IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 76755 / 18

in the matter between:

JOAO RODRIGUES	Applicant
and	
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
MINISTER OF POLICE	Third Respondent
IMTIAZ AHMED CAJEE	Fourth Respondent
YASMIN SOOKA	First *Amicus Curiae*
DUMISA BUHLE NTSEBEZA	Second *Amicus Curiae*
MARY BURTON	Third *Amicus Curiae*
WENDY ORR	Fourth *Amicus Curiae*
GLENDA WILDSCHUT	Fifth *Amicus Curiae*
FAZEL RANDERA	Sixth *Amicus Curiae*
SOUTHERN AFRICAN LITIGATION CENTRE	Seventh *Amicus Curiae*
PAN AFRICAN BAR OF SOUTH AFRICA	Eighth *Amicus Curiae*

FORMER TRC COMMISSIONERS' HEADS OF ARGUMENT

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INTRODUCTION AND OVERVIEW

1 In 1971, Ahmed Timol was arrested, interrogated, tortured and murdered. His killers, and those who covered for them, made his death look like a suicide.

2 Until recently, Timol's case was treated by the National Prosecuting Authority in precisely the same manner as hundreds of other apartheid-era crimes: it was simply never prosecuted. It has been confirmed in these proceedings that the primary reason for the lack of prosecution was direct political interference by the executive in the prosecutorial decision-making of the NPA.

3 In 2017, the inquest into the death of Ahmed Timol confirmed what many knew to be true: that he did not kill himself, but was brutally murdered.

4 The applicant, Mr Joao Rodrigues, has been charged with Timol's pre-meditated murder.

5 In these proceedings, Mr Rodrigues seeks a permanent stay of prosecution. That is, on the basis of the prejudice he claims he will suffer if a prosecution proceeds, he seeks the radical remedy of aborting the proceedings once and for all.

6 These submissions have been prepared on behalf of six former Commissioners of the Truth and Reconciliation Commission: Yasmin Sooka; Dumisa Ntsebeza; Mary Burton; Wendy Orr; Glenda Wildschut; and Fazel Randera. They act not only in their own capacities as former Commissioners of the TRC, but also on behalf of their fellow former Commissioners, Richard Lyster, Rev Bongani Finca,

Denzil Potgieter SC and Archbishop Emeritus Desmond Mpilo Tutu (collectively, "**the Former TRC Commissioners**").

7 The Former TRC Commissioners have sought admission as *amici curiae*. Their admission has not been opposed by any of the parties.

8 The Former TRC Commissioners bring a unique perspective to bear on these proceedings. Each of them has specialist expertise and experience in matters related to reconciliation and the appropriate treatment of crimes committed under apartheid. Their interest in these proceedings is in upholding the rule of law and giving full effect to the project of constitutionalism and reconciliation.[1]

9 In these heads of argument, we address the following issues in turn:

9.1 First, we detail the TRC's vision of a bold prosecutorial policy in respect of those that did not seek or were not granted amnesty, and the unfortunate absence of prosecutions over the last 20 years. Our submission on this score is that this Court should be slow to stand in the way of the NPA seeking to remedy its past shortcomings, in circumstances where doing so is imperative to the project of reconciliation and constitutionalism and critical to give effect to the manifest intentions of the TRC.

9.2 Second, we submit that the rule of law requires the prosecution of apartheid-era crimes.

[1] Former TRC Commissioners' founding affidavit, para 16.2.

9.3 Third, we show why this Court should not draw the inference that Mr Rodrigues was granted amnesty pursuant to a subsequent amnesty process, as he asks the Court to do.

9.4 Fourth, we demonstrate, with reference to domestic and foreign examples, that old age and infirmity do not constitute a bar to prosecution. To the extent that these factors are to be taken into account, it is at the sentencing stage.

9.5 Fifth, we illustrate that the prosecution of apartheid-era crimes is consistent with South Africa's international law obligations.

THE NEED FOR A BOLD PROSECUTION POLICY

The TRC's vision of a bold prosecution policy

10 The epilogue to the Interim Constitution spoke of an—

> "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

11 In order to advance reconciliation and reconstruction, the epilogue also provided the basis for the TRC, by requiring that amnesty be granted, in terms of an Act of Parliament, for the politically-motivated crimes of the past.

