, South Africa did not have a national anti-torture law,<sup>100</sup> which meant that charges could be brought only under the common law crime of assault, which prescribed in September 2003. Furthermore, there could be no prosecution for kidnapping as all of the policemen were granted amnesty for her abduction. Finally, there appears to be no real prospects of successful prosecution on the charge of murder either because of a lack of evidence.<sup>101</sup>



#### 2.1.4.2. The legal challenge

The issues raised in the case were whether or not the policy amendments had the effect of allowing for an amnesty, indemnity or a re-run of the TRC process,<sup>102</sup> as the applicants argued, for even though the option of private prosecutions exists, they are expensive. The respondents argued that the policy amendments recognise that it would be unconstitutional to continue the TRC process and that it is not the intention of the NDPP to do so.

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<sup>99</sup> Bubenzer (2009) 216.

<sup>100</sup> Prevention and Combating of Torture of Persons Act 13 of 2013. This Act gave effect to South Africa's obligation to the United Nations Convention against Torture and made torture a punishable offence.

<sup>101</sup> Bubenzer (2009) 216.

<sup>102</sup> *Nkadimeng and others v NDPP and others* (2008) Para 13.

Furthermore, the NDPP does not have the authority to grant amnesties, therefore if he decides not to prosecute then damages claims could still be instituted at civil law.<sup>103</sup>

Judge Francis Legodi held that the policy amendments could be used to grant amnesty, even though the respondents argued that that is not the intention behind the amendments. He noted that it would be undesirable to have a law which did not correctly reflect the intention of the drafters.<sup>104</sup> The court held that the amendments would allow the NPA to decline to prosecute a case, even where there was enough evidence to sustain a prosecution because of the wide discretion enjoyed by the NPA. He said that would violate the NPA's constitutional obligation to ensure that those who have committed crimes are prosecuted for the crimes. Finally, the court held that the amendments did in effect amount to a 'copycat' of the TRC amnesty conditions<sup>105</sup> and that the amended guidelines were not relevant to the decision of whether or not to prosecute.<sup>106</sup>

The High Court dismissed an application by the NDPP and the Minister of Justice for leave to appeal the ruling. Although the respondents could still file a special plea to appeal to the Supreme Court of Appeal or apply for direct access to the Constitutional Court, this judgment confirms that there still exists an obligation on the NPA to conduct post-TRC prosecutions.<sup>107</sup> What is uncertain, however, is what the practical implications of this obligation will entail.

Since the early 1990s, when negotiations began about the transition to democracy, the question of prosecutions has always been a hotly debated issue. It was also evident that the

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<sup>103</sup> *Nkadimeng and others v NDPP and others* (2008) Para 14.2.

<sup>104</sup> *Nkadimeng and others v NDPP and others* (2008) Para 15.4.4.1.

<sup>105</sup> *Nkadimeng and others v NDPP and others* (2008) Para 15.4.3.1.

<sup>106</sup> *Nkadimeng and others v NDPP and others* (2008) Para 15.5.2.

<sup>107</sup> *Giannini et al.* (2009) 63.

TRC was accepted as the best thing for that period of the transition, but that acceptance was based on the understanding that justice would be served also. As the special units evolved over the past two decades, the prospects of prosecutions going ahead have faded, mainly because of the government's lack of political will.

Archbishop Desmond Tutu stated that justice cannot be achieved effectively without the prosecutions, and that should the prosecutions be abandoned, a culture of impunity would be fostered and undermine the rule of law.<sup>108</sup> He warned against the introduction of any further mechanisms that would result in blanket amnesties.<sup>109</sup> Former Deputy Chairperson of the TRC, Alex Boraine, is also critical of the government as he accused the NPA in 2006 of dragging its feet in the prosecutions of those denied amnesty.<sup>110</sup>

## **2.2. The Latin American Narrative**

### **2.2.1. Argentina**

By the end of 1982, Argentina was on the cusp of a revolution. The military regime was at its weakest as it had just lost the battle against the British for the Malvinas (the Falkland Islands) and the country was in the midst of an economic crisis. The people were calling for free and fair elections that would usher them into a new democracy based on respect for human rights.

At the forefront of the elections were two presidential candidates who held very different views about what was supposed to be done about perpetrators of gross human rights violations. The Peronist Party candidate was Italo Luder who held the view that it would be

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<sup>108</sup> Bubenzer (2009) 107.

<sup>109</sup> 'Tutu slates SA's lack of Apartheid prosecutions' *SAPA* December 2005. See Bubenzer (2009) 107.

<sup>110</sup> 'Govt "delaying" TRC prosecutions' *News24* available at <http://www.news24.com/SouthAfrica/News/Govt-delaying-TRC-prosecutions-20061125> (accessed on 13 August 2015).

constitutionally impossible for carry out trials because the amnesty laws enacted by the previous regime could not be repealed. The Radical Party candidate, Raúl Alfosín, promised that he would ensure that investigations into the human rights abuses were conducted and that there would be trials held for those who were responsible for the abduction, torture and killings of what the prior dictatorship had called “subversives”.<sup>111</sup> He promised that the trials would include the military chiefs who were presumably responsible for ordering the crimes, the officers who had acted beyond the scope of their duties regardless of the positions of authority they occupied, and guerrilla leaders who were responsible for the gross human rights violations. He intended the trials to exclude the people were acting under orders.<sup>112</sup>

Alfosín won the presidential elections and assumed power 40 days later. Upon taking office, he announced the measures that he intended to take to ensure that there would be a respect for human rights. He sent to the Congress of Argentina a number of draft bills which were subsequently approved. The bills were designed to repeal the draconian laws that had been enacted by the previous regime,<sup>113</sup> to punish the crime of torture with the same penalty as that for murder,<sup>114</sup> and to ratify all the relevant international and regional human rights covenants.<sup>115</sup> Alfosín considered it necessary to set a time limit to run the trials as well as a limit on the scope of accountability because that would ensure that the trials were done effectively and were seen through to completion. These limits were necessary because the resistance within the military which still had the monopoly on state coercion and were

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<sup>111</sup> Nino C ‘The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina’ *Yale Law Journal* 100 (1991) 2622.

<sup>112</sup> Nino C (1991) 2623.

<sup>113</sup> L.N. 23.077 promulgated 22 August 1984.

<sup>114</sup> L.N. 23.097 Art.1 (1), promulgated 24 October 1984. If the torture victim dies, the torturer faces the same sentence as for murder. See Art 1 (2).

