# **Pervasive Impunity:** From Amnesty to the Apartheid Lawsuit and Beyond

*Principal defendants at Nuremberg Trials*

**Claudia Braude** is an independent scholar based in Johannesburg.

Nation-wide reaction to the court proceedings against the 'Reitz four' students, and the University of the Free State's dropping of internal charges against them for their degrading treatment of the University's female employees has recently highlighted the possible connection between the template of forgiveness central to the Truth and Reconciliation Commission (TRC) and attitudes and events shaping contemporary South African society.

## Apartheid Law Suit

Post-apartheid, post-TRC South African society is arguably characterised by a culture of impunity. To the extent that this is true, the dramatic reversal of South Africa's long-standing official criticism of the law suit against companies alleged to

have aided and abetted the apartheid regime, which is currently waiting judgment in the New York courts, has potentially far-reaching consequences both locally and internationally.

In his letter to the presiding judge of the US Southern District Court of New York, Minister of Justice and Constitutional Development Jeff Radebe recently affirmed the support of President Jacob Zuma's government for Khulumani Victim Support Group's involvement in the litigation. Confirming its belief in the New York court as the appropriate forum to deal with their claims, Radebe even offered to play a mediating role[1]. In so doing, he overturned his predecessor Penuell Maduna's 2003 declaration[2] to the court that the South African government opposed Khulumani's action[3].

Maduna had said that all political parties in South Africa had agreed to avoid "a 'victors' justice' approach to the crimes of apartheid", Nuremberg-style apartheid trials and a New York ensuing litigation[4]. He said that "in order to enable all South Africans to overcome the legacy of apartheid, through the creation of a more just and egalitarian society"[5], they had instead pursued a "transformative and redistributive" approach "based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill"[6]. According to Maduna, the apartheid lawsuit could destabilise the South African economy[7] as it would discourage the foreign direct investment the government believed was necessary to drive the country's economic growth and "address high unemployment levels and its by-product, crime". Maduna told the court that the issues raised in the litigation were political in nature and were being resolved through South Africa's democratic process[8]. He requested that, in deference to South Africa's sovereign rights to resolve domestic issues without outside interference[9], the court dismiss the proceedings[10].

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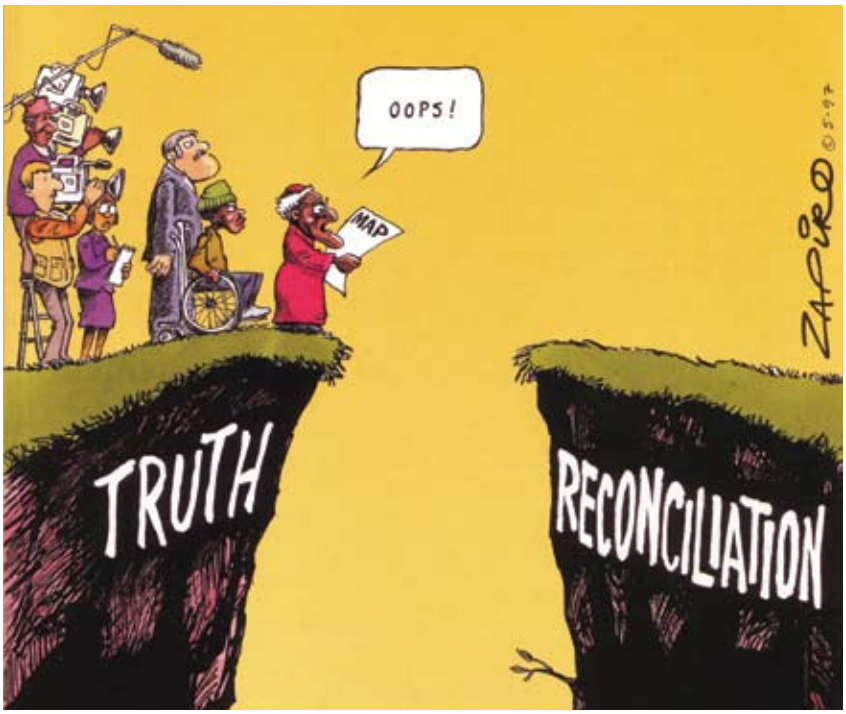
In writing to the court, Maduna was aware that the apartheid litigation picked up where the TRC left off, simultaneously continuous with and ruptured from the Commission's logic and workings.

Designed to reach a political settlement, the TRC was the product of a significant political compromise between the conflicting parties. Hoping to steer the country away from the civil war, occasioned by a right-wing and military backlash, to arrive at democratic elections, the new leadership put aside arguments in favour of justice in order to offer comfort to members of the apartheid regime who feared prosecution. In the name of reconciliation, apartheid perpetrators received amnesty in return for full disclosure about those of their crimes which were politically motivated and proportionately executed.