12 The TRC was established by section 2 of the Promotion of National Unity and Reconciliation Act 34 of 1995 (the "**TRC Act**").

13 The TRC Act set out the TRC's objectives, functions, and powers. These were directed, most importantly, at using fact-finding and public disclosure as means by which to "*promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past*."[2] The TRC was thus tasked with "*establishing as complete a picture as possible of the causes, nature and extent of the gross violations human rights*";[3] facilitating amnesty for those "*who make full disclosure of the relevant facts*";[4] and "*establishing and making known the fate and whereabouts of victims*".[5]

14 Section 20 of the TRC Act provided for the granting of amnesty. In terms of section 20(1):

> "(1) If the Committee, after considering an application for amnesty, is satisfied that-
>
> (a) the application complies with the requirements of this Act;
>
> (b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3);[6] and
>
> (c) the applicant has made a full disclosure of all relevant facts,
>
> it shall grant amnesty in respect of that act, omission or offence.

15 Thus, there were effectively two categories of perpetrators who did <u>not</u> obtain

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2 Section 3.

3 Section 3(1)(a).

4 Section 3(1)(b).

5 Section 3(1)(c).

6 Subsections (2) and (3) of section 20 set out the statutory basis for determining whether the act or omission is an "act with a political objective". Subsection (2) describes acts by a range of persons, including, amongst others, members or supporters of political organisations or liberation movements engaged in furthering a political struggle, and employees of the State engaged in countering political struggle. Subsection (3) describes criteria according to which it must be adjudged whether an act is associated with a political objective, including motive, the context of the commission of the act, its legal and factual nature, its objective, its proportionality in relation to the objective and whether it was ordered by an organization or institution.

amnesty:

15.1 those who should have applied but did not (such as Mr Rodrigues); and

15.2 those who applied, but in the view of the Amnesty Committee, had not met the above requirements and were refused amnesty.

16 The condition of full disclosure was at the heart of the amnesty process. It achieved important ends. It created a public accounting of transgressions, in which perpetrators were identified, the facts regarding their crimes revealed and explained, and a sense of closure provided to many families of victims. It was part of the country's collective healing and reconciliation process.

17 But where amnesty was not sought, or was sought and not granted, prosecution was supposed to follow. In these cases, victims and their families did not receive the consolation of full disclosure. They were entitled, therefore, to see perpetrators face the full consequences of the law. Put differently, the entire *premise* of amnesty, and the compromises it required of victims and their families, was that a bold prosecution policy would follow.

18 The amnesty process thus entailed a careful balancing of rights and interests. Indeed, the Constitutional Court in *AZAPO* recognised that "*amnesty undoubtedly impacts upon very fundamental rights*".[7] Perpetrators were given an opportunity to escape criminal and civil liability, provided they came forward,

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[7] *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others* 1996 (4) SA 671 (CC) para 9.

"*came face to face with his or her conscience*"[8] and made a full disclosure. While victims and their families had no choice but to accept this, their consolation was public acknowledgement, full disclosure, and a sense of closure; that is, "*to hear the truth about the motives of the act and circumstances surrounding their suffering*".[9]

19 South Africa was out of step with truth commissions in many other parts of the world in granting amnesty. In various Latin American jurisdictions, truth commissions specifically collected evidence for use in future prosecutions. For example, in Argentina, the National Commission on the Disappearance of Persons[10] was established in 1983 to investigate forced disappearances and other human rights violations committed by the military dictatorship between 1976 and 1983. The final report[11] recorded the forced disappearance of nearly 9 000 people. It did not offer amnesty to perpetrators. On the contrary, it collected essential legal evidence necessary for the prosecution of perpetrators which was then used in the conviction of the military juntas.[12]

20 Amnesty was thus neither the only possible path, nor a universally popular one. In fact, in *AZAPO,* the applicants brought a constitutional challenge against the key provisions of the TRC Act, on the basis that permitting agents of the State

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8 *Du Toit v Minister for Safety and Security and Another* 2009 (6) SA 128 (CC) para 28.

9 *Du Toit* para 28.

