

IN THE JUDICIAL COMMISSION ON INQUIRY

**ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS TO STOP THE
INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION
COMMISSION CASES**

**SUBMISSIONS SUBMITTED ON BEHALF OF THE HELEN SUZMAN
FOUNDATION**

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Introduction

1 These submissions are made on behalf of the Helen Suzman Foundation (the **HSF**), an independent and not-for-profit institute, dedicated to the promotion of constitutional democracy, human rights and the rule of law. The HSF has been admitted as *amicus curiae* in the High Court proceedings in *L B M Calata and 22 Others v the Government of the Republic of South Africa and 5 Others* (the **High Court proceedings**). The HSF accordingly has a direct interest in the Commission of Inquiry (the **Commission**) and is an “interested party” as defined in paragraph 2.1 of the Terms of Reference. The HSF also acts in the public interest.

2 Acting in terms of section 84(2)(f) of the Constitution, the President has appointed the Commission,

“to investigate matters of public and national interest concerning allegations regarding efforts or attempts having been made to stop the investigation or prosecution of Truth and Reconciliation Commission (“TRC”) cases.”¹

3 The Terms of Reference for the Commission are,

“... in relation to the period since 2003, inquire into, make findings, report on and make recommendations concerning the following, guided by the Constitution, relevant legislation, policies and guidelines—

¹ GG No. 52749 Proclamation Notice 264 of 2025

1.1 whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the South African Police Service or the National Prosecuting Authority to stop investigating or prosecuting TRC cases;

1.2 whether any members of the South African Police Service or the National Prosecuting Authority improperly colluded with such attempts to influence or pressure them; and

1.3 whether any action should be taken by any Organ of State, including possible further investigations to be conducted or prosecutions to be instituted, where appropriate, of persons who may have acted unlawfully by—

1.3.1 attempting to influence or pressure members of the South African Police Service or the National Prosecuting Authority to stop investigating or prosecuting TRC cases; or

1.3.2 members of the South African Police Service or the National Prosecuting Authority colluded with or succumbed to attempts to influence or pressure such members to stop investigating or prosecuting TRC cases; and

1.4 whether, in terms of the law and fairness, the payment of any amount in constitutional damages to any person is appropriate.”²

² Ibid, para 1

4 The President has proclaimed that the *Commissions Act*, 1947 (the **Commissions Act**) shall apply to the Commission and that Regulations may be made after consultation with the Chairperson of the Commission in order to enable the Commission to conduct its work meaningfully and effectively.³

5 Acting in terms of section 1(1)(b) of the Commissions Act, the President made regulations on 19 August 2025 (the **Regulations**).⁴

6 On 29 August 2025, the Chairperson of the Commission, acting in terms of Regulation 14, made Rules for the conduct of the proceedings in the Commission (the **Rules**).⁵

7 Both the Regulations and Rules set out broad powers on behalf of the Commission, including those to subpoena witnesses and information.

8 The Chairperson of the Commission has called upon parties with an interest in the proceedings to file their submissions by 10 October 2025. The HSF makes these submissions in that context.

Outline of the HSF's submissions

9 The HSF welcomes the appointment of the Commission as an important step in the revelation of the truth regarding the crimes that were committed

³ Ibid para 4

⁴ Proclamation Notice R.278 of 2025

⁵ Proclamation Notice 285 of 2025

during apartheid, and in exposing the reasons why such crimes have not to date been investigated and prosecuted.

10 The HSF's submissions to the Commission focus on the scope and obligations of the Commission, not only pursuant to the Terms of Reference which we have set out above, but more broadly within the context of the right to truth and the domestic and international obligations on South Africa to prosecute perpetrators of crimes against humanity, including apartheid.

11 These obligations, we submit below, should frame the Commission's approach and influence the manner in which the Commission receives, deals with, and reaches conclusions in relation to the evidence before it.

12 We note in this regard that the Commission has issued a call for submissions in which it "*calls on all affected and interested parties and individuals with information that can advance its Terms of Reference*" to file statements, memoranda, reports and other relevant documentation. The HSF's submissions, set out below, are submissions that will assist the Commission to "*advance its Terms of Reference*".

13 It will be recalled that, during the Truth and Reconciliation Commission (**TRC**), the TRC received submissions from a number of NGOs and other interested parties in relation to the mandate, scope, role and purpose of the TRC itself. These submissions related to issues such as how the TRC should operate, whether it should handle reparations, amnesty rules, public hearings, inclusion of economic and social rights, and the role of

reconciliation in the context of or as opposed to prosecution.⁶ These submissions were made to assist the TRC in determining how to fulfil its mandate and to give effect to its terms of reference.

14 In relation to the current Commission, the HSF submits that, in exercising its powers and performing its functions, the Commission should similarly welcome submissions that relate to the mandate, scope, role and purpose of the Commission. The HSF submits, in particular, that the Commission should be guided by, and not lose sight of, the important constitutional and international law principles which we set out below.

15 Within that framework, the HSF makes the following submissions which it submits are relevant to the determination by the Commission of its terms of reference:

15.1.1 *First*, the HSF highlights the importance of truth-seeking as a core component of constitutional law, international law and domestic law. Within this framework, the HSF submits that the Commission's primary function is to determine the true facts pertaining to the failure to prosecute apartheid era crimes.

⁶ See for example the submissions of the **Centre for the Study of Violence and Reconciliation (CSV)** who produced policy-orientated submissions and analyses about the TRC's remit and how NGOs should engage with it; the submissions of the **South African Council of Churches** who made reflective submissions about the TRC's role in reconciliation and the moral/pastoral responsibilities of churches; the submissions of the **Community Law Centre (UWC)**, **Development Action Group**, **Legal Resources Centre**, **Black Sash**, **Centre for Human Rights (Univ. of Pretoria)**, **NGO National Coalition**, **National Land Committee**, all of whom made thematic submissions focusing on economic and social rights, the question of reparations, media, public hearings and amnesty procedures etc.

15.1.2 *Second*, the HSF contends that there is a duty resting on the State to prosecute apartheid era crimes domestically, particularly the prosecution of crimes against humanity. Accordingly, when it exercises its functions, the Commission should be guided not only by its own Terms of Reference and Regulations, but by the international and domestic law obligations resting on South Africa (and the Commission itself as an agent of the Republic) to ensure that perpetrators of crimes against humanity are effectively investigated, prosecuted and punished.

15.1.3 *Third*, the HSF wishes to highlight for the Commission that a review of reconciliation processes in comparative foreign jurisdictions demonstrates that where truth and reconciliation processes have been conducted, these are most effective where perpetrators of crimes who are not granted amnesty are subject to investigation and prosecution. This comparative learning is relevant particularly in relation to the Commission's recommendations regarding whether any investigations or prosecutions should be instituted against persons who may have influenced or pressured members of the South African Police Services (**SAPS**) or National Prosecuting Authority (**NPA**) to stop investigating or prosecuting TRC cases, or in relation to members of the SAPS or NPA who may have colluded with or succumbed to such attempts; and the question

whether in terms of the law and fairness, the payment of any amount in constitutional damages to any person is appropriate.

16 Our submissions deal with these aspects in turn. We conclude with submissions as to the manner in which it is submitted that the Commission should exercise its mandate, including through the employment of its ‘coercive’ powers in order to give effect to this truth-seeking function.

PART A: THE RIGHT TO TRUTH

The right to truth under the Constitution

17 The right to truth emerges from a number of constitutional rights and values. These constitutional rights and values include:

17.1 The values of accountability and openness enshrined in section 1(d) of the Constitution.⁷

17.2 The right to dignity enshrined in section 10 of the Constitution.⁸ Denial of the truth in matters of public concern undermines the right to human dignity as it violates the moral agency of individuals in our society.