The logic of amnesty required several discursive manoeuvres. Since amnesty cannot be granted for crimes against humanity, descriptions of apartheid mutated from being an internationally-recognised crime against humanity into a 'gross human rights violation'. Also, since amnesty for gross human rights violations was to be sought equally on 'both sides' of the apartheid struggle, the activities of apartheid forces upholding the racist state were equated with those of the liberation movements fighting for a democratic society. Absent from the failure both to describe apartheid as a crime against humanity, and the moral relativisation of the past, was any memory of apartheid's fundamental criminality and illegality.




Amnesty shielded perpetrators from civil and criminal prosecutions on the part of their victims and families of victims. In exchange for this loss of their rights to claim against perpetrators, victims were to be compensated symbolically through the fact of the TRC and materially through the Commission's reparations provisions.

Both before its establishment and after it completed its finding, public acceptance of the impunity provided by the TRC was far from unanimous.

Dissatisfied with the TRC's outcomes, including the woefully inadequate reparations ultimately received by the victims, Khulumani and others turned for relief and reparations to the American courts which, empowered by the American Alien Tort Claims Act (ATCA), enjoy universal jurisdiction over certain violations of international law. These include claims of torture, genocide, crimes against humanity and war crimes wherever they occur.

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Khulumani was formed in the run-up to the TRC to support its members testifying to the Commission about their traumatic experiences[11]. The organisation is currently home to 35 000 victims of various apartheid atrocities including extrajudicial killings, torture, indiscriminate shooting, sexual assault and arbitrary detention. Tshidiso Motasi is among the organisation's ninety-six claimants in New York. He was five when he witnessed the double murder of his parents, John and Penelope Moloko, the night three policemen stormed into their home. They shot his father in his bed before protecting their identities by shooting his mother who had witnessed the slaying. Undetected, Motasi spent the night alone with his parents' bodies before his cries attracted the neighbours the following morning[12].

The apartheid lawsuit originated in information which started to emerge through the TRC process[13]. The TRC found that business played a central role in sustaining

the economy of the apartheid state, including "by engaging directly in activities that promoted state repression"[14].

While drawing on its findings, the Khulumani claim broke in fundamental ways from the TRC's legal framework.

Crucially, uninhibited by South Africa's domestic amnesty provisions, it retained memory of apartheid's status in international law as a crime against humanity. Khulumani attorney Michael Hausfeld relied, inter alia, on Article I of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid which described apartheid as a crime against humanity[15], and the 1986 American Comprehensive Anti-Apartheid Act (CAAA) which prohibited almost all American cooperation with South Africa's armed forces[16]. He also relied on standards set at Nuremberg and the Yugoslavia and Rwanda tribunals which held the aiders and abettors of crimes that violate customary international law to be criminally liable, especially where the criminal act would probably not have occurred in the same way without their assistance[17].

Framers of the TRC were unable to control the process when, in 2002, Khulumani lodged their claim among several consolidated claims in New York against twenty-one non-South African companies. Khulumani's claims focused on companies that helped to sustain apartheid rule by providing direct aid to the state's military and security apparatus[19].

Hausfeld deliberately positioned his pursuit of justice in contrast to the theology and language of forgiveness that cloaked the TRC, where, under Archbishop Desmond Tutu's leadership, the political compromise underpinning legal amnesty segued into a theology of forgiveness. Instead, Hausfeld emphasised the need for justice for apartheid victims from companies that illegally conducted business with the apartheid state:

"What is the accountability of these secondary actors? Is it moral only? Is their sin or error merely one of misbehaving such that a confession is sufficient to cleanse their conscience and excuse their indiscretion? If they declare they were only doing business or following orders, are they to be forgiven in the name of commerce or trade? Or do they have some obligation to those who were victimised by the crime they knowingly assisted and furthered? Is there a form of justice which holds them accountable in some measure to those they helped abuse?" said Hausfeld[18].

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The South African government's belated support has removed a major obstacle to the success of Khulumani's efforts to hold business to account.

This is excellent news, firstly, for anyone concerned with international human rights. Assuming a life of it own within the US legal system, the Maduna Declaration became the subject of a discussion in another US Supreme Court decision,

unrelated to the Khulumani matter, where it played a significant role in threatening to limit ATCA's applicability and reduce the space for victims to approach the US court. In that context, the Court counselled caution and serious consideration of the Executive Branch's view of the case's impact on foreign policy where foreign sovereignty was jeopardised.

While seemingly far removed, a successful outcome in New York for Khulumani could also have significant implications for all South Africans.