10 *Comisión Nacional sobre la Desaparición de Personas.*

11 Available at: http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm

12 Emilio Crenzel 'Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice' *The International Journal of Transitional Justice* 2 2008 173-191 (available at: https://www1.essex.ac.uk/armedcon/themes/international_courts_tribunals/CONADEPoxfordjournal.pdf).

who committed heinous crimes to escape liability infringed the rights of those that wanted to be prosecuted and punished and made civilly liable.[13]

21 The Constitutional Court ultimately dismissed the application. But it did so with reference to the core rationale for amnesty: that the only way to obtain the truth – which victims sought so desperately to know – was to provide an incentive to perpetrators to come forward.[14] And the conditions in section 20 ensured that wrongdoers would only avoid criminal prosecution if they provided victims with the compensatory benefit of discovering the truth. If they did not, they would be prosecuted.

22 The point here is not that the TRC should not have happened or that amnesty should not have been granted. On the contrary, the Constitutional Court has rightly described the TRC as a "*delicate, constitutionally required balance*".[15] The strict condition for amnesty was that perpetrators provided to victims and their families the compensatory benefit of discovering the truth. If they did not do so, they were to be prosecuted.

23 Ahmed Timol's family never obtained the compensatory benefit of discovering the truth. His mother participated, despite the immense pain and difficulty of doing so, in a Human Rights Violations Committee hearing. Yet by the time of her death, she had still not received an answer to any of the questions she had

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13 *AZAPO* para 9.

14 *AZAPO* para 17.

15 *Du Toit* para 30.

raised surrounding her son's death. She never received the closure and public accounting that amnesty required.

24 That, of course, is because the the policemen implicated in the death of Mr Timol, including Mr Rodrigues, did not apply for amnesty. They had an election, and they chose not to do so.

25 The upshot is that those policemen, including Mr Rodrigues, ought to have been prosecuted.

26 The TRC Act itself envisaged that prosecutions would follow in respect of those that did not obtain amnesty.

26.1 The criteria for qualification for amnesty were carefully calibrated in section 20. The corollary of this was that those not falling within the criteria would be subject to prosecution.

26.2 Section 21 dealt with the effect of refusing amnesty. It required the court to be notified of the refusal of amnesty where criminal or civil proceedings had been suspended pending an amnesty application. Again, the purpose of the provision was plainly to ensure that any stayed prosecution could then continue against any person refused amnesty.

26.3 Section 7 provided that, while no person who was granted amnesty would be criminally or civilly liable, the granting of amnesty to one person would have "*no influence upon the criminal liability of any other person contingent*

upon the liability of the first-mentioned person".[16] This clearly anticipated that where one perpetrator obtained amnesty, prosecution would follow against any co-perpetrators who did not.

27 At the conclusion of the TRC, the Former TRC Commissioners were unanimous in their belief and expectation that the NPA would prosecute those that had not come forward, or were refused amnesty. This was reflected in the Final TRC Report, which, while acknowledging the risk of prosecutions to the peace process, spoke of:

> "*the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the rights of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law*."[17] (emphasis added)

28 As we demonstrate below, no bold prosecution policy would ever eventuate.

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[16] Section 7(b).

[17] TRC Report, Vol 6, Sec 5, Ch 1, "Findings and Recommendations" para 24.

The non-prosecution of apartheid-era political crimes

29 Before handing over the initial TRC Report to President Mandela, the Former TRC Commissioners compiled a list of approximately 300 cases, which they handed to the NPA, and proposed should be prosecuted.

30 Ms Yasmin Sooka, in particular, has taken an active role in seeking to ensure that the TRC cases were prosecuted.

30.1 She was in regular contact with Anton Ackermann SC, head of the Priority Crimes Litigation Unit, and Vusi Pikoli, then NDPP, between 2003 and 2005. Ms Sooka was always assured that the TRC cases were receiving the NPA's attention.[18]

30.2 A coalition of organisations of which Ms Sooka was part, which was known as the South African Coalition for Transitional Justice,[19] worked actively in an effort to ensure the prosecution of certain outstanding TRC cases. [20]

30.3 In 2015, an application was launched to compel a prosecution into the murder of Nokuthula Simelane. It was in those proceedings that it first emerged that Vusi Pikoli had been directly instructed by the executive not to prosecute or investigate apartheid-era crimes.[21]

30.4 One of the things the coalition did was to identify cases in which amnesty had not been granted, or in which amnesty had never been sought. It drew

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[18] Former TRC Commissioners' founding affidavit, para 40.