⁷ Section 1(d) of the Constitution provides that the Republic is required to have “a *multi-party system of democratic government, to ensure accountability, responsiveness and openness.*”

⁸ Section 10 of the Constitution provides that “[e]veryone has *inherent dignity and the right to have their dignity respected and protected.*”

17.3 The right to freedom of thought, opinion and belief enshrined in section 15 of the Constitution.⁹ Access to the truth in matters of public concern is essential for the full enjoyment of this right.

17.4 The interlinked rights to freedom of expression, political choice and assembly enshrined in sections 16, 17 and 19 of the Constitution.¹⁰ Access to the truth in matters of public concern is essential for the full enjoyment of these rights.

17.5 The right of access to information enshrined in section 32 of the Constitution,¹¹ which covers access to any information held by the State, and any information held by any person, provided it is needed for the exercise or protection of rights. Denial of the truth in matters of public concern undermines the right of access to information.

17.6 The right to an effective remedy for any infringement or threat to any right in the Bill of Rights enshrined in section 38 of the Constitution.¹² Access to

⁹ Section 15(1) of the Constitution provides that “[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.”

¹⁰ Section 19(1) of the Constitution provides:

“Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.”

¹¹ Section 32(1) of the Constitution provides everyone has the right of access to “any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights”. This right is given effect to by the Promotion of Access to Information Act 2 of 2000.

¹² In *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 at para 69, the Court said:

“Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an

the truth in cases of rights violations is essential for the enjoyment of the right to an effective remedy. Without access to the truth, it may be impossible to pursue any remedy for a rights violation.

18 Read together, these rights enshrine a right to truth in matters concerning serious human rights violations.

19 Our courts have repeatedly emphasised the importance of the truth within our constitutional democracy.

20 In ***The Citizen (1978) (Pty) Ltd and Others v Robert John McBride*** (CCT 23/10) [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC), the Court recognised that truth (including historical truth) is foundational to reconciliation and memory, and held, in relation to the TRC process, at para 60 that:

“That cannot be correct. The statute’s aim was national reconciliation, premised on full disclosure of the truth. It is hardly conceivable that its provisions could muzzle truth and render true statements about our history false. This Court in Du Toit found that amnesty was granted because ‘[t]ruth-telling is central to the development of a collective memory’. And the TRC saw its own role as central to the development of that collective memory. In its Report, its chairman, Archbishop DM Tutu, noted that the notion of letting bygones be bygones was inimical to the ethos of the

appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.”

transition, since ‘amnesia would have resulted in further victimisation of victims by denying their awful experiences. Further, “the past refuses to lie down quietly” and “has an uncanny habit of returning to haunt one.” Hence: “However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.” I agree.”

- 21 In ***Albutt v Centre for the Study of Violence and Reconciliation and Others*** (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC), the Constitutional Court emphasised the role of truth in giving victims a voice and providing the first step to reconciliation. It explained, at para 59:

“The participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation. In this regard, the TRC makes the following comment in its report: ‘In some cases . . . the Commission assisted in laying the foundation for reconciliation. Although truth does not necessarily lead to healing, it is often a first step towards reconciliation.’”

- 22 In South Africa, many of the true facts pertaining to apartheid-crimes that were committed remain hidden, either because the perpetrators did not disclose fully and truthfully before the TRC, or because they did not seek

amnesty at all. Even where it is clear that atrocious crimes were committed, whilst the SAPS and NPA could have secured access to the truth through the investigation and prosecution of apartheid era crimes, in the proceedings before the High Court giving rise to this Commission, the applicants have demonstrated that the truth was intentionally suppressed (or not pursued) with the consequence that the true facts remain hidden.¹³

23 This accords with the HSF's experience in post-apartheid South Africa. To this end, one of HSF's core missions is to end impunity for systematic criminal conduct destructive of a constitutional state — whether for state capture-related crimes or apartheid era atrocities.¹⁴

24 The HSF submits that the suppression of information, the failure to take steps to investigate, and the extreme delays in the prosecution of apartheid crimes goes against the right to truth, the right to an effective remedy, and the right (where appropriate) to reparations. It has resulted in a culture of impunity which is inconsistent with the foundational values of the Constitution in section 1(a) to (d). In the premises, when the Commission carries out its duties, it should do so in a manner which is consistent with the constitutional right to truth.

The right to truth under international law

25 The right to truth is also bolstered by a consideration of South Africa's international law obligations. Together they conduce to an important

¹³ *Calata and Others v President of the Republic of South Africa and Others* (Case No. 2025/5245).

¹⁴ See <https://hsf.org.za/about/about-hsf>.

principle: that failing to deal properly with historical injustice is an injustice in itself.

26 As found in *Glenister II*, “*Our Constitution appropriates [South Africa’s international law obligations] for itself, and draws [them] deeply into its heart, by requiring the state to fulfil it in the domestic sphere*”.¹⁵ This includes customary international law, which has “*a higher rank in the international hierarchy than treaty law*”.¹⁶

27 There is an emerging principle of customary international law that recognises a right to truth for serious human rights violations.¹⁷ While the contours of the right to truth under customary international law are still developing, a core of the right has crystallised.¹⁸ This is that States have an obligation to provide victims, those closely related to victims and the public with information about serious human rights violations.¹⁹ The customary norm thus also recognises the right to truth as a collective right held by the public.²⁰ And, importantly, commissions of inquiry are

¹⁵ *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011).

¹⁶ *Sonke Gender Justice NPC v President of the Republic of South Africa [2020] ZACC 26* at para 45; citing *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 63; citing *Prosecutor v Anto Furundžija*, IT-95-17/1-T, § 153, ICTY 1998. Section 232 of the Constitution provides that “*customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*”

¹⁷ The right to truth falls under the umbrella right to know. See Groome “Principle 2: The Inalienable Right to Truth” in Handleman and Unger (eds) *United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press, Oxford 2018) (“**Groome**”) at 59. See further Groome, “The Right to Truth in the Fight Against Impunity” (2011) 29 *Berkeley Journal of International Law* 175 available at <http://scholarship.law.berkeley.edu/bjil/vol29/iss1/5>.

¹⁸ Groome above at 59.

¹⁹ See Naqvi “The right to the truth in international law: fact or fiction?” (2006) *International Review of the Red Cross* Volume 88 Number 862 (“**Naqvi**”) at 260; and Groome *ibid* at 65.

²⁰ Naqvi *ibid*; and Groome *ibid*.

considered a key mechanism for fulfilment of the obligation to provide the public with the truth.

- 28 An explicit recognition of the right to truth is found in the United Nations Principles on Impunity²¹ (formulated in 1996) and the Updated Principles (updated in 2005).²² The UN Principles on Impunity identify an inalienable right to the truth.²³ This was affirmed in the Updated Principles in Principle 2, which says:

“Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.” (emphasis added).

- 29 Principle 2 explicitly recognises a collective right to truth held by the *public*, as distinguished from the right of victims to know the truth recognised in Principle 4. Moreover, Principle 5 of the Updated Principles provides that

²¹ Economic & Social Council (ECOSOC), Commission on Human Rights, The Administration of Justice and the Human Rights of Detainees, Annex 1 “Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” U.N. Doc. E/CN.4/Sub.2/1996/18 (June 29, 1996) (“**UN Principles on Impunity**”) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/141/42/PDF/G9714142.pdf?OpenElement>.

²² ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights: Impunity, Add. 1 “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” Principle 2, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (“**Updated Principles**”) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

²³ Principle 1 provides: “Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future.”

States must take effective measures to give effect to the right to truth. The same Principle specifies the use of commissions of inquiry to ascertain the truth in cases of massive or systemic human rights violations as an effective measure to give effect to the right to truth.

- 30 In a 2006 report on the right to truth, the Office of the UN High Commissioner for Human Rights,²⁴ concluded that:

“[T]he right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations.”