To understand how this might be the case, it is necessary to reexamine a series of seemingly unrelated events that have arisen out of and since the TRC, and to look critically at South African society and consciousness that has evolved in its wake.

### Arms Deal: Charges, Amnesty, Charges Dropped

The events surrounding the corruption charges against Jacob Zuma linked to the fractious arms deal offer one among many possible entry points to consider what might be at stake in the Khulumani case. Their complex relationship, sometimes explicit, to the language and logic of the TRC – including in the calls for an amnesty, in allegations of a political motive, and in the NPA's ultimately dropping of the charges – make it a particularly illuminating study.

In 2002, it was confirmed that Zuma was part of the arms deal probe. In August 2003, former National Prosecutions Authority (NPA) boss Bulelani Ngcuka announced that Schabir Shaik, Zuma's financial adviser, would be charged with corruption and fraud. Saying there was a prima facie case against Zuma, Ngcuka said he would not be prosecuted. Zuma was, however, implicated in Shaik's corruption trial. Found guilty of corruption and fraud related to the arms deal, in 2005 Shaik was sentenced to fifteen years imprisonment. When Zuma was subsequently charged (for racketeering, corruption, fraud, money laundering, with alternatives including tax evasion[21]), his charge sheet disclosed that for over ten years, including as South African deputy president, he or his family received 783 payments totalling R4 072 499,85 from Shaik or his companies[22]. According to Judge Hilary Squires, during Shaik's trial, these payments were designed to generate "a sense of obligation" on Zuma's part, which he repaid in kind "by providing the help of his name and political office as and when it was asked for, particularly in the field of government contracted work"[23].

According to trial witnesses, Shaik experienced frustration with Zuma's expenditure "without caring where [the money came] from"[24], including in 2000 when, without consulting him, Zuma commissioned architects and a builder to design his Nkandla homestead[25]. Shaik asked Zuma if he thought 'money grew on trees'"[26]. According to the prosecution, payment for the Nkandla homestead was linked to the R500 000 annual payment to Zuma from French arms dealer Thint in return for Zuma's protection in the arms deal investigation[27]. This agreement became part of the arms deal investigation instead.

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NPA boss Vusi Pikoli announced Zuma would be charged with corruption. In June 2005, then President Thabo Mbeki fired him as deputy president. Zuma was charged in October, including for the alleged agreement with Thint[28]. The Scorpions – the nickname of the NPA's Directorate of Special Operations, the special organised-crime fighting unit created by Mbeki in 1999[29] – raided Zuma's home and offices of his attorney, Michael Hulley. (The Durban High Court's

2006 ruling that the Scorpion's search-and-seizure warrants were unlawful was overturned later that year by the Supreme Court of Appeal, a ruling itself upheld by the Constitutional Court in July 2008.) In December 2006, the NPA re-charged Zuma. In the middle of all this, in November 2005 Zuma was accused of rape by the HIV-positive daughter of a family friend. After a highly publicised trial, he was acquitted of the rape charges in 2006.

Zuma's supporters believed the corruption and rape charges were Mbeki's politically motivated campaign to frustrate his presidential ambitions. Believing there would have been no charges or investigations without political interference, and perceiving the Scorpions and NPA as central parts of Mbeki's anti-Zuma arsenal, they accused these state institutions of being used as political weapons[30].

Overturning Nicholson's judgment, Judge Louis Harms in the Supreme Court of Appeal said that a prosecution was not unlawful merely because it was brought for an improper purpose[40] and that the motive behind the prosecution was relevant only if, in addition to being wrongful, reasonable and probable grounds for prosecuting were themselves absent[41].

These perceptions were bolstered in July 2007 when a copy of the Scorpion's 'Special Browse 'Mole' Report' was leaked to Zuma's supporters. Consisting predominantly of speculative research into the sources of funding for Zuma's legal and political campaigns[31], it alleged that Zuma's presidential aspirations were financially backed by Libya's Moammar Gadaffi and Angola, and warned of potential insurrection if Zuma failed to become president[32].

Scorpion's investigator and report author, Ivor Powell has said its commissioning in early 2006 was not difficult to understand. "Zuma's supporters were growing increasingly militant and threatening violence and mayhem in the face of what they characterised as a vicious campaign of vilification against their leader," he said[33]. "Add the curious emergence of a white rightwinger, Jurg Prinsloo, as a self-professed ally and driving force behind the 'Office of Jacob Zuma' and you get a mix that, unsurprisingly, sets off alarm bells in the NPA – and probably also the Presidency," said Powell[34], whose report emphasised its inconclusive and unverifiable nature[35]. Finalising the report in mid-2006[36], former Scorpions head, Leonard McCarthy recommended, inter alia, "that consideration be given to launching investigations into money laundering, tax evasion, contravention of exchange control regulations and conspiracy to sedition"[37].