[19] This included the International Centre for Transitional Justice and the Foundation for Human Rights.

[20] Former TRC Commissioners' founding affidavit, para 41.

[21] Former TRC Commissioners' founding affidavit, para 41.

up a list of 22 key cases, which it ultimately handed over to the NPA in January 2018, at a meeting with the Priority Crimes Litigation Unit and the then-head of the Hawks.[22]

30.5 In his affidavit filed in this matter,[23] Macadam confirmed that all investigations into the TRC cases were stopped in 2003 – including the investigation of the Timol case. Ms Sooka was shocked to read this, as Macadam had informed her on numerous occasions that the NPA was dealing with these cases.[24]

31 In other words, it appears clear – and indeed to be common cause in these proceedings – that a key reason for the non-prosecution of apartheid-era political crimes is that the executive directly interfered in the NPA's prosecutorial decision-making.[25]

32 It was this that prompted the Former TRC Commissioners to address a letter to President Cyril Ramaphosa on 5 February 2019, calling on him to appoint a commission of inquiry into the political interference that prevented the investigation and prosecution of TRC cases, and to apologise to victims and their families who have been denied justice for several decades.[26]

33 For decades, victims, families and civil society have been dogged in their efforts

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22 Former TRC Commissioners' founding affidavit, para 41.

23 Macadam affidavit, pp 796-806.

24 Former TRC Commissioners' founding affidavit, para 41.

25 Former TRC Commissioners' founding affidavit, para 42.

26 Former TRC Commissioners' founding affidavit, para 42; Annexure "YS1".

to ensure that such prosecutions took place. The present proceedings suggest that the NPA may now, at long last, acknowledge that it bears constitutional, statutory and international law obligations to prosecute the politically motivated crimes of the apartheid era, and to resist the executive interference that has been brought to bear on it.

34 We submit, with respect, that this court should be very slow to stop the NPA from doing so.

THE RULE OF LAW REQUIRES PROSECUTION OF APARTHEID-ERA CRIMES

35 The above section demonstrates that the NPA has betrayed, in a most profound way, those who gave their lives to the struggle for liberty and democracy. In this section, we explain that the NPA's approach also has profound implications for the rule of law.

36 Section 1 of the Constitution provides that South Africa is founded on certain values, including "supremacy of the Constitution and the rule of law".[27] It requires, *inter alia*, that the laws of the country are respected and enforced.

37 This is particularly true of criminal law. The Constitutional Court has held that "*[c]rime strikes at the very core of the fabric of our society*" and that it "*undermines some of the fundamental human rights enshrined in our Bill of Rights*", including the rights to life, the right to freedom and security of the person, and the right to

[27] Section 1(c).

dignity.[28]

38 Thus, the State has a constitutional duty to address crime, which arises *inter alia,* from its duty in section 7 of the Constitution to "*respect, protect, promote and fulfil the rights in the Bill of Rights*".[29] Section 179 of the Constitution establishes the NPA, and empowers it to institute criminal proceedings and to carry out any necessary functions incidental to instituting criminal proceedings. And while these functions are cast as powers, they are what the Constitutional Court has described as "*a power coupled with a duty to use it if the requisite circumstances were present*."[30]

39 This makes the NPA an institution of utmost constitutional importance.[31] As the SCA has explained, it is "*integral to the rule of law and to our success as a democracy*",[32] and the NPA and NDPP together constitute "*servants of the rule of law*."[33] It is for this reason that any decision to discontinue a prosecution is reviewable under the principle of legality – an incident of the rule of law.[34]

40 To the general duty of the NPA to prosecute crimes must be added the cardinal principle that the law applies to all alike. This too is a requirement of the rule of

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[28] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 144 (minority per Ngcobo J)

[29] *NICRO* para 144.

[30] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 15; *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) para 181.

[31] *S v Basson* 2005 (1) SA 171 para 33.

[32] *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 para 114

[33] Id para 117.