(our emphasis)

- 31 There are also a number of UN resolutions that propound the right to truth and call for its protection. In 2005, the General Assembly of the United Nations passed a resolution on the Basic Principles on the Right to Reparation for Victims.²⁵ The Resolution recognised a collective right to truth for human rights violations as a component part of the right to a remedy.²⁶

²⁴ Promotion and Protection of Human Rights: Study on the right to the truth. UN Doc E/CN.4/2006/91 (8 February 2006) (“**UN study on the right to truth**”) available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf?OpenElement>.

²⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147 (16 December 2005) (“**Basic Principles on the Right to Reparation for Victims**”) available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

²⁶ Ibid at paras 18, 22(b) and (e).

32 In 2009, the Human Rights Council adopted a resolution on the right to truth, in which the Council recognised “*the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights*” and encouraged States to “*consider establishing specific judicial mechanisms and, where appropriate, truth and reconciliation commissions to complement the justice system, in order to investigate and address gross violations of human rights*”.²⁷ In 2013, the General Assembly adopted a resolution containing identical terms.²⁸

32.1 In 2010, both the General Assembly and the Human Rights Council passed resolutions proclaiming an International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims.²⁹ And in 2011, the Human Rights Council passed a resolution establishing a Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence.³⁰

33 These international law and soft law sources provide important evidence of the development of a customary norm. The crystallisation of a customary norm recognising a right to truth is further supported by the

²⁷ Human Rights Council, Right to Truth, UN Doc A/HRC/12/L.27 (25 September 2009) at paras 1 and 4.

²⁸ General Assembly, Right to Truth, A/RES/68/165 (18 December 2013).

²⁹ General Assembly, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, A/RES/65/196 (21 December 2010); and Human Rights Council, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, A/HRC/RES/14/7 (17 June 2010).

³⁰ Human Rights Council, Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, UN Doc A/HRC/RES/18/7 (13 October 2011).

decisions of regional bodies and courts and by State practice at the national level.

34 At the regional level, the European Court of Human Rights has inferred a right to the truth as part of the prohibition against torture, the right to an effective remedy, and the right to an effective investigation.³¹ The African Commission on Human and Peoples' Rights has similarly inferred a right to truth as part of the right to an effective remedy.³²

35 The Inter-American Commission on Human Rights recognised a collective right to truth arising from the obligation to respect and ensure the enjoyment of the rights and freedoms recognised in the American Convention on Human Rights³³ and from the right to simple and prompt recourse for the protection of the rights enshrined in the Convention.³⁴ The Inter-American Commission has stated that “[e]very society has the *inalienable right to know the truth about past events, as well as the motives*

³¹ See Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94 at para 175, in which the ECtHR held that the authorities' failure to assist the applicant in establishing the truth about the whereabouts of her son violated the prohibition against torture enshrined in article 3 and the right to an effective remedy enshrined in article 13 of the *European Convention on Human Rights, 1950*; Judgment of 14 November 2000, *Tas v. Turkey*, Application No. 24396/94 at paras 88-92, in which the ECtHR held that the authorities failure to conduct an investigation into the disappearance of the applicant's son in custody had violated the right to an effective remedy and the right to an effective investigation in terms of article 5 (right to liberty and security) of the of the *European Convention on Human Rights, 1950*; and Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94).

³² African Commission on Human and Peoples' Rights "Principles and guidelines on the right to a fair trial and legal assistance in Africa" African Union Doc. DOC/OS(XXX)247, Principle C(b)(iii), available at https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf. Principle C(b)(iii) provides that the right to an effective remedy includes "access to the factual information concerning the violations".

³³ Organization of American States, American Convention on Human Rights, 22 November 1969.

³⁴ These rights are found in articles 1(1) and 25 of the American Convention on Human Rights. See Inter-American Commission, Report No. 1/99, of 27 January 1999, Case of Lucio Parada et al. v. El Salvador, at paras 148-158 available at <http://cidh.org/annualrep/98eng/Merits/EISalvador%2010480.htm>.

*and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future”.*³⁵ The Inter-American Court on Human Rights has also recognised a collective right to truth, stating that “[s]ociety has the right to know the truth regarding such crimes, so as to be capable of preventing them in the future.”³⁶

36 At the national level, an important indicator of the crystallisation of a customary norm is the establishment of truth commissions in numerous countries where systemic or mass human rights violations have been committed to uncover the truth. As Professor Groome, a leading authority on the right to truth confirms, the proliferation of truth commissions demonstrates the “*near universal value*” placed on truth-seeking in respect of serious human rights violations.³⁷ South Africa, of course, has been at the forefront of these developments, with the TRC providing a model for truth commissions throughout the world.

37 HSF submits that our Constitution’s commitment to truth-seeking is both confirmed and given deeper meaning by South Africa’s international law commitments to the right to truth as evidenced by the emerging principle of customary international law that recognises a right to truth for serious human rights violations. As outlined above, this is a collective right held by the public at large.

³⁵ Inter-American Commission on Human Rights, annual Report 1985-1986, OEA/SER.LV/II.68, Doc. 8 rev. 1, at 205 available at <http://www.cidh.oas.org/annualrep/85.86eng/toc.htm>.

³⁶ *Bámaca-Velásquez v. Guatemala* judgment of February 22, 2002 (Reparations and Costs) at para 77 available at https://www.corteidh.or.cr/docs/casos/articulos/Seriec_91_ing.pdf.

³⁷ Groome above n 17 at 64.

Truth-seeking as a core component of the TRC Act

38 The HSF submits that the Commission's mandate and role cannot be viewed in isolation. Rather it is an extension of, and aims to give effect to, the principles of *truth* and *reconciliation* that were established through the TRC process, and which culminated in the TRC's Report that envisaged accountability for gross human rights violations through prosecution where amnesty had not been sought or had been denied.³⁸ In circumstances where these prosecutions have not been pursued, the work of the TRC risks being undermined.

39 A core objective of the *Promotion of National Unity and Reconciliation Act*, 1995 (the **TRC Act**), which established the TRC, was to create a complete picture of the nature and extent of the gross human rights violations committed during apartheid. This objective indicates that truth-seeking was a core component of the TRC, and this component should be considered by the Commission in the discharge of its mandate to consider the steps taken by the SAPS and the NPA to pursue the perpetrators of apartheid-era crimes within the constitutional dispensation.

40 The final clause of the Interim Constitution lays the foundation for the establishment of the TRC as follows:

"In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences

³⁸ Truth and Reconciliation Commission of South Africa Report (29 October 1998) Volume 5, Chapter 8, p 309.

associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.” (emphasis added)

41 This mandate prompted Parliament to commence with a process of public consultation and legislative drafting, which led to the promulgation of the TRC Act in July 1995.

42 The former Minister of Justice, Mr Dullah Omar, described the intention behind the TRC Act, and the TRC to flow from it, in an interview in late 1994 as follows:

42.1.1 The intention of the Act would be to establish a TRC to enable South Africans to come to terms with their past. *“If the wounds of the past are to be healed, if a multiplicity of legal actions are to be refrained from, if future human rights violations are to be avoided, disclosure of the truth and its acknowledgement is essential”* (emphasis added); and

42.1.2 The tasks of the TRC would include investigating and establishing the truth about human rights violations and their acknowledgement. Gross violations of human rights must be fully and officially investigated with due regard to fair

procedures. There must be both knowledge and acknowledgement of the violations, and the events need to be officially recognised and publicly revealed.³⁹

43 Alex Boraine, who was known for proposing the TRC, as well as being its vice chair alongside Archbishop Desmond Tutu, stated at a conference on “Justice in transition: Dealing with the past”, in February 1994, that:

“To seek the truth is not of necessity an act of revenge, nor does it need to deteriorate into a witch-hunt. To know the truth is to counter the deceit, the cover-ups, which characterised much of oppression in South Africa. In this sense, truth is the beginning of reconciliation. To perpetuate the living of a lie, makes reconciliation impossible.”⁴⁰

(emphasis added)

44 Furthermore, civil society and policy fora at the time also located disclosure and public acknowledgment at the heart of the proposed commission’s mandate, advising that “*the whole question of “recovery of the truth” must have a central proactive and remedial role*”.⁴¹

³⁹ I Liebenberg, *The Truth and Reconciliation Commission of South Africa: context, future and some imponderables* (1996) 11 SAPR/PL p 133 – 134.