<sup>115</sup> L.N. 23.054 promulgated 19 March 1984 (ratifying American Convention on Human Rights).



united in opposition. The time limits envisaged by Alfossín were therefore necessary to protect the democratic system.<sup>116</sup>

### 2.2.1.1. Obstacles to Prosecutions

There were three major obstacles to limiting the time-frame and the scope of the trials. The first obstacle was the principle of non-retrospective application of the law which Congress overcame by declaring the laws null and void rather than abrogating them. It declared that laws were only valid if they were just.<sup>117</sup>

The second obstacle was that military jurisdiction had been established by the military court. This was problematic because the impartiality of the courts was not guaranteed; however, ex post facto loss of a court's jurisdiction was unconstitutional.<sup>118</sup> A compromise was agreed upon according to which the military courts could exercise jurisdiction as a court of first instance, but that there would be an automatic appeal to the federal court where new evidence could be introduced. Secondly, the military court would be given six months to conclude the trials, whereafter the time could be extended. The government made these decisions under the misguided assumption that the military judges would be willing to prosecute as a means of purging the military of those people who brought it to disrepute. Secondly, the government hoped that the military court would dispose of the cases quickly because only few would be prosecuted. This assumption was wrong, for the military courts

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<sup>116</sup> Nino (1991) 2623.

<sup>117</sup> Nino (1991) 2624.

<sup>118</sup> COD. JUSTICIA MILITAR Arts 108-109. (*Ediciones Libreria del Jurista* 1985). Military courts have jurisdiction whenever crimes are committed either in military location or in connection with performance of acts of service).

failed to conduct proper trials by rejecting cases erroneously. The government thereafter decided that the federal court could hear those cases.<sup>119</sup>

The third obstacle was the regulation of the criminal law defence of due obedience.<sup>120</sup> This defence was undesirable because it allowed for many mid-level officials to escape punishment.<sup>121</sup> Alfossín sent a draft bill to Congress, presenting a revocable presumption that the officials who had committed crimes under orders, and without decision-making capacity, had acted under the mistake that the orders were legitimate. This phrasing meant that only those who had given the orders, those who had followed orders but had sufficient discretion not to comply with the orders, and those who had committed extraordinary brutal violations of human rights were to be prosecuted. This meant that even though there would be a number of officers who could use the defence of following orders, the number would be greatly reduced by the presumption, particularly in the case of those officers who had followed orders but committed extraordinarily brutal crimes. The phrasing struck a balance between the outrageous literal interpretation of the law that would have awarded immunity to everyone except members of the junta, and the excessively harsh interpretation that would have required every accused person to prove positively that he had been led to believe that the order was legitimate.<sup>122</sup>

This presumption was amended to exclude crimes considered to be abhorrent and atrocious, although the crimes were not defined. As this caused confusion, it was decided that the scope would be limited through an application of ordinary military court processes.

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<sup>119</sup> Nino (1991) 2426.

<sup>120</sup> Nino Comment: 'The Human Rights Policy of the Argentina Constitutional Government: A Reply (detailing legal obstacles to nullifying amnesty law) *Yale Journal of International Law* 11 (1985) 217.

<sup>121</sup> Nino (1991) 2626.

<sup>122</sup> Nino (1991) 2626.

<sup>123</sup> The military courts, however, failed to conduct trials within the allotted six months, including the extension. The Federal Court of Buenos Aires then assumed jurisdiction and conducted trials, as opposed to the federal courts of the interior that were very slow in assuming jurisdiction and concluding cases. In the end, the safeguards that Alfossín had felt were necessary to protect the democratic system were not closely followed, mostly due to the unco-ordinated participation of Congress and the courts.

As the military increasingly became intolerant of the trials, which they said were targeting them, they threatened to revolt. In December of 1986 Alfossín sent a proposal to Congress to enact what is commonly referred to as the “full stop” laws which, although heavily criticised, led to the rejuvenation of the courts and resulted in the indictment of 450 people. This law gave the courts 60 days within which to indict the military men involved. The military resisted citation and the Supreme Court failed to take responsibility for defining the limits of due obedience. Furthermore, the decision resulted in a rebellion by a military group known as the ‘painted faces’. Frantic and heated discussions within the government ensued. The government then enacted a law that provided that the revocable presumption of due obedience was now irrevocable.<sup>124</sup> This law defined which military ranks held decision-making powers and excluded the exception of abhorrent and atrocious acts for all other military ranks.

Human rights organisations, journalists and academics criticised the law strongly, with the result that the government lost support, as evidenced by poor performances in the parliamentary and provincial election of September 1987.<sup>125</sup> But when the ‘painted faces’

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<sup>123</sup> Nino (1991) 2627.

<sup>124</sup> L.N. 23.52 1 promulgated 4 June 1987.

<sup>125</sup> Nino (1991) 2629.

attempted another rebellion, they were repressed immediately by the bulk of the military, which had now expressed its clear support for the democratic institutions.

Alfosín also regained favour with both houses of Congress by announcing that there would be no more limitations on the trials. This favour and success of the government, however, was short-lived and clouded by a terrorist attempt on *garrison La Tablada* in January of 1989, and by hyperinflation which exploded from February 1989 onward. The Radical Party lost the presidential elections in May of 1989 and Alfonsín resigned from his presidency before the end of his term, as he realised that only a newly-elected government would be able to contain the socio-economic crisis.<sup>126</sup> When Carlos Menem of the Peronist Party succeeded Alfonsín in July 1989, he pardoned all the people who had been convicted or were being tried for state or subversive terrorism, for misconduct in the war, and for rebelling against democratic institution.<sup>127</sup> The pardons extended to those who were responsible for organising the campaign of terror.<sup>128</sup>

Alfonsín's efforts in pressing for prosecutions represent a great success for justice in Argentina. He recognised that successful transition from a repressive government to a democratic one needs a strong political will to be achieved. At the beginning of the transition, Argentina had limited options on how best to deal with crimes committed during the repression, but doing nothing was not an option. Alfonsín's government did not view the success of the Truth Commission as an indication that the transition had been completed, but rather used the process to build an ethos of respect for human rights. It made all the efforts to ensure that the Truth Commission be not seen as merely a compromise of justice

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<sup>126</sup> Nino (1991) 2629.

<sup>127</sup> On 3 December 1990, these soldiers rebelled again and once again faced trials.

<sup>128</sup> The most notorious culprits for the massive human rights violations such as Videla, Massera, Viola, Camps, Suarez Mason, and Firmenich, were all pardoned.

for truth. The efforts to conduct trials became the major building blocks for the establishment of the rule of law in Argentina.

## 2.2.2. Chile

### 2.2.2.1. The arrest and detention of Augusto Pinochet

The arrest and detention of General Augusto Pinochet in London in 1988 was one of the most significant events in international law. During his dictatorship that lasted 17 years, Pinochet was responsible for the death or forcible removal of some 3 196 people.<sup>129</sup> The *Pinochet* case is significant because although it did not end in a prosecution of the former dictator, it acted as a catalyst for lasting political and legal change in Chile and the rest of Latin America.<sup>130</sup>

Pinochet was arrested by British police on charges of terrorism, torture and genocide. His arrest warrant was issued by Spanish magistrate Baltasar Garzón, whose complaint was based on the principle of universal jurisdiction for crimes against humanity. Essentially, although Garzón's claim was also in respect of a number of Spanish victims, the majority of the victims were Chilean. Between 1998 and 1999 the British courts heard the applications for extradition of Pinochet and ruled that he did not enjoy immunity from prosecution for his crimes and therefore could be extradited to Spain. Members of the Chilean government and the opponents to extradition urged the British government to send Pinochet back to Chile on medical grounds. In 2002, Pinochet was returned to Chile.<sup>131</sup>

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<sup>129</sup> Jonas 'The Ripple Effects of the Pinochet Case' *Human Rights Brief* vol. 11 no. 3 (2004) 1.