Believing it gave them proof that the Scorpions were targeting Zuma far more widely than the legal charges against him, the leaked report was what some observers considered a "propaganda coup"[38] for Zuma and his supporters.

Mbeki responded to the resulting scandal by appointing a team in the National Security Council, led by Arthur Fraser[39], to investigate the report's production and leaking. The NIA was licensed to secretly monitor McCarthy's conversations.

Perceptions that the Zuma charges were politically motivated were corroborated in September 2008 by Judge Chris Nicholson. Judge Nicholson found that the NPA's decision to prosecute him was invalid and he dismissed the charges saying that Zuma was correct to infer a political conspiracy against him.

However, the NPA successfully appealed against Nicholson's decision in January 2009. Overturning Nicholson's judgment, Judge Louis Harms in the Supreme Court of Appeal said that a prosecution was not unlawful merely because it was brought for an improper purpose[40] and that the motive behind the prosecution was relevant only if, in addition to being wrongful, reasonable and probable grounds for prosecuting were themselves absent[41]. Charges against Zuma were reinstated.

Zuma was elected ANC president at the organisation's conference in Polokwane in December 2007. A week later, the NPA brought new charges of corruption, racketeering and tax evasion against him.

Zuma and his supporters believed these new charges were also part of a political conspiracy, motivated now, they believed, by Mbeki's personal desire for revenge in reaction to his humiliating Polokwane defeat. They believed Mbeki and his supporters were continuing to use state organs to try by whatever new means to prevent Zuma ascending to the position of the country's president.

Secure in his position as ANC president, people started to call for a different, non-legal resolution to the charges against Zuma, including the possibility that he be granted amnesty.

Sunday Times editor Mondli Makhanya prominently affirmed the suggestion, saying he was increasingly "persuaded … by this proposal for an amnesty"[42]. Describing an open judicial commission of inquiry with the incentive of amnesty as "the moral and logical thing" for South Africa to consider, Makhanya said it would "entail encouraging those who have knowledge of arms deal corruption … to come forward with information"[43].

South Africans have become accustomed to amnesties. Makhanya listed amnesties granted and forgiveness given since 1994. These included not only to "tax evaders", "people who had ferreted money in offshore accounts", "small businesses whose tax affairs were not in order" and "even a sort of amnesty for the taxi owners to regularise their operations" and, most obviously, for "apartheid-era crimes"[44].

The fact, particularly, that amnesty had been given to perpetrators of apartheid crimes made an amnesty for Zuma both imaginable and palatable. "Just as SA had bargained with the devil during the [TRC], there [is] no reason why we [cannot] bargain with present-day perpetrators of the serious political crime of the arms deal"[45], said commentator Xolela Mangcu[46]. "Many South Africans will find it difficult to forgive past corruption, but has corruption been any more heinous than the crimes that were the subject of the first (TRC)?" said a reader in a letter to the press[47]. "We have seen murderers walk free, on political grounds, time and again … [and] many other parties cited for crimes and left untouched," said Michael Trapido, Mail & Guardian bloggist[48]. All were commenting on amnesty for Zuma.

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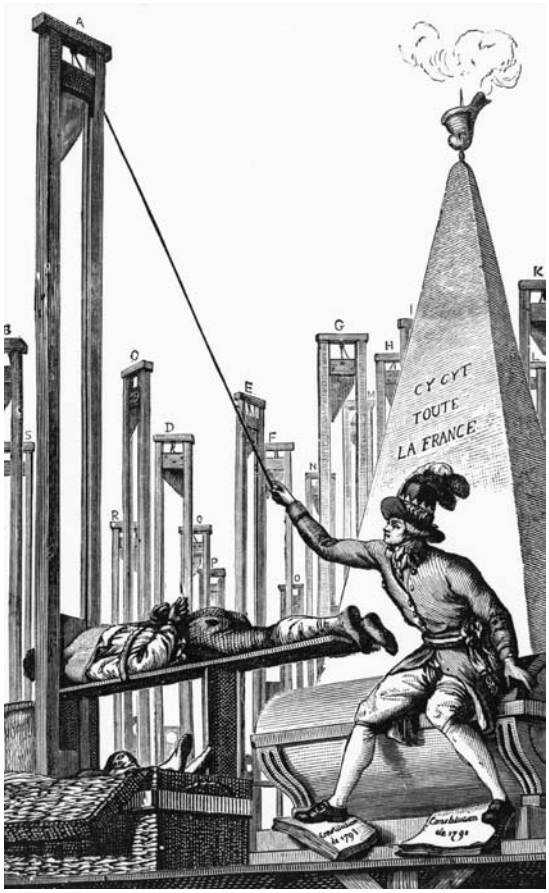
One particularly high-profile, person left effectively untouched for his actions was Adriaan Vlok, apartheid minister of police. Several months before calls for amnesty for Zuma became mainstream, Vlok had been arrested, charged and given a suspended sentence for his involvement in the attempted murder in 1989 of Frank Chikane. As head of the South African Council of Churches, Chikane had been prominent in the anti-apartheid movement when Vlok's men almost fatally impregnated his clothes with poison. At the time of Vlok's arrest, Chikane was director-general of the Presidency. Washing Chikane's feet in a well publicised act of atonement, Vlok asked for and received his forgiveness.