[34] *Democratic Alliance and Others v Acting National Director of Public Prosecutions* 2012 (3) SA 486 para 27.

law, and essential to the proper administration of the criminal justice system. As this Court has previously affirmed:

> "The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike…The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed."[35]

41 In the present case, the threat to the administration of justice is particularly severe. That is because it is former agents of the state that are alleged to have committed serious crimes. The prosecution of these agents is essential "*to ensure public accountability, the promotion of good governance, the protection of the rule of law and the protection and advancement of the rights enshrined in the Bill of Rights*."[36] Shielding state perpetrators from justice – as occurred with impunity under apartheid – undermines public confidence in the criminal justice system, threatens the administration of justice itself and risks creating an environment conducive to state agents again becoming involved in such conduct.

42 It has been said of the courts that, without trust and public confidence, the judiciary cannot function properly and "*the rule of law must die*".[37] This, we submit, is equally true of the prosecuting authority. When the NPA loses the faith and trust of the public, the rule of law, public accountability, and the culture of moral responsibility is irreparably harmed.

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[35] *Pikoli v President* 2010 (1) SA 400 (GNP) at 406E.

[36] *Democratic Alliance v President of the Republic of South Africa and a related matter* [2019] 1 All SA 681 (GP) para 69.

[37] *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) para 19.

43 The NPA's approach to the prosecution of apartheid-era crimes has, with respect, lost it a significant amount of public trust and confidence. The only way for it to restore that confidence is to prosecute those crimes wherever possible.

44 This imperative need not sit uncomfortably alongside the need to protect the rights of the accused. This was made clear by Sachs J in *S v Basson*, where he explained that:

> "The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom."[38]

45 The TRC Commissioners submit that to grant a stay of prosecution in this case, and cases like it, would amount to a "double-breach" of the rule of law.

46 The first breach results from the obdurate failure by the NPA to prosecute crimes over the last twenty years. Even if Mr Rodrigues is not responsible for the NPA's failure in this regard, its impact on the rule of law and on public confidence is manifest.

46.1 This breach was effectively recognised by the Constitutional Court in *Du Toit*. Writing for the Court, Langa CJ recognised that, while amnesty was necessary for reconciliation, "*the promise not to punish those who have flagrantly violated the law seems to be at odds with one of the basic*

[38] *S v Basson* 2005 (1) SA 171 (CC) para 126.

features of the South African constitutional order: namely, the rule of law".[39]

46.2 He explained that "*the rule of law requires… that the law should punish those guilty in terms of the law and absolve those who are not*."[40]

46.3 Thus, while recognising that the limitation on the rule of law that amnesty entailed was a necessary compromise imposed by the Constitution itself, the clear implication is that the failure to prosecute those who had not sought amnesty would be a manifest violation of the rule of law.

47 The second breach arises from *employing* the first violation of the rule of law, and the delay in prosecution it entailed – as Mr Rodrigues seeks to do – as a basis to prevent future prosecutions from occurring. For the historic failure to prosecute to be used now as a reason not to prosecute *further* erodes the rule of law and *further* diminishes public trust and confidence in our criminal justice system. It entrenches impunity.

48 With respect, Mr Rodrigues has not raised anything that makes his a special case. He is in the same position as *any* perpetrator of an apartheid-era crime who did not seek or obtain amnesty. The effect of granting a permanent stay of prosecution in such a case, which has no readily distinguishable features, would be to create a precedent effectively immunising perpetrators of other outstanding TRC cases against prosecution. That would severely damage the rule of law,

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[39] *Du Toit* para 23.

[40] *Du Toit* para 24.

and would create precisely the culture of impunity that the TRC was intended to prevent.

49 For these reasons, we submit that the prosecution of Mr Rodrigues, and others like him, is important in order to uphold the rule of law, and to maintain a culture of accountability and moral responsibility.

THE ABSENCE OF A SECOND AMNESTY PROCESS

50 Mr Rodrigues describes as one of the "*material questions*" in this matter the question whether the State President has granted him amnesty notwithstanding that he has never applied for such amnesty.[41]

51 This is a factual question. Because he has no evidence that amnesty was granted, Mr Rodrigues asks the court to draw an inference that he was. He says that "*[i]t appears that there was indeed amnesty granted*", and contends that "*the most probable inference is that there was indeed an amnesty granted*".[42]

52 When finding facts or making inferences, a court will select a conclusion which, though not the only reasonable one, is the one that "*seems to be the more natural, or plausible, conclusion from amongst several conceivable ones*".[43]

53 As we explain below, it is neither the most natural nor the most plausible inference that Mr Rodrigues was granted amnesty. Indeed, the only reasonable

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41 Rodrigues Heads of Argument para 16.