⁴⁰ A Boraine, J Levy and R Scheffer, *Dealing with the past: Truth and reconciliation in South Africa* (Cape Town, 1994) p 153.

⁴¹ G Simpson, “*Truth, Dare or Promise*”: *Civil society and the proposed commission on truth and reconciliation* (1994). Paper presented at the Centre for the Study of Violence and Reconciliation conference Making Ends Meet: Reconciliation and reconstruction in South Africa, World Trade Centre, Johannesburg, 18 August 1994.

45 This truth-seeking intention behind the TRC can be seen in the Preamble to the TRC Act which provides that,

“[I]t is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future” (emphasis added).

46 The Preamble thus recognises a dual purpose to the TRC, namely the establishment of the truth, followed by the publication of the truth that is exposed. This vindicates the public’s general right to know.

47 The objectives of the TRC, as set out in section 3 of the TRC Act include:

47.1 *“establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings.”*

47.2 *“facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act.”*

47.3 *“establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them.”*

(emphasis added)

48 This truth-seeking function was also recognised by the Constitutional Court in **AZAPO & Others v President of the Republic of South Africa & Others** where it was acknowledged that the incentive of amnesty for full disclosure was designed precisely to uncover the truth that would otherwise remain hidden and thereby to advance national unity and reconciliation.⁴²

49 The investigative and truth-seeking component of the TRC is important not only for the victims and their families to have closure, but for the general public to have their right to know vindicated.

50 Axiomatically, where perpetrators of apartheid-era crimes do not seek amnesty, or do not disclose truthfully and fully, that key objective is thwarted. That is itself an injustice. However, the injustice is perpetuated and aggravated where the SAPS and the NPA fail to take steps, which they are empowered and required to do in law, to investigate and

⁴² (CCT17/96) [1996] ZACC 16 para 17.

prosecute apartheid-era crimes. As a consequence, and given the absence of any viable civil law remedy, the truth is lost forever.

51 The SAPS and NPA's failure to prosecute individuals against whom an investigation has provided credible evidence of a violation, itself amounts to a violation of the 'right to truth' and the 'right to know' and constitutes a breach of the State's duty to prosecute violations of human rights. It also robs the victims or their families of access to an appropriate remedy and / or redress for such violations, and undermines the very truth-seeking function of the TRC.

52 Furthermore, the investigation and prosecution of apartheid-era crimes is a continuum of the role and objectives of the TRC and not a process that stands separate from it. The TRC's Final Report envisaged accountability for gross human rights violations through prosecution where amnesty had not been sought or had been denied, and undertook to make available to the appropriate authorities information within its possession concerning serious allegations. This is consistent with the TRC's function of establishing the truth.⁴³

The right to truth should inform and guide the Commission

53 Given the rights that we have summarised in this section, and the role of the truth in South Africa's constitutional dispensation, HSF submits that the lodestar of the Commission's work should be the establishment of the

⁴³ Truth and Reconciliation Commission of South Africa Report (29 October 1998) Volume 5, Chapter 8, p 309.

truth. This aim should guide the process followed by the Commission, the evidence gathered by the Commission and the exercise of the Commission's powers.

PART B: THE DUTY TO PROSECUTE CRIMES AGAINST HUMANITY

54 Apartheid is codified in the Rome Statute as a crime against humanity. The prohibition of apartheid has reached an elevated status under international law which attracts universal obligations, through both its recognition as a *jus cogens* norm, and a related obligation accruing to the international community (a norm *erga omnes*) in regard to racial discrimination generally.

55 There is a heightened obligation on the State (through its law enforcements agencies) to prosecute international law crimes and crimes against humanity (which include apartheid). This principle was firmly established by the Constitutional Court in ***National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another***⁴⁴ (**SAHRLC**). There, the Court set out the following guiding principles:

55.1 South Africa was the first African state to domesticate the Rome Statute into national legislation. This was done in terms of section 231(4) of the Constitution through the enactment of the *Implementation of the Rome Statute of the International Criminal Court Act, 2002 (ICC Act)*. The

⁴⁴ [2014] ZACC 30 (**SAHRLC**)

international crimes over which the International Criminal Court (ICC) exercises jurisdiction, including the crime against humanity of apartheid, are listed in schedule 1 to the ICC Act and have thus become statutory crimes in our domestic law.⁴⁵

55.2 The international crime of apartheid, even in the absence of binding international treaty law, require states to suppress such conduct because *“all states have an interest as they violate values that constitute the foundation of the world public order”*.⁴⁶

55.3 Moreover,

*“The purpose of the power to prosecute international crimes in South Africa is to ensure that the perpetrators of such crimes do not go unpunished. In order to achieve that purpose it is necessary for the National Director of Public Prosecutions to have the power not only to prosecute perpetrators before our Courts, but, to that end, to bring them before our Courts. This is also consistent with the constitutional requirement that the Implementation Act be construed in a way that gives effect to South Africa’s international law obligations and the spirit, purport and objects of the Bill of Rights.”*⁴⁷

56 It is noted that no one was prosecuted for the crime of apartheid while apartheid lasted in South Africa and there have been no prosecutions of

⁴⁵ SAHRLC at para 33.

⁴⁶ SAHRLC at para 37.

⁴⁷ Ibid, para 95

the leaders and/or agents of apartheid for the crime of apartheid. The HSF submits, for the reasons that follow, that this constitutes a violation of South Africa's international law obligations to prosecute the international crime of apartheid.

The obligation under international law to investigate, prosecute and punish the crime of apartheid

57 The Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 (**Apartheid Convention**) declares that apartheid is a crime against humanity and that "*inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination*" are international crimes (Article I).⁴⁸ Under the Apartheid Convention, international criminal responsibility applies to individuals, members of organisations and representatives of the State who commit, incite or conspire to commit the crime of apartheid.⁴⁹ It was considered that a special international criminal court be established to try the crime of apartheid. However, in the end it was left to individual States to enact legislation that would enable them to prosecute apartheid criminals on the basis of a form of universal jurisdiction utilising their domestic law enforcement mechanisms.⁵⁰

⁴⁸ John Dugard, "Convention on the Suppression and Punishment of the Crime of Apartheid", <https://legal.un.org/avl/pdf/ha/cspca/cspcae.pdf>. Apartheid Convention, article 1.

⁴⁹ Ibid. Apartheid Convention, article 3.

⁵⁰ Ibid. See articles 4 and 5 of the Apartheid Convention which allows State parties to prosecute non-nationals for a crime committed in the territory of a non-State party where the accused is physically within the jurisdiction of a State party.

58 Some of the constituent acts of apartheid are criminalised under the Apartheid Convention, namely murder (homicide), torture, arbitrary arrests of members of a racial group and legislative measures calculated to prevent a racial group from participation in the political, economic and cultural life of the country (Article II). Such acts particularly amount to the crime of apartheid when committed “*for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them*”.⁵¹ The Apartheid Convention further criminalises the deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part, exploitation of labour, including forced labour and persecution of organisations and persons who oppose apartheid.

59 The stated purpose of the Apartheid Convention is to provide a universal instrument that would make it “*possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid*” (see Articles IV and V). It was therefore intended to impose obligations on States Parties to adopt legislative measures to suppress, discourage and punish the crime of apartheid.⁵²

⁵¹ Du Plessis, ‘Apartheid’ in Elgar Encyclopedia of Crime and Criminal Justice (28 November 2024), <https://doi.org/10.4337/9781789902990.apartheid>.