The TRC process was premised on the principle that those who did not obtain amnesty would be prosecuted[49]. The Chikane murder attempt was one of more than three hundred cases which the TRC's Amnesty Committee had given the




NPA when it finalised its own work in 2001. The state had sufficient evidence in these cases to further investigate suspected perpetrators who had failed either to apply for, or to receive, amnesty. The first post-apartheid trial of an apartheid-era government minister for a crime committed in the apartheid era, the Vlok case was also one of only a handful of these TRC-related cases which the NPA has pursued to date. In August 2007, Vlok pleaded guilty to attempted murder charges. Together with Johan van der Merwe and three former senior police officers, he received a ten-year jail sentence suspended for five years[50].

Protagonists in and observers of the TRC were outraged by the plea bargain, which, in contrast to the TRC, happened behind closed doors. "'[T]his wasn't a court case. There was no cross examination," said Alex Boraine, deputy TRC head[51]. Describing both the Vlok plea bargain process as "farcical"[52] and justice as "the biggest loser", Boraine expressed his concern about its impact on the rule of law. "We are a country locked in crime. This is a case where someone is just let off for a vicious attempt of murder. Is it any wonder we have such a high crime rate if we continue to ignore criminal injustice like this?" he said.[53]

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Boraine's frustration was not isolated. It occurred in the context of the state's demonstrably listless approach to the TRC's unfinished business. Rather than actively pursuing the suspected perpetrators named by the TRC, Parliament amended the NPA Prosecution Policy to allow the non-prosecution of those who met TRC requirements but who had failed to apply for amnesty. The 2005 amendments controversially also provided additional open-ended criteria under which the National Director of Public Prosecutions (NDPP) could decline to prosecute, even where there was sufficient evidence to secure a conviction[54].

Interpreting the NPA amendments as providing a second amnesty for apartheid perpetrators, critics believed they undermined the TRC's integrity.

Towards the end of 2007, Mbeki announced the creation of a special pardons process for people convicted of offences committed in the pursuit of political objectives. Parliament agreed to a "special dispensation" so that people "in prison for a politically motivated offence committed before June 16 1999, or released from prison having committed offences of a political nature … could qualify for a pardon from our State President"[55]. While the special pardon did not initially extend to people for whom amnesty had already been refused by the TRC[56], Mbeki's multiparty advisory reference group of MPs "unanimously agreed to ask the president to extend their terms of reference to include pardon applications from prisoners denied amnesty by the [TRC]"[57].

Opposed to this pardons process, a coalition of NGOs which included Khulumani argued that it both constituted an unacceptable rerun of the TRC's amnesty

process and failed to adhere to its basic principles and norms[58].

In the context of the culture of immunity and forgiveness that evolved from the processes surrounding the TRC amnesty and its aftermath – including the Vlok plea bargain, amendments to the NPA prosecutions policy and the ongoing developments around the special pardons process – it is perhaps not surprising that it arguably made little sense to Zuma's supporters that he should be pursued by the law while they watched apartheid perpetrators walk away immune from prosecution. If perpetrators of heinous deeds who demonstrated neither commitment to democracy nor human decency could get amnesty and special pardons, why not Zuma, a hero of the struggle, for the lesser alleged crime of corruption?

Indeed, calls for amnesty for Zuma were informed by a similar logic to that governing the TRC amnesty process.

Where, in the interests of the social stability resulting from political reconciliation, South Africans had accepted the TRC's morally unsatisfying legal compromise of amnesty in place of prosecutions; so, too, amnesty was now promoted for Zuma as a way to bring about the political reconciliation (including within the ANC itself) considered necessary to avoid the instability that could accompany the political fallout flowing from a trial[59]. South Africa was, accordingly, described in terms of the social unrest that characterised the violent years of political transition in the early '90s. Suggesting, for example, that, as in the TRC era, "we [are] still ... in a state of transition", Trapido's support for an amnesty was motivated by his desire "to forego the terrible growing pains that this trial will visit upon us"[60]. "[C]an [this country] afford the backlash of the Zuma trial at this point in our development?" he asked[61].