42 Rodrigues Heads of Argument para 24.

43 *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) paras 34,35, 39 and 40.

conclusion is that Mr Rodrigues has never been granted amnesty or a presidential pardon.

54 We are aware of three attempts to introduce widespread presidential pardons – i.e. a "second amnesty process" – for those who were not granted amnesty by the TRC. In respect of two of these attempts, Ms Sooka was actively involved in thwarting them by means of litigation.[44]

55 The first attempt was in 2005, when the NPA sought to amend its prosecutions policy, by introducing the power not to prosecute politically motivated crimes of the past. While the proposed amendment recognised that a continuation of the amnesty process would violate the Constitution, it allowed for the NPA to enter into agreements with perpetrators and set out "*criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past*", which mirrored the TRC amnesty conditions, such as full disclosure and a political objective.[45] The effect of this was to provide for an effective back-door amnesty for those responsible for politically motivated crimes, who had not previously applied for amnesty.

56 Thembisile Nkadimeng (the sister of Nokuthula Simelane, who was abducted and murdered by the Security Branch); the widows of the Cradock Four (the young freedom fighters murdered by a police hit squad in 1985); as well as the Khulumani Support Group; the Centre for the Study of Violence and

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[44] Former TRC Commissioners' founding affidavit, para 58.

[45] *Nkadimeng and Others v National Director of Public Prosecutions and Others* [2008] ZAGPHC 422 (12 December 2008) para 29.

Reconciliation; and the International Centre for Transitional Justice, brought a constitutional challenge to the proposed amendments to the prosecutions policy.

57 In *Nkadimeng,* the High Court found, having regard to the NPA's statutory and constitutional prosecutorial obligations, that, in allowing the NPA to decline to prosecute where there is sufficient evidence to do so, the proposed amendments were unlawful, unconstitutional and invalid.[46]

58 The second attempt was in 2007, when President Mbeki announced to a joint sitting of parliament the need to deal with the "*unfinished business*" of the TRC.[47] His proposal was a special dispensation in the form of a pardons process for those who claimed that they were convicted of offences that were politically motivated and had not obtained amnesty from the TRC. He constituted a Pardons Reference Group (PRG) charged with considering pardons requests and submitting recommendations to him.[48] Again, it was effectively an attempt at a second amnesty process.

59 Immediately after its formation, a coalition of NGOs in which Ms Sooka was involved made efforts to engage with the PRG to address issues of victim participation, transparency and public disclosure.[49]

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[46] *Nkadimeng* para 18.

[47] *Centre for the Study of Violence and Reconciliation v The President of the Republic of South Africa* 2009 JDR 0380 (GNP) at 28-29.

[48] *CSVR v President* at 28.

[49] *CSVR v President* at 12.

60 When it became clear that victim's submissions were regarded as unnecessary, the applicants sought to interdict the President from granting pardons. The interdict was granted by the High Court.

61 Thus, in *Albutt v Centre for the Study of Violence and Reconciliation and Others*,[50] the Constitutional Court held that the participation of victims was fundamental to the amnesty process, and that the victims' exclusion was irrational.[51] It accordingly confirmed the interdict imposed by the High Court.

62 There was a third attempt at obtaining widespread amnesty for politically-motivated crimes. The TRC Commissioners were not themselves involved in resisting this attempt, and, unlike *Nkadimeng* and *Albutt*, it was not initiated by the executive itself.

62.1 In May 2002, after the President pardoned 33 members of the ANC and PAC who had applied to the TRC unsuccessfully, 384 convicted prisoners – all of them former or present IFP members who had been instructed by the movement not to participate in the TRC – applied for presidential pardons.[52]

62.2 Mr Chonco filed his application for amnesty with the Minister, but it was ignored for years. He accordingly commenced proceedings against the Minister and President seeking an order declaring that the Minister had failed to process the applications for pardon and thus enable the President

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[50] 2010 (3) SA 293 (CC).