⁵² *Ibid.*

60 Strangely, South Africa did not accede to the Apartheid Convention after apartheid was abandoned in South Africa. It was only on 14 May 2024 that South Africa acceded to this Convention.⁵³ However, it has been confirmed in *Mfalapitsa and Rorich v Minister of Justice* (regarding the killings of the COSAS 4), that apartheid was a crime under customary law at the relevant time (1982) and that such crimes, as a matter of South African and customary international law, do not prescribe.⁵⁴ They accordingly cover the period and the crimes that this Commission is considering under its mandate. This is an important development for the Commission's work, for multiple reasons:⁵⁵

60.1 First, the defendants, Thomedi Mfalapitsa and Christiaan Rorich, are the two perpetrators of the attack on the COSAS 4 still living; Jan Coetzee, Willem Schoon and Abraham Grobbelaar passed away in the long-delay between the amnesty hearings and the initiation of these proceedings. The importance of performing the Commission's work expeditiously is underlined by the difficulty of time affecting the possibility of justice and accountability for victims of apartheid. It also impacts on constitutional damages, as the HSF will highlight below.

⁵³ Dugard et al, *Dugard's International Law, a South African Perspective* (6th Ed), forthcoming, p. 258.

⁵⁴ *Mfalapitsa v Minister of Justice and Correctional Services* 2025 (1) SACR 482 (GJ).

⁵⁵ See further *Apartheid on Trial: The COSAS 4 Prosecution and the Direct Application of Customary International Law in South Africa*, Miles Jackson and Hannah Woolaver, EJIL:Talk! 1 May 2025, at <https://www.ejiltalk.org/apartheid-on-trial-the-cosas-4-prosecution-and-the-direct-application-of-customary-international-law-in-south-africa/> (portions of the analysis below are drawn from the piece by Jackson and Woolaver.

60.2 Second: the core objection of the accused (para. 25) was that these counts of crimes against humanity under customary international law did not fall within the exceptions from the 20-year prescription period set out in section 18 of the *Criminal Procedure Act*, 1977. Section 18(g) of that Act does exempt from prescription the crime of genocide, war crimes, and crimes against humanity under the ICC Act. But this was not the basis of the indictment, given that the ICC Act is prospective only. The charges were based instead on the direct application of customary international criminal law in terms of section 232 of the Constitution, which reads: ‘*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*’ On this basis, the accused argued that the offences had prescribed. In addition, the accused argued that the charges infringed the principle of legality, as protected under section 35(3)(l) of the Constitution.

60.3 The High Court rejected the accused’s objections, holding (para. 91): “*[T]he objection raised by the accused, based on the principle of legality as being a ground for the inability of the State to prosecute the accused for a crime against humanity of murder, read with s232 of the Constitution, is without merit and is dismissed. Furthermore, the contention that the State’s right to prosecute them for crimes against humanity under customary international law having lapsed is also without merit.*”

60.4 Third, the High Court’s decision is consistent with how the International Law Commission (the **ILC**) has viewed the prohibition of apartheid as a peremptory (*jus cogens*) norm of general international law. The ILC has

contended that the practice of apartheid would amount to “*a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being*”.⁵⁶ The ILC noted further that a general agreement is shared by States as to the peremptory character of the prohibition on apartheid and other norms at the Vienna Conference on the Law of Treaties and how apartheid has been prohibited by a treaty admitting of no exception.⁵⁷ It is also consistent with the position on prescription under international law of such crimes. As an example of this approach under international law, Article 29 of the Rome Statute of the ICC provides: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”

61 Accordingly, the prohibition on apartheid is widely considered to form part of customary international law and apartheid constitutes a “[f]lagrant violation of the purposes and principles of the [UN] Charter.”⁵⁸

⁵⁶ See Responsibility of States for Internationally Wrongful Acts 2001, read with commentary on article 40 in the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, *Yearbook of the International Law Commission* (2001) Vol. II, part two, pp. 112-113. See too the ILC’s work on Jus Cogens, GAOR, 74th session. Suppl.no 10 (A/74/10). <http://legal.un.org/ilc/reports/2019/english/Ch5pdf>.

⁵⁷ Ibid.

⁵⁸ [International Humanitarian Law Databases](#) (ICRC) (**‘ICRC Rules’**), Rule 88; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep, § 131.

The requirement for domestic prosecution of the crime of apartheid under international law

62 Despite its clear status as an international crime, the crime of apartheid has not been prosecuted at the international level.

63 As a result, HSF submits there is a heightened need to ensure that prosecution must be accomplished at the domestic level. A remedy in the present context would require South Africa to prosecute individuals within its jurisdiction, including government officials, who have committed a serious breach of one of international law's most sacred norms – the prohibition of apartheid.⁵⁹

64 Such prosecutions would contribute to making meaningful reparation for all the injury caused by apartheid's wrongful conduct, as the TRC recognised with respect to apartheid in South Africa.⁶⁰ That obligation is heightened given the absence of an effective international law remedy against the perpetrators of apartheid-era crimes.

⁵⁹ For a discussion of prosecution as a form of satisfaction, see Christina Hoss, "Satisfaction", *Max Planck Encyclopedia of Public International Law* (2011), paras. 18-19. In South Africa, see in particular Catherine Jenkins, "After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa" *South African Journal on Human Rights* (15), 3, pp 415-485.

⁶⁰ Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report* (29 October 1998), Volume 5, p. 309.

The heightened obligations on account of the fact that certain apartheid-era crimes are “continuing crimes”

65 A **continuing** international crime *“is a violation of a primary obligation targeting a potentially ongoing situation that has been committed and then maintained”*.⁶¹

66 Nissel employs the following, particularly relevant, analogy to distinguish between completed crimes and continuing crimes:⁶²

“To commit a continuing crime, the perpetrator must be in breach of a prohibition over a period of time. Enforced disappearance of persons, for example, takes time to commit - whether the disappearance is mere moments or endures for decades. Thus, if a perpetrator kidnaps a victim, murders that victim secretly without revealing any information, (at least) two crimes were committed at the same time. The instant the victim was murdered, the perpetrator committed the [completed] crime of murder; additionally, so long as the perpetrator does not release information about the victim’s whereabouts, the former is in continuing commission of the crime of enforced disappearance of persons.”

67 As this example suggests, the crime of ‘enforced disappearance’ is the archetypal continuing crime. It involves not only the initial act of abducting,

⁶¹ Alan Nissel, ‘Continuing Crimes in the Rome Statute’, 25 *Michigan Journal of International Law* (2004) 653, 661.

⁶² *Ibid.*

arresting or detaining a victim, rather, its defining feature is the continuing “*refusal to acknowledge that deprivation of freedom or give information on the fate or whereabouts*” of the victim.⁶³

68 The continuing nature of ‘enforced disappearances’, and their devastating impact on both victims and their families, has been recognised by a number of international legal instruments, foreign courts and international human rights bodies.

68.1 In Article 17(1) of the 1992 Declaration on Enforced Disappearances, ‘enforced disappearances’ is “*considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified*”.

68.2 Article III of the Inter-American Convention on Forced Disappearance of Persons, states that the crime of ‘enforced disappearance’ “*shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined*”.

68.3 The 2006 International Convention on the Protection of All Persons from Enforced Disappearances takes note of the offence’s ‘continuous nature’ (Article 8 and 24) in considering the issue of statutes of limitations.

69 Given that the crimes committed under apartheid included continuing crimes such as ‘enforced disappearances’ — the truth of which have never been revealed — HSF submits that the obligations on the SAPS and the

⁶³ Schedule 1, Part 2, Paragraph 2(i), *Rome Statute Act* and Article 7(2)(i), *Rome Statute*

NPA in this regard are especially heightened, including in respect of constitutional damages. The HSF considers these in turn below.