<sup>130</sup> Jonas (2004) 1.

<sup>131</sup> Jonas (2004) 1.

#### 2.2.2.2. The Pinochet effect

Before Pinochet was arrested in London, the prospects of prosecuting him in Chile were impossible as he was protected by the amnesty laws. Furthermore, he had enjoyed parliamentary immunity by virtue of his position as senator for life, even after his senatorship, and even though he was no longer the president. In 2000, the Chilean Congress provided yet another layer of protection, this time granting all former presidents of Chile immunity from prosecution. This step represented a concerted effort to prevent prosecutions and to uphold impunity.<sup>132</sup>

There was a major shift in the attention given to human rights issues during the 16 months that Pinochet had been detained. Victims had now been given a new voice, as the international community considered Pinochet to be a criminal. Although a number of charges had been brought against Pinochet in Chile, his detention emboldened victims to pursue the prosecution of the former dictator. By the end of 2003, some 300 charges had been brought against him. Added to this, judicial reforms in the 1990s resulted in the Pinochet-appointed judges being replaced by judges sworn to upholding human rights, thereby allowing courts to re-interpret the amnesty laws. Chilean judge Juan Guzmán was one of the first judges to uphold the new interpretation of the amnesty laws and upon Pinochet's return, he got the Congress to strip Pinochet of his parliamentary immunity. Pinochet was then indicted and placed under house arrest for his role in the so-called 'Caravan Deaths' in which 70 of his political opponents were killed. Pinochet never had his day in court as he died before he could stand trial.<sup>133</sup>

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<sup>132</sup> Jonas (2004) 1.

<sup>133</sup> Jonas (2004) 1.

The detention of Pinochet had the effect of paving the way for prosecutions of other military officials. Prior to his arrest there had been only a few successful prosecutions of officials who fell explicitly outside the scope of the amnesty laws. By the end of 2003, there were more than 300 indictments of military officers and many of them had already been convicted for the disappearances of persons under Pinochet's rule. Furthermore, there were judges appointed to deal specifically with human rights abuses, which resulted in further breakthroughs. Although many of the judgments handed down by the courts appeared to be contradictory, there is no doubt that Pinochet's arrest had a major ripple effect on justice and an end of impunity, not only in Chile, but all over Latin America.<sup>134</sup> This development is called the 'Pinochet effect.'

Argentina is one of the countries that experienced the Pinochet effect. After Alfosín had stepped down from power and Menem had pardoned the military officers, victims were faced with a new obstacle. The victims joined the international human rights advocates who were filing cases against Argentinian human rights violators residing abroad in Italy, Sweden, Germany, France, and Spain. This was not an easy task as extradition requests from Spain and other foreign countries were not readily accepted by the Menem administration or by his successor, Fernando De La Rúa. However, in the meantime the Spanish judge, Garzón, had been investigating human rights abuses in Argentina as well, and he was the one who issued the warrant for the arrest of the Argentinian naval officer Miguel Cavallo, who was living in Mexico. And a Mexican court ruled in favour of Cavallo's extradition in 2003. Unlike his predecessors, newly elected Argentine President Nestor Kirchner did nothing to oppose

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<sup>134</sup> Jonas (2004) 2.

extradition and refused to provide Cavallo with legal assistance, stating that “the Argentine State does not defend delinquents”.<sup>135</sup>

The arrest of Pinochet added momentum to the existing movement of investigating and prosecuting members of the military who had not been covered by the amnesty laws. The movement against impunity caused the Argentine judge, Rodolfo Canicoba, to act on the arrest warrants of Garzón and to order the arrests of 45 military officers and one civilian charged with terrorism, genocide and torture. The unprecedented move by Canicoba was met with an even bolder move by President Kirchner who repealed De La Rúa’s 2001 decree that had prevented the extradition of former military officers. Perhaps most telling of all was the annulment of the amnesty laws by the Argentinian government in 2003, and the enactment of additional legislation that would facilitate the prosecution of crimes against humanity. These developments sent clear messages that judges and prosecutors were encouraged to open and re-open cases and question the constitutionality of the amnesty laws.<sup>136</sup>

Because of the work that had been done by Alfossín’s administration, the demand for a respect of human rights had been cemented as a fundamental tool to end impunity and promote the rule of law. This can clearly be seen in the refusal of the people to accept inactivity on the part of government. When they felt they had no recourse domestically, they joined the international community to pursue international prosecutions.

A very important lesson that should be learned from Chile is that the movement against impunity did not begin with the arrest of Pinochet, but rather it was a culmination of nearly three decades of persistent efforts aimed at cultivating respect for human rights and the

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<sup>135</sup> Jonas (2004) 3.

<sup>136</sup> Jonas (2004) 4.



pursuit of justice. Furthermore, it is equally important to realise that just as the movements did not begin with his arrest in London, they also did not end with Pinochet's release. What the arrest of Pinochet did for Chile, Argentina and other countries in Latin America was to establish respect for the rule of law and show that there is no place for impunity, even if it means pursuing justice decades after the fact.

### **2.3. Conclusion**

In South Africa, the foundation built by the TRC was not complemented by any serious attempts to pursue justice, even when the people demanded it. In a purely comparative exercise, at the point of transition, the obstacles that faced Argentina were direr than those faced by South Africa. Argentina was constantly threatened by military rebellion and the amnesty laws could not be simply repealed, whereas South Africa had managed a successful and peaceful transition to democracy, and had negotiated relatively fair amnesty conditions. It is imaginable that if Argentina could manage prosecutions, South Africa could, too.

On the other hand, in the event that the political status of South Africa was not as stable in practice as it appeared to be in theory, the lessons from Chile can be as important. The movement against impunity gained great momentum only after the arrest of Pinochet. It has been a little over 10 years since the final TRC report was submitted to former President Mbeki and the government has been lethargic. The effects of this listlessness are already beginning to show in the rapid deterioration of the rule of law and the endless delays in charging officials who are alleged to have been involved in corrupt practices, especially insofar as it relates to the awarding of public tenders. Chile teaches us that even with the passage of time, it can never be too late to take steps to seek justice.