[51] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 para 69

[52] *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) paras 3-4.

to consider and decide the applications in terms of s 84(2)*(j)*, and directing the Minister to do everything necessary to enable the President to exercise the powers conferred upon him by s 84(2)*(j)*.[53]

62.3 On appeal, the Constitutional Court held that the power to pardon resides in the President, and that Mr Chonco had pursued the incorrect party to obtain his relief. His application was dismissed.[54]

63 In light of the foregoing, we submit that there are three reasons why this Court should not draw the inference that Mr Rodrigues was pardoned or granted amnesty.

63.1 First, on the facts, the known attempts to introduce a second amnesty or pardons process for those in the position of Mr Rodrigues were halted by means of litigation. No other attempt has been identified or suggested. There is simply no factual basis for the inference sought by Mr Rodrigues.

63.2 Second, the granting of amnesty and presidential pardons is an inherently public process. It constitutes the exercise of a public power, which is subject to public law challenge.[55] It is highly unlikely, and would indeed be unlawful, if such a decision was taken secretively and without a public record. We submit that the court should not lightly draw an inference that unlawful conduct has occurred.

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[53] *Chonco* paras 7 and 14.

[54] *Chonco* para 40.

[55] See, for example, *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC).

63.3 Third, it is particularly unlikely that a pardons process was undertaken in respect of the Timol case, given the requirement in *Albutt* that before any such pardons could be granted, the victims had to have been consulted. There is no evidence that any of the Timol family have been consulted about such a process.

64 In any event, the onus rests on the applicant to prove his case. He has taken the initiative of bringing an application for a permanent stay of prosecution, an unusual form of remedy that is rarely granted. This would require him not only to prove that it may be inferred factually that he was pardoned, but also properly to identify the constitutional and statutory basis upon which a pardon was lawfully effected. He has failed to do so.

AGE AND INFIRMITY ARE NO BAR TO PROSECUTION

65 Mr Rodrigues complains that "*it is inherently unfair*"[56] to charge him on a count of murder after the lapse of more than 47 years, and that he is "*seriously prejudiced*".[57] Among the reasons for this prejudice are his "*seriously fading memory*",[58] and the "*serious negative impact*" a long trial will have on his "*fragile health*".[59] He claims that his current state of health is poor, and that in addition to his old-age, he suffers from diabetes, an unspecified heart condition, difficulty walking and fatigue.[60]

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[56] Founding affidavit, para 36, p35.

[57] Founding affidavit, para 41, p36.

[58] Founding affidavit, para 57, p54.

[59] Founding affidavit, para 41.5, p37.

[60] Founding affidavit, para 65, pp59-60.

66 These allegations are not supported by documentary evidence of any kind. Nor has any expert evidence been provided. The Court cannot accept Mr Rodrigues' mere say-so in this regard.

67 Accordingly, the only basis upon which this Court could conceivably accept that Rodrigues' state of health is a basis to stay prosecution is if it concludes that his old age – and the infirmity that *necessarily* entails – is itself a reason to stay prosecution.

68 As we demonstrate below, that is self-evidently not so. Instead, age and infirmity are factors that may appropriately be taken into account at the sentencing stage, in mitigation. They should not prevent a prosecution from proceeding altogether.

Domestic case law

Legal principles

69 A permanent stay of prosecution has been described as "*radical, both philosophically and socio-politically*", as "*far-reaching*" and as a remedy that will "*seldom be warranted in the absence of significant prejudice to the accused*."[61]

70 Section 35(3) provides that every accused person has a right to a fair trial, including in section 35(3)(d), the right to have their trial begin and conclude without unreasonable delay and, in section 35(3)(i), the right to adduce and

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[61] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 38.

challenge evidence. Other fundamental rights are also implicated in an enquiry about a delay in prosecution, including those in section 12.[62]

71 In *Sanderson*, the Constitutional Court explained that, in determining the reasonableness of delay, it is not only the interests of the accused that must be considered, but also the profound social interest in bringing a person charged with a criminal offence to trial.[63]

72 Determining the reasonableness of delay entails a balancing exercise, in which the conduct of both the prosecution and the accused are weighed and the following considerations examined:[64]

72.1 the length of the delay;

72.2 the reason the government assigns to justify the delay;

72.3 the accused's assertion of a right to a speedy trial; and

72.4 prejudice to the accused. [65]

73 To these must be added the *nature of the offence* – a factor that has had a profound impact in ensuring that sexual offences, which are notoriously difficult for victims to report, are prosecuted after a long delay.[66] The reasoning applied to rape cases may be extended to murder. Rape for a variety of reasons,

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62 *Bothma v Els and Others* 2010 (2) SA 622 (CC) at para 33.