The duties on the SAPS

70 SAPS's constitutional duties are outlined in section 205(3) of the Constitution which provides that:

“The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.”

71 In ***Glenister v President of the Republic of South Africa and Others***⁶⁴, the court held that *“it is equally clear that the national police service, amongst other security services, shoulders the duty to prevent, combat and investigate crime”*.

72 Section 16(1) of the *South African Police Service Act, 1995* (the **SAPS Act**) refers to crimes listed in section 16(2)(iA) that identifies national priority offences as the *“commission of any alleged offence mentioned in the Schedule”*. Item 4 of the schedule to the SAPS Act states that a national priority offence includes *“any offence referred to in Schedule 1 to the [ICC Act]”*. Item 1(f) of part 2 of schedule 1 to the ICC Act includes the crime against humanity of apartheid as a national priority offence that requires national prevention or investigation.⁶⁵

⁶⁴ [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

⁶⁵ SAHRLC at para 54.

73 The statutory designation of international crimes under the SAPS Act domesticated into our law by the ICC Act required the SAPS to prioritise these types of crimes and indeed imposes a duty on it to do so.⁶⁶

74 Therefore, SAPS has a duty to investigate crimes against humanity. That duty arises from the Constitution read with the ICC Act, which must be interpreted in relation to international law.⁶⁷

75 HSF submits that the findings of the Constitutional Court in *SAHRLC* create a duty on the SAPS to take steps to investigate apartheid crimes.

The duties on the NPA

76 In relation to the obligations on the NPA, section 179 of the Constitution establishes a single national prosecuting authority with the power to institute criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting criminal proceedings.⁶⁸ National legislation must be enacted to ensure that these functions are exercised without “*fear, favour or prejudice*”.⁶⁹

77 The national legislation in question is the *National Prosecuting Authority Act, 1998 (NPA Act)*. Considered holistically, the NPA Act obliges the prosecuting authority to prosecute crimes, including crimes against humanity. This is consistent with the principles set out above.

⁶⁶ *SAHRLC* at para 57.

⁶⁷ *SAHRLC* at para 55.

⁶⁸ Constitution, section 179(2)

⁶⁹ Constitution, section 179(4)

- 78 The failure by the State to investigate (through the SAPS) or to prosecute (through the NPA) is accordingly inconsistent with the Constitution, the NPA Act, as well as South Africa's international law obligations as domesticated by the ICC Act.
- 79 The important role which retrospective investigations play in preventing future violations has been recognised in United Nations Resolutions, such as that mandating the *Special Rapporteur on Summary Execution*, which reiterated that all "*States have an obligation to conduct exhaustive and impartial investigations... to identify and to bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity and to prevent recurrence of such executions*".⁷⁰

Constitutional damages

- 80 Aside from the duties upon the NPA and the SAPS discussed above, the HSF submits that there is a further important component of the Commission's work that flows from the nature of the crimes in question. The Commission's Terms of Reference in paragraph 1.4 say that the

⁷⁰ Human Rights Council Resolution 26/12 [HRC/res/26/12] (11 July 2014); See also: National Commissions of Inquiry in Africa; *Vehicles to Pursue Accountability for Violations of the Right to Life?* by Thomas Probert and Christof Heyns; Pretoria University Law Press 2020 at page 21.

Commission must determine “*whether, in terms of the law and fairness, the payment of any amount in constitutional damages to any person is appropriate*”.

81 Given the nature of apartheid as a crime attaining a *jus cogens* status, in light of the continuing nature of its predicate components (such as enforced disappearances), and due to the years-long failures to provide truth or accountability for such crimes, the HSF submits that the State (either in its own name, or through the SAPS or the NPA), should be liable for constitutional damages to those victims of apartheid who have been failed by the government’s inaction.

82 Such constitutional damages are particularly appropriate given the delays by the State in taking appropriate action, which has bedevilled the opportunity for justice to be achieved by way of timely prosecutions. As the discussion of the COSAS 4 case shows, the defendants, Thhomedi Mfalapitsa and Christiaan Rorich, are the two perpetrators of the attack on the COSAS 4 still living; Jan Coetzee, Willem Schoon and Abraham Grobbelaar passed away in the long-delay between the amnesty hearings and the initiation of the criminal proceedings.

83 The importance of performing the Commission’s work expeditiously is thus one component of the delay. But another is also underlined by the difficulty of time affecting the possibility of justice and accountability for victims of apartheid; that is, that victims who have suffered the double indignity of being subject to apartheid crimes and then not receiving prosecutions,

truth or accountability timeously, should be considered prime candidates for constitutional damages by the State that has failed them.

84 From this perspective, international criminal justice, as advanced by the Commission, clearly overlaps with transitional justice, which comprises

*“the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”*⁷¹ .

85 Constitutional damages would be a fair and just – and in certain cases, where the delays have scuppered the chance for prosecutions, the only – form of reparations available to victims.

PART C: LEARNINGS FROM COMPARATIVE JURISDICTIONS

86 It is submitted that the Commission ought to take into account comparative state practices in relation to the conduct of truth commissions, which can provide valuable learning and guidance in the South African context.

⁷¹ United Nations Security Council, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, Report of the Secretary-General, August, 24 2004, U.N. Doc. S/2004/616.

87 In this regard, section 39(1)(c) of the Constitution provides that when interpreting the Bill of Rights, a court “*may consider foreign law*”.

88 In ***S v Makwanyane*** Justice Chaskalson commented that “*the international and foreign authorities are of value [to the judges] because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue*”.⁷² Along these lines, it is valuable for the Commission to consider how foreign authorities have dealt with the complex issue of addressing gross, systemic human rights violations.

89 Comparative practice demonstrates that commissions of inquiry may serve various purposes, including uncovering the truth, promoting national reconciliation, and fostering accountability for past crimes. In addition, they provide vital evidence that supports prosecution, whether through national or international courts.

90 The following commissions set up in foreign jurisdictions provide examples of where commissions, in the continuum of truth-seeking, have recommended prosecutions:

90.1 The International Criminal Tribunal for Rwanda (ICTR),⁷³ 1994-2015: Following the 1994 genocide, Rwanda established commissions to investigate the atrocities. The ICTR, supported by the United Nations, was

⁷² [1995] ZACC 3; 1995 3 SA 391 (CC) para 34.

⁷³ See ICTR Website: <https://unictr.irmct.org/>.

created to prosecute those responsible for the genocide. The ICTR convicted numerous individuals involved in planning, executing, and inciting the genocide, including high-ranking officials. In addition to the ICTR, Rwanda's national courts also pursued prosecutions of genocide perpetrators. This approach demonstrates that truth-seeking and prosecutions can operate in tandem.

90.2 The Truth and Reconciliation Commission in Sierra Leone, 2002-2004:

Following the end of the civil war, a Truth and Reconciliation Commission was established in Sierra Leone to investigate war crimes and human rights violations committed during the conflict. The Report of the TRC led to the establishment of the Special Court for Sierra Leone⁷⁴ which prosecuted individuals responsible for atrocities. The TRC's report provided historical context, evidence of violations and recommendations, while the Special Court ensured individual accountability.