## CHAPTER THREE

### POLITICS AND THE NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA

#### 3. Introduction

One of the most important elements for a stable and democratic government is a firmly-established respect for the rule of law. The prosecution of crimes helps establish such respect. Whereas truth commissions may be regarded as a form of restorative justice, criminal prosecutions are retributive in nature.<sup>137</sup> However, trials should not be seen as tools for revenge; rather, it is important that they be regarded as fulfilling also a social function, by which is meant that they serve not merely to punish the perpetrator and thus make amends to the victim but, in addition, criminal trials help to nurture a culture of accountability. Pursuing retribution through legitimate prosecutions within the framework of the rule of law thus contributes to establishing and solidifying a political order that is based on the law.<sup>138</sup>

Corruption runs contrary to a culture of accountability fundamentally, and it undermines the rule of law because it diminishes public trust in institutions of state and principles of good and accountable governance.<sup>139</sup>

The consequences of the South African government's political manipulation of the NPA to stall post-TRC prosecutions has resulted in a state of affairs where, in cases involving high-level state officials, prosecutorial discretion is tailored to suit the whims of the executive arm of government.

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<sup>137</sup> Verdeja *Unchopping a tree: Reconciliation in the aftermath of Political violence* Temple University Press (2009) 96.

<sup>138</sup> Verdeja (2009) 96.

<sup>139</sup> Heymans C and Lipietz B *Corruption and Development* ISS Monograph Series No. 40 (1999) 9-20.

### 3.1. The rise and fall of the 'Scorpions'

In June 1999, former President Mbeki announced the establishment of the Directorate of Special Operations (the DSO, also known as the 'Scorpions'). This unit was a well-resourced, multidisciplinary investigative team, equipped to investigate national priority crimes, including corruption within the South African Police Services.<sup>140</sup> The Scorpions operated on the so-called *troika* principle, which was based on the adoption of a multidisciplinary strategy to combat organised crime in South Africa. In practice, the multidisciplinary team consisted of police investigators, prosecutors and crime data analysts.<sup>141</sup>

This unit was established under Section 7 of the National Prosecuting Authority Act<sup>142</sup> (NPA Act) and came into legal effect in 2001. The establishment of the 'Scorpions' coincided with South Africa signing the United Nations International Convention against Transnational Organised Crime (UNTOC)<sup>143</sup> and the enactment of the Prevention of Organised Crime Act (POCA).<sup>144</sup> It appears from the drafting of POCA and the DSO enabling laws, that parliament had intended the 'Scorpions' to be the main tool for combating racketeering and organised crime.<sup>145</sup>

The 'Scorpions' came into being mainly because of the low conviction rates in racketeering cases, as well as cases involving police corruption and other species of organised crime.<sup>146</sup>

The 'Scorpions' had a staff totalling 536 people, drawn from the ranks of the country's top

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<sup>140</sup> Berning J and Montesh M 'Countering corruption in South Africa: The rise and fall of the Scorpions and Hawks' *SA Crime Quarterly* vol. 39 (2012) 1.

<sup>141</sup> Commission of Inquiry into the Mandate and Location of the Directorate of Special Operation (DSO) Report (2006) 18.

<sup>142</sup> National Prosecution Authority Act 32 of 1998. Several Cabinet ministers constituting the criminal justice cluster, meaning the ministers responsible for Safety and Security, Justice and Constitutional Development were tasked with setting up the Unit. See Khampepe Commission Report (2006) 19.

<sup>143</sup> Palermo Convention 2000.

<sup>144</sup> Prevention of Organised Crime Act 121 of 1998.

<sup>145</sup> Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' *ISS Monograph* (1999) 96.

<sup>146</sup> Khampepe Commission Report (2006) 17.

policemen and experts in the fields of forensic investigation. Some of the young recruits underwent specialised training in the US and UK.<sup>147</sup> By February 2004, the 'Scorpions' had disposed of 653 cases, comprising 273 investigations and 380 prosecutions.<sup>148</sup> Out of the 380 prosecutions, 341 of them resulted in a conviction, which meant that it had an average conviction rate of 93, 1%.

Public confidence in the 'Scorpions' grew in proportion to the increasing number of high-profile cases they investigated and which led to successful prosecutions. But the government felt uncomfortable when the 'Scorpions' started to investigate top politicians. In fact, shortly after they were established the 'Scorpions' said that they would investigate the infamous arms procurement process (hereafter 'the arms deal'). The arms deal was valued at R43, 8 billion, and is said to have come about as a result of the alleged bribing of high-ranking members of the African National Congress (ANC), the governing political party.<sup>149</sup> The members of the ANC were also government officials and included then Deputy President Jacob Zuma,<sup>150</sup> former Minister of Transport Mac Maharaj,<sup>151</sup> and businessman Schabir Shaik.<sup>152</sup>

During the investigation into the arms deal in 2001, the 'Scorpions' discovered certain irregularities in connection with the awarding of tenders by the Department of Defence. Schabir Shaik was implicated in the dealings. He was prosecuted and was found guilty on two counts of corruption and one of fraud relating to his relationship with Jacob Zuma,

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<sup>147</sup> Berning and Montesh (2012) 5.

<sup>148</sup> NPA Annual Report for (2004/2005) 87.

<sup>149</sup> Redpath (1999) 16.

<sup>150</sup> Current President of South Africa.

<sup>151</sup> Current Presidential Spokesperson.

<sup>152</sup> Berning and Montesh (2012) 4.

whose financial advisor and long-time confidante he was. In *S v Schaik*<sup>153</sup> the court sentenced Schaik to 15 years' imprisonment for contravening the Corruption Act, 94 of 1992.

Throughout the three-year-long trial, the relationship between Zuma and Schaik was called into question, but neither the state nor the defence called him to testify as a witness. This anomaly led to the media questioning why Zuma had not been charged together with Schaik. Upon Schaik's conviction, Mbeki dismissed Zuma as the deputy president, resulting in political tension within the ANC.

After the Schaik trial, in 2005, the 'Scorpions' raided Zuma's home to search for evidence that could be used against him. These raids were criticised severely by the ANC-aligned Congress of South African Trade Unions (COSATU), saying that the Scorpions were becoming a law unto themselves.<sup>154</sup> In the following year, the 'Scorpions' raided the offices of Zuma's lawyers to find information that they could use as evidence against him in an anticipated corruption trial. Again, the raid elicited sharp criticism from the ANC. Zuma thereupon instituted legal action against the 'Scorpions', accusing it of having violated attorney-client privilege. The court upheld Zuma's claim.<sup>155</sup>

It was this investigation into Zuma by the 'Scorpions' that led to the question whether or not the DSO was accountable and whether it was located rightly within the NPA, or

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<sup>153</sup> *S v Shaik & Others* JOL (2005) 14601 (D).

<sup>154</sup> 'Vavi: Scorpions a law unto themselves' *News24* available at <http://www.news24.com/SouthAfrica/News/Scorpions-a-law-unto-themselves-20080807> (14 October 2015).