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Similarly, just as amnesty was cloaked in a religious discourse in the TRC, so Zuma and others were not shy to evoke religious justifications for calls for forgiveness. For example, in March 2009, shortly before the national elections, when Zuma attended a church service at the Rhema Church, church leader Ray Macauley echoed Tutu when he sermonised on the importance of seeking forgiveness. "Forgiveness frees us; it restores us, and we become leaders in life," he said[62].

Most tellingly perhaps, just as in a TRC amnesty application where a political motive was a necessary condition to successfully trigger immunity from prosecution, so too calls for amnesty for Zuma were underpinned by describing his alleged involvement in the arms deal as a political crime. "I call it a political crime because it amounts to nothing less than state-sanctioned embezzlement of public funds," said Mangcu in calling for an arms deal amnesty to "forg[ive] the arms deal perpetrators". "It consisted of a deliberate misleading of the nation, and covering up for individual self-interest in the name of national interest. As in all political crimes, the allegations are that it was driven from the highest offices in the land," he said[63].

The TRC's relativised equation of racist forces with liberation ones assumed a new life in a modified form, revealed in Patricia de Lille's disagreement with Mancgu. "Corruption is criminal, not political," she said. "There is no higher moral value and no political cause or struggle involved here. It is simply a crime by those entrusted by the people to represent them. In this instance they are crooks, not freedom fighters, and we cannot provide amnesty for criminal offences, whether they

have political consequences or not"[64]. In so saying, De Lille implicitly rejected the equation of post-TRC corruption with the amnesty-attracting violations previously committed in pursuit of political causes.

The reanimation in the Zuma context of the TRC notion that a crime associated with a political motive could be overlooked ultimately steered circumstances to the dropping of charges. Recognising perhaps that "going the route of a general amnesty would require some kind of public admission of guilt"[65], not all Zuma's supporters had agreed with the call for amnesty. COSATU, for example, demanded that "any criminal charges facing the ANC president be quashed"[66] instead. They were not to be disappointed.

In February 2009, Zuma's legal team made representation to the NPA motivating the dropping of the charges. In March, they presented the prosecutors with secret taped National Intelligence Agency (NIA) recordings of conversations between McCarthy, Ngcuka and businessman Mzi Khumalo in which the men discussed the timing of reinstating charges against Zuma[67]. The recordings were legally obtained in the course of the 2007 probe of the Browse Mole report, which now proved to be a crucial turn of events. In the conversations, Ngcuka reportedly told McCarthy that although the NPA was ready to act he did not want Zuma to be charged before Polokwane[68]; that McCarthy was the "only one who could save the country" after Mbeki's Polokwane election failure; and that Ngcuka instructed McCarthy when to recharge Zuma[69].

The recordings were legally obtained in the course of the 2007 probe of the Browse Mole report, which now proved to be a crucial turn of events.

Zuma's supporters interpreted the taped conversations as "overwhelming evidence"[70] of a "conspiracy by the Ngcuka team"[71], proving "serious abuse of the powers of our state institutions", including the NPA and the Scorpions[72], and blatant interference in the work of the NPA[73].

Presenting the tapes as evidence of this perceived political conspiracy[74] "during which the head of the Scorpions colluded with outsiders such as Ngcuka and … Khumalo, who were clearly motivated by ulterior motives and not justice"[75], Zuma's team argued there had been political meddling in the NPA's work[76].

In April 2009, acting NPA head, NDPP Mokotedi Mpshe dropped all charges against Zuma, ending the eight-year long investigation and leaving Zuma a free man to successfully contest the national presidential elections two weeks later.

Giving the taped conversations as justification for his decision[77], Mpshe agreed with Zuma's lawyers when he accused McCarthy of colluding with Ngcuka in a political conspiracy. Describing the tapes as showing such 'abuse of power' on the part of former NPA management[78] and amounting to such political damage that it "render[ed] the high-profile case invalid"[79], Mpshe said he was forced to collapse the case[80].

Not all of Mpshe's colleagues concurred. Billy Downer, leading Zuma prosecutor, categorically denied Zuma's prosecution originated from a political vendetta or that he'd been targeted for an unwarranted prosecution by the NPA. Downer and other prosecution figures believed a judge should have decided if the case was too compromised to continue[81].

Legal commentators noted Mpshe's confirmation that he still considered the

case against Zuma to be solid and winnable[82]. "Prosecutors argued that the alleged interference with the investigation did not compromise the integrity of the prosecution … and the evidence available to the prosecution team was unaffected by the allegations," said Barney Pityana[83].