90.3 Following the end of the Pinochet dictatorship, Chile created the National

Commission on Truth and Reconciliation to investigate human rights violations committed under the regime. The commission investigated 2 920 cases over a period of nine months and compiled a report.⁷⁵ Individual perpetrators were not named in the report, however, dossiers were given to civil authorities in some cases, which provided important evidence that

⁷⁴ See Special Court for Sierra Leone Website: <http://www.rscsl.org/>

⁷⁵ The Commission's findings, known as the "Rettig Report" after its Chairperson, are available here: <https://www.usip.org/publications/1990/05/truth-commission-chile-90>.

led to the prosecution of several former officials and military officers responsible for torture, extrajudicial killings, and other abuses during the dictatorship.⁷⁶

90.4 Liberia's Truth and Reconciliation Commission, 2006-2009,⁷⁷ investigated atrocities committed during its civil war, and recommended the creation of an extraordinary criminal court "*to adjudicate criminal responsibility for individuals, armed groups and other entities that the TRC determines were responsible for 'egregious' domestic crimes, 'gross' violations of human rights and 'serious' humanitarian law violations*".⁷⁸ Although the implementation of this recommendation has been delayed, current efforts to establish a war crimes court to address accountability for civil war-era crimes, underscores the enduring public expectation that there should be individual accountability through prosecution.⁷⁹

90.5 Guatemala established the Commission for Historical Clarification (1997-1999) to investigate violations of human rights during its civil war (1960–1996). Although the commission was not permitted to attribute individual responsibility for violations, the findings of the commission⁸⁰ have played

⁷⁶ I Liebenberg, *The Truth and Reconciliation Commission of South Africa: context, future and some imponderables* (1996) 11 SAPR/PL p 143.

⁷⁷ See <https://www.amnesty.org/fr/wp-content/uploads/2021/08/afr340072006en.pdf>.

⁷⁸ Final Report of the Truth and Reconciliation Commission of Liberia p 76. Available here: <https://trcofliberia.org/resources/reports/final/trc-final-report-volume-1-full.pdf>.

⁷⁹ Human Rights Watch, Liberia: Renew Mandate to Establish War Crimes Court (28 April 2025). Available here: <https://www.hrw.org/news/2025/04/28/liberia-renew-mandate-establish-war-crimes-court>.

⁸⁰ See <https://www.cev.org.co/>.

a significant role in the subsequent prosecution of individuals responsible for war crimes and genocide, including the genocide of the Maya people by the Guatemalan military. For example, former dictator Jose Efraim Rios Montt was put on trial for genocide and crimes against humanity in 2013 based on the findings of the report.⁸¹

90.6 Most recently, as part of Columbia's Peace Process, the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP) issued its first convictions on September 16 and 18, 2025. The JEP forms part, alongside other bodies, of the Comprehensive System for Truth, Justice, Reparation, and Non-Repetition (*Sistema Integral de Verdad, Justicia, Reparación y No Repetición*, SIVJRNR) — a transitional justice framework established by the 2016 Peace Agreement between the government and the Revolutionary Armed Forces of Colombia (FARC-EP) and later incorporated into the country's Constitution. These convictions were eagerly awaited by the public, by stakeholders, and more broadly by all those who are concerned with transitional justice around the world.⁸²

91 There are also examples of commissions which were set up to establish the truth behind gross human rights violations but failed to lead to prosecutions, resulting in widespread dissatisfaction amongst citizens:

⁸¹ International Center for Transitional Justice, *Challenging the Conventional: Case Studies – Guatemala*. Available here: <https://www.ictj.org/sites/default/files/subsites/challenging-conventional-truth-commissions-peace/guatemala.html#01/5>

⁸² See *Colombia's Peace Process: an unprecedented tribunal hands down its first convictions*, Elie Tassel-Maurizi and Mateo Merchán Duque, 9 October 2025 EJIL:Talk! <https://www.ejiltalk.org/colombias-peace-process-an-unprecedented-tribunal-hands-down-its-first-convictions/>

91.1 In Uruguay the ‘Investigative commission on the situation of the “disappeared” people and its causes’ was established in 1985, following eleven years of military rule marked by widespread torture and arbitrary imprisonment.⁸³

91.1.1 The commission reported on 164 disappearances during the years of military rule and provided ample evidence for military involvement in the process of repression. However, the report was not made widely known and made no undertakings to safeguard human rights or officially investigate abuses afterwards.

91.1.2 Furthermore, shortly after the commission’s hearings a law declaring the expiration of the state’s punitive authority was passed, which amounted to full amnesty for perpetrators of human rights abuses.

91.1.3 This gave rise to widespread dissatisfaction amongst the Uruguayan population and illustrates that a commission’s recommendations for prosecution, and the state’s proactive response to these recommendations, can be of vital importance in mending a nation.

⁸³ I Liebenberg, *The Truth and Reconciliation Commission of South Africa: context, future and some imponderables* (1996)

11 SAPR/PL p 140 & 141.

91.2 In Argentina, the National Commission on the Disappearance of Persons (CONADEP) (1983–1984) was established after the end of Argentina’s “*Dirty War*” which involved forced disappearances, torture and executions.

91.2.1 The Argentine government created CONADEP to investigate violations of human rights and to expose the organisation and methods of the Argentinian security forces during the period of oppression.

91.2.2 The result of these investigations was the “Never Again” report, which was forwarded to President Alfonsín in 1984, together with the names of 1 300 military officers implicated by testimonies received and research done by the commission.

91.2.3 Subsequently, hundreds of prosecutions were initiated, which raised high hopes for victims, their families and NGOs. However, strong resistance from the military resulted in an end to the trials of human-rights abusers who had been identified in the report.

91.2.4 As time passed, the implicated officers closed ranks and the new democratic government turned to other issues.

91.2.5 The commission was successful in unearthing and exposing human rights violations but ultimately failed to deal with the

perpetrators of human rights abuses and provide restitution for victims.⁸⁴

92 These comparative examples demonstrate that it is not only feasible but frequently considered best practice for commissions to recommend prosecutions in appropriate circumstances.

93 In countries where truth-seeking commissions recommended prosecution, and this recommendation was implemented by the state, nations were in a better position to reconcile and move forward, whereas in countries such as Uruguay and Argentina, the truth-seeking and reconciliation process remained incomplete where prosecutions did not ensue from the commissions' findings.

CONCLUDING SUBMISSIONS

The purpose of this Commission is truth-seeking and justice-serving

94 The purpose of a commission of inquiry is not only to advise and inform the President,⁸⁵ but, as found in ***State Capture Commission v Zuma***,⁸⁶

“... a commission of inquiry may also serve the purpose of holding a public inquiry in respect of a matter of public concern. The purpose

⁸⁴ I Liebenberg, *The Truth and Reconciliation Commission of South Africa: context, future and some imponderables* (1996) 11 SAPR/PL p 138 - 140.

⁸⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (**SARFU III**).

⁸⁶ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* (CCT 295/20) [2021] ZACC 2; 2021 (5) BCLR 542 (CC); 2021 (5) SA 1 (CC) (**State Capture Commission**).

of a public hearing under those circumstances is to restore public confidence in the institution in which the matter that caused concern arose. Here, the focus is not what the President decides to do with the findings and recommendations of a particular commission. Instead, the objective is to reveal the truth to the public pertaining to the matter that gave rise to public concern."⁸⁷ (our emphasis)

95 One of the primary functions of a public commission of inquiry is fact-finding. They are convened in order to uncover the truth. In ***Minister of Police v Premier of the Western Cape***,⁸⁸ the Constitutional Court held that in addition to advising the executive, a commission of inquiry serves this deeper public purpose, particularly at times of "*widespread disquiet and discontent*".⁸⁹

96 The Canadian Supreme Court has held that commissions of inquiry are, "*often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover 'the truth'*" and that "*the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent*

⁸⁷ Ibid para 5.

⁸⁸ Minister of Police and Others v Premier of the Western Cape and Others (CCT 13/13) [2013] ZACC 33 (**Minister of Police**).

⁸⁹ Ibid at 45.

*means of informing and educating concerned members of the public.*⁹⁰ (emphasis added)

97 This Commission has been established to deal with similar concerns in circumstances where the public has lost faith in the ability or intent of the SAPS and NPA to complete the unfinished business of the TRC by expeditiously conducting investigations of apartheid-era crimes and prosecuting offenders where necessary, or stipulating for constitutional damages where prosecutions prove impossible or unrealistic.