<sup>155</sup> Montesh M 'A critical analysis of crime investigative systems within the South African Criminal Justice System: a comparative study' *Unisa* Doctoral Dissertation (2007) 131.

whether it should be brought under the auspices of the South African Police Services.<sup>156</sup>

Indeed, it is these events which led to the downfall of the 'Scorpions'.<sup>157</sup>

In 2008, the ANC hosted its 52<sup>nd</sup> national conference (commonly known as the Polokwane conference) where Mbeki was ousted as president of the ANC and replaced by Zuma. Small wonder that in 2009 Zuma, when he became president, signed into law amendments which disbanded the 'Scorpions', replacing them with the Directorate of Priority Crime Investigation (DPCI), the so-called 'Hawks'.<sup>158</sup> The latter were to be located within SAPS, in accordance with the resolution taken at the Polokwane conference.<sup>159</sup> In the same year, Hugh Glenister, a South African businessman, brought an application in the Western Cape High Court, challenging the enactment of the two amendment laws. The court's judgment became known as the *Glenister I* judgment.<sup>160</sup> The challenge was unsuccessful and the Bills were enacted into law.

In 2011, Glenister brought another application (*Glenister II*) to the High Court, this time challenging the constitutional validity of the above-mentioned laws. This application, too, was unsuccessful, so Glenister appealed to the Constitutional Court, basing his appeal on the submission that the provisions violated Section 179 of the Constitution, which sets out the powers and functions of the NPA. He contended that, to disband the 'Scorpions' would undermine the independence of the NPA as provided for in Section 179(4) of the Constitution.<sup>161</sup>

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<sup>156</sup> Redpath (1999) 16.

<sup>157</sup> Berning and Montesh (2012) 4.

<sup>158</sup> See Act 56 and 57 of 2008.

<sup>159</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) Paras 8-12.

<sup>160</sup> *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC).

<sup>161</sup> Section 179 (4) 'National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.'

The Constitutional Court held that parliament had not acted irrationally when enacting the impugned provisions, firstly because legislative authority rests with parliament, which is bound only by the Constitution in exercising its power. Secondly, the determination of whether or not a law is rational depends on the relationship between the schemes it takes and the legitimate governmental purpose it wants to achieve.<sup>162</sup> To survive the rationality test, the legislation does not have to be shown to be reasonable or appropriate.<sup>163</sup> The court held also that the location within the SAPS was not in itself unconstitutional and the decision to disband the 'Scorpions' and to replace it with the 'Hawks' did not in itself offend the Constitution.<sup>164</sup>

The court expressed the undeniable need for anti-corruption measures to be employed in South Africa because corruption undermines the democratic ethos of the country while threatening the rule of law. It held that when corruption and organised crime are allowed to flourish, this results in the deterioration of security and stability in the country, while also stunting sustainable development and economic growth. Furthermore, corruption fuels maladministration and public fraudulence, which results in the inability of the state to fulfil its obligations to respect, promote and fulfil the rights enshrined in the Bill of Rights.<sup>165</sup>

### **3.2. The duty to establish an anti-corruption unit**

The applicants in *Glenister II* argued that there was a duty on the state to establish an anti-corruption unit imposed by the Constitution and international law.

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<sup>162</sup> *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC).

<sup>163</sup> *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paras 86 and 89-90 and *New National Party* (1999) Para 24.

<sup>164</sup> *Glenister v President* (2011) para 69.

<sup>165</sup> *Glenister v President* (2011) para 83.

In their majority judgment, Moseneke DCJ and Cameron J held that the Constitution is the primal source for the duty of the state to fight corruption. The Constitution does not command expressly that a corruption-fighting unit should be established, nor does it prescribe operational and other attributes that must be established. However, the Court found that the state has a duty to establish an anti-corruption unit, as corruption disables the state from respecting, protecting, promoting and fulfilling rights as required by section 7(2) of the Constitution. To combat corruption, the state is required to have an integrated and comprehensive response.<sup>166</sup>

The Court found that the international instruments and conventions that South Africa has ratified impose a clear and unequivocal duty on the government to create an anti-corruption unit that has the necessary independence. However, the Court noted that it would not be prescriptive as to what measures the state must take, as long as they are all within the range of possible conduct that a reasonable decision-maker in the circumstances would adopt. The Court held that to create an anti-corruption unit which is not adequately independent would not be determined to be reasonable and that the duty was constitutionally enforceable.<sup>167</sup>

### **3.3. The operational and structural independence of the ‘Hawks’**

The applicants argued that the ‘Hawks’ lacked the necessary structural and operational independence to be an effective corruption-fighting unit, therefore, violating South Africa’s international obligations and the Constitution.<sup>168</sup>

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<sup>166</sup> *Glenister v President* (2011) para 175.

<sup>167</sup> *Glenister v President* (2012) para 175.

<sup>168</sup> Section 233 of the Constitution (1996).



Ngcobo CJ, in the minority judgement, held that independence requires that the anti-corruption agency be able to function effectively without undue influence from any and all political forces. It requires mechanisms to be put in place that will ensure that there is no interference with the chain of command of the unit, so that there is no undue influence on the operational decisions such as starting, continuing and ending criminal investigations and prosecutions involving corruption.<sup>169</sup>

Moseneke DCJ and Cameron J held that the question that was to be asked was not whether or not the 'Hawks' have sufficient structural and operational autonomy to protect the unit from undue political influence, but rather whether the autonomy was secured through sufficient institutional and legal mechanisms.<sup>170</sup> Additionally, a further criterion, namely, the perception of independence, was added by the court. It was added not to impose further obligations on parliament, but rather to build public confidence in the independence of the unit, which is an essential component. This is judged by the standard of a reasonable and informed member of the public who may have misgivings about the fact that the features protecting the 'Hawks' are markedly more tenuous than those protecting the 'Scorpions'.<sup>171</sup>

The court found that the provisions creating the 'Hawks' may be able to create a hedge around it, but fails to afford it an adequate measure of autonomy, as there is not sufficient insulation from undue political influence in its structure and functioning. For instance, conditions of service pertaining to the members of the unit and its head make them vulnerable to abuse. The statutory provisions of the 'Hawks' were considered comparatively against the regulated structure of the 'Scorpions' that preceded them. However, the court cautioned that the exercise should not be seen as being an application of a golden standard

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<sup>169</sup> *Glenister v President* (2011) para 131.

<sup>170</sup> *Glenister v President* (2011) para 206.

<sup>171</sup> *Glenister v President* (2011) para 207.

from which parliament cannot deviate. The comparison should be aimed at revealing where the Hawks can be determined to be less independent than the 'Scorpions'.

The Constitutional Court upheld the appeal and ruled that the amendment laws were unconstitutional. It gave parliament 18 months to remedy the defect. In the meantime, the 'Scorpions' was disbanded and the 'Hawks' was established.