Faced with what the NPA appeared to consider a winnable case, they were perplexed by Mpshe's decision to drop charges on account of allegations of politically motivated abuse of prosecutorial process. In justifying dropping the charges on these grounds, Mpshe had used a judgment handed in the Hong Kong High Court by Judge Conrad Seagroatt[84]. Constitutional law experts not only criticised the striking similarities between his decision and Seagroatt's judgment (Mpshe's office denied it was plagiarism, describing his failure to credit Seagroatts as an "innocent oversight"[85]); but also his failure to mention or take cognizance of the subsequent overturning of Seagroatt's judgment by a higher court. They were particularly mystified by Mpshe's apparent ignoring and contradicting of the legal principle established by Harms in NDPP v Zuma that a prosecution was not unlawful merely because it was brought for an improper purpose[86]. According to Harms, the motive behind the prosecution was relevant only if, in addition to being wrongful, reasonable and probable grounds for prosecuting were absent[87]. "With the benefit of the Harms judgment … [Mpshe] would understand that the wrongfulness or otherwise of the investigation does not vitiate the integrity of the prosecution itself, which was unaffected by the flawed process alleged," said Barney Pityana, former chair of the South African Human Rights Commission[88].

Constitutional lawyer Pierre de Vos noted that "the act does not empower the NPA to drop charges against an accused in a case where abuse of the process is alleged"[89]. 'Perplexed' "that they focused so narrowly on a ground for dropping the charges that is not actually mentioned in the prosecuting policy"[90], De Vos said Mpshe's decision may be illegal[91]. Differentiating between the political and legal aspects involved in the matter, he also dismissed the relevance of the political motive: "For legal purposes, the question is always: would Mr Zuma be able to get a fair trial? The NPA says, even after the new evidence, that he would. And that is the legal question to ask. The political aspect is not legally relevant and should not be legally relevant," he said.[92]

Was Mpshe thinking about the criteria in the context of Mbeki's special pardons, where he, as the NDPP, could decline to prosecute even where there was enough evidence to secure a conviction[93]? In any event, commentators believed that political motive had won out definitively over legal merit[94].

Whether or not the NPA was on solid legal ground or whether its decision was politically driven remains unclear. What is clear, however, is that the outcome of the Zuma matter represented in an inverted form an extension of and invisible continuity with the logic of the TRC amnesty process. Where a successful TRC amnesty application had required a political motive on the part of the perpetrator, shielding Zuma from prosecution – by dropping the charges if not by amnesty – also centred on a political motive, now on the part of the prosecutor. And just as amnesty in the TRC era was justified as being in the national interest, so too, some NPA members justified their decision to drop charges in the name of national interest[95]. They reportedly argued that "millions of ordinary people would be uncontrollably angry about the decision, because of their deep love of the man and their sense of terrible injustice about the hateful way he has been treated. …

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[T]hey would … take to the streets. There would … be riots and … destruction of property. All … hell would break loose and the police would be forced to intervene. … [P]eople would be killed in the chaos that would ensue"[96]. (Ironically, in so doing they echoed Powell's elaboration of the motives for the Browse Mole Report.)

## Culture of Impunity: Constitutional Democracy and the rule of law

More than ten years after the TRC finalised its Report, and now outside the parameters of its problematic but widely accepted social contract, the reanimation of characteristic features of the TRC has made manifest the dangers latent in its process from the outset.

Observers and commentators were deeply troubled by the implications of the NPA's decision for South Africa's constitutional democracy and the rule of law.

"The credibility of this body … trusted with the protection of our country [and] unquestionable guardianship of our constitution, has suddenly and unequivocally evaporated … [S]urely no right-minded South African will ever be able to trust it with so much as the proper prosecution of a parking ticket,"