The lawful exercise of the Commission's powers and the need for the exercise of those powers in the Commission's fulfilment of its mandate

98 Commissions of inquiry appointed by the President in terms of section 84(2)(f) of the Constitution do not automatically have coercive powers, as these are generally reserved for the court.⁹¹

99 However, in ***State Capture Commission***, the Constitutional Court confirmed that where a commission is intended to address 'a matter of public concern'⁹² it is necessary for the commission to exercise coercive powers such as being able to compel witnesses to testify or to produce documentary evidence.⁹³ This is provided for by section 3 of the Commissions Act which vests commissions with the powers equal to those

⁹⁰ *Phillips v Nova Scotia* [1995] 2 SCR 97 at 137-8. Cited with approval in *Minister of Police* at 45.

⁹¹ *SARFU III* at 176; *Minister of Police* at 46.

⁹² Section 1(1) of the Commissions Act.

⁹³ *State Capture Commission* at 6.

enjoyed by the High Court.⁹⁴ Section 6 of the Commissions Act prescribes criminal sanctions for those who fail to comply with summonses issued by the commission.⁹⁵

100 The determination of whether a commission's investigation constitutes a 'matter of public concern' is an objective determination, taking into account the spirit, purport and objects of the Bill of Rights. It requires not only a public interest in the subject matter, but a public concern.⁹⁶

101 Moreover,

*"The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern."*⁹⁷ (emphasis added)

102 The Commission's terms of reference clearly envisage the investigation of matters of public concern, *inter alia*, whether members of the SAPS and NPA colluded in efforts not to prosecute apartheid-era crimes and whether

⁹⁴ Ibid at 11.

⁹⁵ Ibid at 14.

⁹⁶ *SARFU III* at 171.

⁹⁷ Ibid.

outside forces, including very senior politicians, sought to suppress the prosecution of apartheid-era crimes.

103 First, they are matters in which the general public (as opposed to those persons and institutions directly engaged by apartheid-era crimes) has an interest. Secondly, they are matters over which the public would hold a concern. This is so because any attempt to unduly influence the operations of, particularly, the NPA would constitute a grave matter of public concern.⁹⁸ They further involve the investigation and prosecution of international crimes, including that of apartheid, and which by definition is not only in the public interest of South Africa, but – by virtue of the crime’s prohibition having attained the status of a peremptory norm – is also a matter of international concern.

104 Accordingly, the HSF submits that this Commission does lawfully exercise the coercive powers afforded to it by the Commissions Act and as are set out in the Regulations and Rules.

105 The Regulations and Rules set out the Commission’s coercive powers, *inter alia*:

105.1 The obligation to answer questions posed at the Commission (save for matters of privilege);⁹⁹

⁹⁸ *Glenister II* at 197.

⁹⁹ Regulation 8.

105.2 The Commission's powers of search and seizure;¹⁰⁰

105.3 The Commission's power to summons persons;¹⁰¹ and

105.4 The Commission's power to summons the production of documents.¹⁰²

106 The Constitutional Court found in **State Capture Commission**, that a witness called to a commission of inquiry may not invoke the constitutional¹⁰³ or common law right to remain silent.¹⁰⁴

107 The importance of this cannot be under emphasised as the Constitutional Court noted in **Magidwana**,¹⁰⁵

"It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission's search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who

¹⁰⁰ Regulation 10.

¹⁰¹ Rule 7.

¹⁰² Rule 10.

¹⁰³ Section 35(1) and (3) of the Constitution.

¹⁰⁴ *State Capture Commission* at 90-93.

¹⁰⁵ *Magidwana v President of the Republic of South Africa (Black Lawyers Association Amicus Curiae)* [2013] ZACC 27.

*should be heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised.*¹⁰⁶

(emphasis added)

108 This much was affirmed in **SARFU III**, namely,

*“A person who is served with a subpoena is required to give evidence and to produce documents in relation to the terms of reference of the commission to the satisfaction of the commission”.*¹⁰⁷

The importance of the Commission exercising its powers

109 As noted above, the central purpose of the TRC Act is a truth-seeking one.

It is however equally true, the HSF submits, that the work of the TRC did not finish on the publication of its final report on 29 October 1998, but extends into the investigation of apartheid era crimes referred to the NPA by the TRC and to the prospection of the perpetrators of those crimes.

110 The SAPS¹⁰⁸ and the NPA¹⁰⁹ are the bodies that are constitutionally mandated to carry on these post-TRC functions, and hence the ongoing truth-seeking exercise. They constitute discrete and independent institutions.¹¹⁰

¹⁰⁶ Ibid at 15.

¹⁰⁷ *SARFU III* at 185.

¹⁰⁸ Section 205 of the Constitution.

¹⁰⁹ Section 179 of the Constitution.

¹¹⁰ *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6.

- 111 Accordingly, any failure to perform that obligation constitutes a dereliction of the duties of the SAPS and the NPA, more so where the failure to perform these obligations is as a result of deliberate attempts to cease the investigation or prosecution of apartheid-era crimes.
- 112 The HSF emphasises the important role to be played by the establishment of this Commission as a means of vindicating the right to truth as an effective remedy for persons that are still awaiting information on the deaths and/or disappearances of their loved ones, as well as the public at large. This right cannot be progressed without a full and independent accounting as to any failings made by the SAPS and NPA, as well as any unlawful and constitutional interference that other parties might have brought to bear upon the decision-making processes of the SAPS and NPA.
- 113 It is for the applicants to make their case for the calling of those whose conduct they impugned in the proceedings before the High Court giving rise to this Commission.¹¹¹ The HSF makes a different principled point: it urges the Commission, in the exercise of its mandate and in pursuance of the truth that, to call on those who may be responsible for the failure of the investigation and prosecution of apartheid-era crimes to give evidence before it, and to account for these failures.

¹¹¹ *L B M Calata and 22 Others v the Government of the Republic of South Africa and 5 Others* (case number 2025-005245).

- 114 Whoever is called or volunteers to give evidence regarding any alleged involvement in the suppression of apartheid-era prosecutions, should also be compelled to make available all relevant documents.
- 115 And the Commission should further – in the discharge of its mandate to determine whether any person should be provided constitutional damages – consider which victims have been failed by the State’s failures, particularly those who are no longer likely to receive justice in the form of prosecutions given the intolerable delays by the State.
- 116 In this regard, the HSF highlights that the Constitutional Court has held that constitutional damages may be appropriate where other remedies (delictual damages, execution of orders, structural relief, contempt, etc.) are unavailable or inadequate, and where the award is supported by evidence of loss and is appropriate in the public-interest calculus.¹¹²
- 117 It is only through full and comprehensive disclosure by implicated individuals (including, where necessary through the exercise of the Commission’s coercive powers) that this assessment can be conducted, the deceit and cover-ups of the last 30 years can be countered, the truth will be revealed, and the beginning of reconciliation achieved.¹¹³ And to the extent that the truth is revealed, but it turns out that the process of

¹¹² *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* (CCT 157/20) [2021] ZACC 45; 2022 (8) BCLR 985 (CC) (7 December 2021).

¹¹³ A Boraine, J Levy and R Scheffer, *Dealing with the past; Truth and reconciliation in South Africa* (Cape Town, 1994) p 153.

uncovering has been so delayed that prosecutions are compromised, then the Commission's powers (under paragraph 1.4 of its mandate) to issue recommendations regarding constitutional damages, is a clearly critical feature of restorative justice.

Request for opportunity to make oral submission

118 The HSF extends its gratitude to the Commission for the opportunity to make these submission. It requests that, in addition to these submissions, it is afforded an opportunity to make oral submissions to the Commission in relation to the aforementioned issues at the appropriate juncture.