### **3.4. Corruption and the independence of the NPA**

In 2009, the acting head of the NPA, Mokotedi Mpshe, made the announcement that the charges against Zuma would be dropped because there was a discovery of telephone recordings between former NDPP, Bulelani Ngcuka, and head of the 'Scorpions', Leonard McCarthy. The tapes were in the possession of President Zuma's legal team, which made representations for the permanent stay of prosecution because the recordings allegedly showed evidence of political interference and abuse of power by Ngcuka and McCarthy. Mpshe stated that it was not so much the prosecution itself that was tainted, but rather the legal process. He said it was the hardest decision he has ever had to make and that it did not amount to an acquittal of Zuma.<sup>172</sup>

While it can be conceded that the conversations between Ngcuka and McCarthy regarding the timing of the charges against Zuma may have been ethically problematic,<sup>173</sup> Mpshe's decision to drop the charges has been challenged by the official opposition party, the Democratic Alliance (DA). In their heads of argument to the legal challenge instituted in the Western Cape High Court, the DA submitted that his decision was irrational and unlawful,

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<sup>172</sup> 'NPA drops charges against Zuma' *Mail and Guardian* available at <http://mg.co.za/article/2009-04-06-mpa-drops-corruption-charges-against-zuma> (accessed 6 October 2015).

<sup>173</sup> Suttner R 'Op-Ed The long and very winding road to re-instatement of Zuma's corruption charges' *MSN Money* available at <http://www.msn.com/en-za/money/topstories/op-ed-the-long-and-very-winding-road-to-re-instatement-of-zumas-corruption-charges/ar-AAf8yHX?ocid=spartanntp> (accessed 6 October 2015).

stating that “the DA does not assert that Zuma is guilty, but only that he, like any other person, should face criminal charges when compelling evidence of wrongdoing exists. He too should be given the benefit of his day in court to challenge the allegations against him, even if he is anxious to avoid that prospect.”<sup>174</sup> The submission in the DA’s heads of argument echo the sentiment of most South Africans who demand accountability and transparency in the government and the Prosecuting Authority.

Charges against Zuma have irked him throughout his incumbency as president. The manner in which the various NDPPs have come into and left office, coupled with the widespread adverse public and media attention that the NPA has attracted, particularly in relation to how it has dealt with the corruption charges against Zuma, has compromised its independence.<sup>175</sup> Although the charges against Zuma have been withdrawn, it does not mean that they cannot be re-instated at a later stage when he no longer enjoys personal immunity from prosecution before domestic courts, as incumbent president. At the time of writing, Zuma is embroiled in a scandal relating to the R246 million upgrade of his rural private dwelling, Nkandla. The Public Protector, Thuli Madonsela, has investigated accusations of wrongdoing in respect of the upgrading and she found certain features in the upgrades to be ‘non-security’ features.<sup>176</sup> She stated in her report, entitled *Secure in Comfort*, that “the President tacitly accepted the implementation of all measures at his residence and has unduly benefitted from the capital investment from the non-security installations. A reasonable part of the expenditure should be borne by him and his family.”

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<sup>174</sup> ‘Spy Tapes case: The DA’s head of argument’ available at <http://www.politicsweb.co.za/documents/spy-tapes-case-the-das-heads-of-argument> (accessed on 6 October 2015).

<sup>175</sup> Suttner R (2015) 1.

<sup>176</sup> Report of the Public Protector *Secure in Comfort* (2014) 431-2.

The non-security measures include a swimming pool, a fowl run, a cattle kraal and an amphitheatre.<sup>177</sup>

An ANC investigation into the upgrade, headed by the Minister of Police, Nhleko, found that Zuma is not liable for paying back the money spent on his homestead and that the much-criticised swimming pool was in fact not a swimming pool, but an emergency ‘fire pool’ or ‘open water source’ that can be used to extinguish fires that can erupt from the flammable thatched huts.<sup>178</sup>

The controversy has sparked outrage amongst citizens and has resulted in chaotic scenes in Parliament, occasioned by persistent interjection and heckling by one of the opposition parties, the Economic Freedom Fighters (EFF), demanding that Zuma pay back the money as recommended by the Public Protector. The EFF has taken the matter to the Constitutional Court, for it to decide whether Zuma should indeed pay back the money. Although this may be a step forward for democracy, it is unclear whether the Constitutional Court’s judgement will be adhered to given that, at the time of writing, the *Glenister II* judgment has yet to be obeyed.<sup>179</sup>

The Public Protector has submitted an affidavit to the Constitutional Court to join in the EFF case, either as a respondent or *amicus curiae*, on the basis that the Court’s decision will have a bearing on her powers in all other matters. The Public Protector’s participation as an

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<sup>177</sup> Report of the Public Protector (2014) 437.

<sup>178</sup> Report by the Minister of Police to Parliament on security upgrades at Nkandla private residence of the President (2015) para 6.2.

<sup>179</sup> The Helen Suzman Foundation returned to court in November 2014 and successfully challenged the constitutionality of section 16 and Chapter 6A of the SAPSAA Act which governs the establishment and operation of the DPCI. The Constitutional Court confirmed the decision of the Western Cape Division of the High Court which ruled that the Act failed to secure the adequate structural and operational independence of the Hawks. *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC), Available at <http://hsf.org.za/resource-centre/hsf-briefs/judgment-in-the-matter-of-the-helen-suzman-foundation-and-the-president-of-the-republic> (accessed on 7 October 2015).

interested party in the Constitutional Court case follows from a Western Cape High Court judgment in October 2014, according to which the Public Protector's recommendations are not binding and enforceable. The Public Protector maintains that the Western Cape High Court decision has set a precedent which has caused politicians and organs of state to disregard her recommendations.<sup>180</sup> According to Zuma, "recommendations are recommendations, [they] are not verdicts, subject to be taken or not taken if they are recommendations, it is only a judge verdict [*sic*] that you have got to either go to prison or pay the money [*sic*]." <sup>181</sup>

### 3.5. Conclusion

The events described might appear as exceptions or isolated instances of political interference with state institutions that derive their powers to make independent decisions from the Constitution. The trouble is that these exceptions become the rule if they are allowed to continue to happen. This blatant disregard for the law, if not halted, is bound to spawn a culture of impunity within the higher echelons of government, giving rise to a state of affairs where the rule of law and the notion of being accountable to the law are jettisoned for selfish interests. Where the law is disregarded, corruption thrives. While the connection between corruption and human rights might not seem apparent, in practice the diversion of funds otherwise meant for the fulfilment of socio-economic rights has a devastating effect on the lives of the underprivileged in particular, the very sector of society that simply cannot afford to pay bribes in order to give effect to their rights to housing, education, health, sanitation, or to obtain civic documents.

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<sup>180</sup> 'Nkandla High Court Ruling has severely compromised Public Protector: Madonsela' *Times Live* available at <http://www.timeslive.co.za/politics/2015/09/30/Nkandla-high-court-ruling-has-severely-compromised-Public-Protector-Madonsela> (accessed on 8 October 2015)

<sup>181</sup> 'Jacob Zuma: I am not going to pay back the money' available on *Youtube* published 11 March 2015 <https://www.youtube.com/watch?v=UuTyQTh8Iz0> (accessed on 8 October 2015).

The next chapter discusses the need to maintain the rule of law and the notion of accountability in the context of the theme of this paper.