In a front-page editorial, Sunday Times editor in chief Makhanya, who had previously supported an amnesty for Zuma, said that the NPA had sent a general message to South Africans that "it is fine for the mighty and powerful to bully and intimidate their way out of trouble"[97] and, particularly, to "corrupt politicians and civil servants that this society has no problem with malfeasance"[98]. Accusing the NPA of having "[struck] a body blow to the constitutional framework that we have so painstakingly built", the Sunday Times said it had opened the door to a lawless society[99]. For de Lille, the dropping of charges altogether was a victory for Zuma and the ANC that had been "won at the expense of the constitution, the rule of law and the principle of equality before the law"[100]. She said that, in showing that all were not equal before the law[101], the NPA's decision had presented a significant "dilemma" for "crime-ridden" South Africa, "undermining our justice system which is predicated on the principle that criminal activities, no matter who commits them, must be investigated and the full force of the law brought against those responsible", she said[102]. The NPA had "sen[t] entirely the wrong message to our people – essentially, the government is saying there is a way out for those who break the law"[103]. Wim Trengove, Senior Counsel advocate who had acted for the NPA as the prosecution's senior council against Zuma, agreed that Mpshe's decision which he described as "incomprehensible", "indefensible" and "ominous"[104], "had undermined the entire judicial process"[105]. De Vos also saw "a direct attack on the rule of law and our constitution" in what he considered to be a "strong legal argument" that the NPA's decision was ultra vires. The Mail & Guardian said that "nothing could be more destabilizing than the thorough collapse of the rule of laws that this decision represents"[106]. Commenting on "what Zumaism has done to the fabric of our national life"[107], Pityana described Mpshe's reliance on the tapes as "deeply offensive to anyone's sense of fairness and justice"[108] and as having left the NPA "[lying] in tatters without a shred of credibility in the public eye"[109]. The credibility of the NPA was, undeniably, damaged in the public mind. "The credibility of this body … trusted with the protection of our country [and] unquestionable guardianship of our constitution, has suddenly and unequivocally evaporated … [S]urely no right-minded South African will ever be able to trust it with so much as the proper prosecution of a parking ticket," said one Sunday Times reader[110]. Trengove called on all South Africans and particularly lawyers to speak out. "[I]f we don't, we might one day look back at this decision and realise that it was a tipping point leading to the slippery slope of erosion and ultimate destruction of the rule of law," he said.

Read against the TRC, it becomes possible to see the way and extent to which

the erosion of the rule of law that some observed in the NPA decision was, in fact, a pre-existing condition. The rule of law was largely non-existent under the fundamental criminality of the apartheid state and only tentative in its possibility in a constitutional democracy since 1994.

From the abuses of power under apartheid, from the TRC amnesty provisions and from the NPA's failures to act since, South Africans have long known that all are not equal before the law, that it is fine for the mighty to intimidate their way out of trouble, that South Africa has no problem with malfeasance on the part of politicians and civil servants, that criminal activities are not investigated and that the full force of the law is not brought against those responsible, no matter who commits them. The message that there is a way out for those who break the law had long been sent.

The TRC represents the failed chance to close the door on apartheid's fundamental criminality and lawlessness. Having avoided a Nuremberg route in dealing with the crimes of the past, and failing to conduct even a few select prosecutions, South Africa – through the institution of the TRC – squandered the opportunity to draw a line in the sand and mark the beginning of the rule of law.

One doesn't have to look far for evidence of the fact that the fabric of post-TRC South African society is consequently corroded by an entrenched and pervasive culture of impunity. The fact of impunity is a key feature, for example, of assessments of the causes of the xenophobia murderousness that shocked South Africa and the world in March 2007, contained in a report compiled by the Forced Migrations Studies Programme at Wits University[111]. Even in the few cases where arrests were made, suspects were released without being charged, including with the assistance of the authorities[112]. "Similarly, before, during and after the May 2008 violence, some arrests were made at the different scenes of violence but most of those arrested were released without charges thanks to the mobilisation of communities and their leaders", including protest marches[113]. Authorities intervened to secure the release of businesses owners who had been arrested after forcing Somali shop owners out of Masiphumele through xenophobic violence in 2006[114]. Authorities who were sufficiently aware of who was responsible for stolen goods when they retrieved them, failed to arrest the perpetrators[115]. It is not surprising, therefore, that the report's first recommendation towards countering xenophobia and reducing the potential for future violence was the development of "interventions to promote accountability and counter a culture of impunity"[116]. The report pointed to "a worrying culture of impunity with regard to perpetrators of public violence in general and of xenophobic attacks in particular". According to the report, in an environment in which "foreign nationals have been repeatedly attacked in South Africa over many years, but no one has to date been held accountable"[117], and in which people "believed that those who attacked and chased foreigners from the area did something good for the community and should not be prosecuted"[118], "the actual and perceived impunity with which perpetrators of xenophobic violence are seen to act can only continue to encourage the ill-intentioned to attack foreigners"[119].

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## Apartheid Lawsuit Again

The apartheid law suit counters the wider juridical and political culture of impunity that has demonstrably become entrenched in South African life, both public and private, in the wake of the TRC. At a time when many very committed South Africans

perceive a body blow to the country's constitutional democracy and the rule of law, when the NPA continues to prevaricate on TRC-related prosecutions, when the culture of impunity is pervasive, the outcome of the apartheid law suit could signal a crucial message. Khulumani's success in New York in holding perpetrators to account rather than granting them impunity for their deeds could have significant implications for all South Africans. Free of political restraints in the name of reconciliation and forgiveness, and operating from a different understanding about the relationship between law and society, the lawsuit presents another chance – while offshore – to communicate the importance of justice, of holding people to account for their deeds.

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