## CHAPTER FOUR: THE RULE OF LAW AND ACCOUNTABILITY

### 4. Introduction

The value of trials for human rights violations in countries emerging from repressive regimes has been a subject of great debate amongst transitional justice scholars.<sup>182</sup> Samuel Huntington has argued that trials should not be pursued because they could destroy the necessary foundations for democracy, but if they are pursued, they should be carried out at the beginning of a transition.<sup>183</sup> O'Donnell and Schmitter have admitted that in the case of very gross human rights violations, trials might be necessary, but they are pessimistic about the effect that the trials might have on democracy.<sup>184</sup> They conclude that “if civilian politicians use courage and skill, it may not necessarily be suicidal for a nascent democracy to confront the most reprehensible facts of its recent past”.<sup>185</sup> This paper has argued that human rights trials – post-TRC trials in particular – are essential for creating a democracy founded on respect for the rule of law.

#### 4.1. The importance of the rule of law

The rule of law is a political ideal that exists within a political system but it must not be confused with other political ideals such as democracy, justice, equality, human rights and human dignity.<sup>186</sup> It is the combination of these ideals that creates an effective and functioning society. In its broadest definition, the rule of law means that “people should

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<sup>182</sup> Sikkink K and Booth-Walling C ‘The impact of Human Rights Trials in Latin America *Journal of Peace Research* 4 (2007) 428.

<sup>183</sup> Huntington S *The Third Wave: Democratization in the Late Twentieth Century* University of Oklahoma Press (1991) 228.

<sup>184</sup> O'Donnell G and Schmitter P *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* Johns Hopkins University Press (1989) 30.

<sup>185</sup> O'Donnell and Schmitter (1989) 32.

<sup>186</sup> Raz J ‘The rule of law and its virtue’ in Raz J *Authority of law: Essays on law and morality* Oxford University Press (2009) 211.

obey the law and be ruled by it”.<sup>187</sup> In the political and legal sense, its definition is narrowed to mean that government shall be ruled by the law and be subject to it. This ideal is commonly expressed by the phrase “government by law and not by men”.<sup>188</sup>

Raz identifies principles that can be derived as characteristics of the rule of law, noting that the list is not exhaustive and that the circumstances of the different societies will play a role in their validity or importance. The principles include: (1) the making of particular laws (particularly legal orders) should be guided by open, stable, clear, and general rules; (2) the independence of the judiciary should be guaranteed; and (3) the discretion of the crime-preventing agencies should be not be allowed to pervert the law.<sup>189</sup> Whether or not a country adheres to the rule of law can be measured by the level of accountability for the commission of crime.

#### **4.2. Accountability**



Chapter Three showed a very clear lack of accountability in South Africa for acts of corruption within the highest echelons of government. It thus supports the philosophical basis of this study which was that if public officials saw that there was no punishment for gross human rights violations, nothing or very little would deter them from committing “mere” economic crimes.<sup>190</sup> Chapter Three traced also the rise and fall of the specialised anti-corruption unit, the ‘Scorpions’, the political manipulation of the NPA, and the corruption scandal surrounding the private home of Zuma. It drew the conclusion that these symptoms are an early indication of the erosion of the rule of law, as corruption eats away at the fabric of democracy. The comparative lack of accountability by high state officials in

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<sup>187</sup> Jennings *The Law and the Constitution* (1933) 42-5

<sup>188</sup> Raz J (1979) 212.

<sup>189</sup> Raz J (1979) 217-218.

<sup>190</sup> See above Chapter One Section 1.4.



South Africa can be attributed in part to the lack of post-TRC prosecutions because, as will be shown below, Argentina and Chile have fared better in the creation of a human rights culture and a system of accountability as a result of pursuing post-TRC prosecutions.

#### 4.2.1. Argentina

In the late 1990s and early 2000s most of the transition states in Latin America were focused mainly on holding competitive elections. Argentina was faced with the challenge of having free elections before it could establish independent courts to hold state actors accountable.<sup>191</sup> This proved to be the biggest challenge to the institution of prosecutions in the early stages of the transition.<sup>192</sup>

Where Argentina was lacking in criminal prosecutions, the international community made up by exercising universal jurisdiction as, for example, the case of the naval officer, Cavallo, who was arrested in Mexico.<sup>193</sup> Not only did the trials conducted outside Argentina promote justice, they encourage human rights activists, too, to have recourse to international courts where they were frustrated by domestic laws that hampered the institution of prosecutions. Argentinian human rights activists thereupon sought the assistance of Spain, Italy and Germany when the Menem government passed a law which gave previous gross human rights violators' total amnesty from prosecutions. This amnesty served only to galvanise human rights activists to pursue prosecutions relentlessly. They simply refused to accept impunity, and mobilised civil society to call for the accountability to the law that former President Alfonsín had initiated.<sup>194</sup> In 2003, the Supreme Court held the amnesty laws to be

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<sup>191</sup> Chavez R *The rule of law in nascent democracies: Judicial politics in Argentina* Stanford University Press (2004) 2.

<sup>192</sup> See above Chapter Two section 2.2.2.2.

<sup>193</sup> See above Chapter Two section 2.2.2.2.

<sup>194</sup> See above Chapter Two section 2.2.2.2.

unconstitutional, as a result of which the courts struck down the pardons given to former dictatorship officials convicted or facing trial. By August 2014, 121 prosecutions had been held against former state officials for crimes against humanity originating from the dictatorship, resulting in 503 convictions.<sup>195</sup>

After the dictatorship, Argentina established an anti-corruption office which is regarded as ‘an agency that seems clearly devoted, against great odds, to bring some transparency and accountability into government. In the very cynical climate that dominates Argentina today, such good standing is quite remarkable’.<sup>196</sup>

All of the above in no way suggests that Argentina does not face continuing problems of corruption, police abuse of power, extremely bad prison conditions and access to justice for the indigenous population. It does have such problems, but does not shy away from them. On the international scene, Argentina is a champion of human rights and has played a leading role in sponsoring several human rights initiatives.<sup>197</sup>

#### 4.2.2. Chile

Chile has also been influenced much by the international community in promoting human rights, and it is also regarded as having one of the lowest levels of corruption in Latin America.<sup>198</sup> However, like Argentina, it is not immune to corruption. In the 1990s, corruption at the municipal level in the form of patronage was widespread, resulting in 241 corruption-related charges reported between 1993 and 1994. In 2002 and 2003, it was

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<sup>195</sup> Human Rights Watch *World Report 2015: Argentina* available at <https://www.hrw.org/world-report/2015/country-chapters/argentina> (accessed 25 October 2015).

<sup>196</sup> Meagher P *Anti-Corruption Agencies: A Review of Experience* IRIS Center University of Maryland (2002) 61.

<sup>197</sup> Meager P (2002) 61.

<sup>198</sup> Brinegar A ‘Evaluating Citizen Attitudes about Corruption in Chile’ in Blake C and Morris S (eds.) *Corruption and Democracy in Latin America* University of Pittsburgh Pre (2009) 131.

confronted with one of the biggest corruption scandals it had faced since the beginning of the Latin American re-democratization period, which garnered much media and political attention.<sup>199</sup>

Anti-corruption reforms throughout the re-democratization period were exceedingly partisan in that there was no uniform governmental strategy to combat corruption. However, after the widely-publicised 2003 corruption scandals, there was a consensus in government over the need for reform.<sup>200</sup> In 2002 and 2003 the ruling coalition, the *Concertación*, was involved in a number of bribery scandals involving members of parliament and three government officials who were accused of having received bribes for the allocation of licences for vehicle-refitting plants in the state of Rancagua. The case had an immediate effect on the balance of power in the House of Deputies, as the six deputies had their parliamentary powers stripped in November 2002. Eventually, three participants were declared ineligible to hold public position for a period of six years and were found guilty by a court, which sentenced them to a suspended 50 days' imprisonment.<sup>201</sup>

In response to the scandals the government implemented a package of 49 reform measures in 2003. These included slashing the number of patronage jobs from 3000 to 600.<sup>202</sup> Chile's quick response to the scandal shows that the government was serious about combating corruption and about holding violators of the law accountable. The government was under pressure to show that the impunity that marked the Pinochet dictatorship had no place in a country based on the rule of law.

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<sup>199</sup> Brinegar (2009) 131.

<sup>200</sup> Brinegar (2009) 136.

<sup>201</sup> Brinegar (2009) 136.

<sup>202</sup> Brinegar (2009) 137.

Chile has had two advantages that enabled it to act decisively. Firstly, there is no ruling political party in government.<sup>203</sup> In South Africa, on the other hand, the ANC has been the dominant power in parliament since 1994. This means that, although the official opposition party has been instrumental in exposing acts of corruption and seeking redress in the courts, they do not have enough political clout to influence political reform. Second, Chile has a low level of corruption compared to South Africa. Where corruption in Chile does surface, it is in the public eye immediately, and with the emergence of a freer media and NGOs active at the civic level, acts of corruption that were previously clandestine are now made public.<sup>204</sup>

The Chilean government therefore has a clear standard to uphold and a duty to ensure that corruption levels stay low. In South Africa, corruption may be a legacy of Apartheid, but because the mandate of the TRC was limited to gross violations of civil and political rights, there is no record of the extent of corruption or economic violence committed during Apartheid. Compared to the Sierra Leonean Truth Commission, for example, the South African TRC has been criticised for having a very limited mandate, with a narrow perspective that presented a 'compromised truth'.<sup>205</sup>

There appears to be a lack of appreciation of the importance of prosecutions in South Africa, even though there are a number of justifications for trials which extend further than mere retribution. The survivors do not so much desire that the perpetrators be punished harshly; all they want is to have the good name and honour of their loved ones restored in a public forum, for all to hear and see, and to know what happened to their relatives or friend who disappeared or were murdered. Prosecutions would acknowledge also the surviving victims,

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<sup>203</sup> Brinegar (2009) 136.

<sup>204</sup> Balán M 'Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile' *Comparative Politics* 4 (2011) 459.

<sup>205</sup> Hayner P *Unspeakable Truths, Pacing the Challenge of Truth Commissions* (2002) 74-75.

affirming that their claims for justice are legitimate. While it is claimed that corruption is a victimless crime, in the case of grand corruption the victims are the citizens who are robbed of basic social and economic rights because state funds are siphoned away into the pockets of corrupt officials. Secondly, trials assign individual criminal responsibility to leaders and key actors who commit crimes and thus remove claims of collective guilt.<sup>206</sup> This is important for the restoration of the reputation of a government, as it is more desirable for certain individuals to be found guilty of corruption than for the people to view their governments as being corrupt. And, lastly, trials deter future abusers by signalling to potential despots what will happen should they oppress their fellow citizens.<sup>207</sup>

### 4.3. Recommendations

South Africa is still a very young democracy, with a political and legal order still in relative infancy. It is therefore necessary to ensure that democratic institutions function openly and properly. The NPA must not act at the bidding of powerful politicians, and must be seen to act without fear, favour or prejudice. It is recommended that as part of the checks and balances that characterise sound democratic governance, an application should be brought to the courts to determine whether the NPA is sufficiently independent from political interference. This will ensure that the powers and the duties of the NPA are interpreted in accordance with the values enshrined in the Constitution and, more importantly, that the lack of political will in prosecuting both post-TRC crimes and economic crimes is adjudicated by the independent courts in accordance with the separation of powers doctrine.

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<sup>206</sup> DeLaet D *The Global struggle for human rights: Universal principles in world politics* Cengage Learning (2014) 190.

<sup>207</sup> Roth K 'Human Rights in the Haitian Transition to Democracy' in Hesse C and Post R *Human Rights in Political Transition: Gettysburg to Bosnia* Zone Books (1999) 134.

Secondly, it is recommended that a unit similar to the 'Scorpions' be reconstituted, based upon the aforementioned troika principle as its past success is undeniable.<sup>208</sup> This unit should be given a mandate to focus solely on investigating and prosecuting economic crimes. Such a unit would be desirable because it could reduce the burden on the police, enabling them to dedicate resources to other priority crimes while not compromising on the fight against corruption in the highest echelons of the government. Furthermore, a unit operating independently on this specific mandate can help redeem public confidence in the government's commitment to combating corruption and thereby creating a measure of increased accountability.

#### 4.4. Conclusion

Although truth commissions are significant for fact-finding and reconciliation, trials are indispensable for reinforcing justice and the rule of law. The South African TRC achieved exemplary success in ushering the country into a peaceful democracy through the provision of conditional amnesty for those who appeared before the commission to reveal the truth. This carrot presented to perpetrators also carried with it a stick to punish those who shunned the process. Unfortunately, the lack of prosecutions turned into *de facto* blanket amnesties which manifested in a culture of impunity. It can be observed from Argentina that the pursuit of human rights trials will not threaten the political stability of a country; rather, trials have the effect of strengthening democracy while promoting citizen participation both domestically and internationally.<sup>209</sup> Chile has shown that the passage of time cannot be a

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<sup>208</sup> See discussion on the 'Scorpions' chapter 3 section 3.1.

<sup>209</sup> See above Chapter Two section 2.2.1.

hindrance to achieving justice because all that is required is the necessary political will to set off the necessary ripple effect.<sup>210</sup>

What this paper has found is that an established rule of law is of paramount importance. It has also found that it is not enough for there to exist institutions such as the National Prosecution Authority, the Office of the Public Protector and a progressive judiciary, if they are subject to political manipulation or wholly disregarded. The people and their government need to know that no one is above the law.



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<sup>210</sup> See above Chapter Two section 2.2.2.

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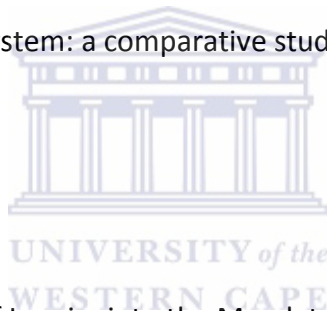
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