63 *Sanderson* para 36,

64 *Sanderson* paras 25-26.

65 *Sanderson* para 35; *Bothma* para 36.

66 *Bothma* para 38.

psychological and societal, tends to induce a reluctance on the part of victims to speak about it.[67] Murder silences the victim permanently. [68]

74 The five factors listed in the preceding paragraphs are not to be treated as a formulaic check list. Each case must be decided "ad hoc" on its own facts.[69] These must include in this matter that murder is an offence that does not prescribe,[70] that the crime was committed by the security police who played a central role in the brutal enforcement of apartheid and were assisted by the state in covering their tracks,[71] and that the more serious the crime, *"the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial"*.[72]

75 Generally speaking, in the absence of demonstrable trial prejudice to the accused, a stay of prosecution is unlikely to be granted. Where the prejudice is not trial-related, there are a range of other remedies, less radical than a permanent stay.[73] The key inquiry is the fairness of the trial.[74] And in considering fairness, it must be remembered that the accused will <u>at the trial</u> have all the benefits of the fundamental right to a fair trial, including the right to be presumed innocent and to be convicted only if the State is able to prove its case beyond

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67 *Bothma* at paras 46-54.

68 An assessment of the nature of the offence in this matter must take into account that the applicant was found in the inquest proceedings to have been central to a covering up of the murder of Mr Timol. That weighs against allowing a delay in prosecution to justify a stay. Inquest judgment of Mothle J p135 para 331.

69 *Bothma* para 37.

70 *Bothma* para 45.

71 Inquest judgment of Mothle J p117 para 313.

72 *Bothma* para 77, where the Constitutional Court added *"As the popular saying tells us, 'Molato ga o bole' (Setswana) or 'ical'aliboli' (isiZulu) - there are some crimes that do not go away."*

73 *Sanderson* para 39.

74 *Bothma* paras 33, 35.

reasonable doubt, notwithstanding the passage of time and the inevitable difficulties that that will create for the State.[75]

76 Thus, in *Bothma v Els*, where a delay of 39 years in prosecuting allegations of rape and sexual abuse (37 years of which was pre-trial delay) was held not to be unreasonable, Sachs J explained that:

> "the delay in the present matter must be evaluated not as the foundation of a right to be tried without unreasonable delay, but as an element in determining whether, in all the circumstances, the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence." [76]

Old age and infirmity

77 Our focus is however on the extent to which old age and infirmity are factors that contribute, in a legally relevant sense, to the prejudice suffered by the accused.

78 In our submission, old age, ill health and a fading memory do not constitute grounds for leniency in prosecution. Instead, they must be considered as potentially mitigating factors in the imposition of a sentence. The Constitutional Court in *Sanderson* made plain that the mere allegation of fading memory – an allegation that Mr Rodrigues makes without substantiation – is insufficient to

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[75] *Bothma* paras 68-76.

[76] *Bothma* para 35.

justify a permanent stay. The Court rejected the applicant's allegations in this regard as "*general and argumentative*".[77]

79 Indeed, it is to be expected that age and infirmity would be considered in sentencing. The general principle that applies to sentencing is that the punishment must fit both the criminal and the crime. The famous *Zinn*-triad requires a court to consider the gravity of the offence, *the circumstances of the offender*, and public interest.[78]

80 Accordingly, perpetrators are regularly prosecuted in their old age, and often many years after the crime has been committed. Their age and physical condition may sometimes, but not always, be factors taken into account in sentencing.

81 Thus, in *S v Heller*, the Court held, in respect of an appellant who was 62 years old when he was convicted, that his age "*evokes a note of compassion in the bleak recompense of imprisonment in the afternoon of his years*".[79]

82 In *Hewitt v S,*[80] in dismissing an appeal by 75 year old tennis icon Robert Hewitt against a six year sentence for offences committed between 20 and 35 years prior, the SCA confirmed the principle that while old age is a mitigating factor, it is not a bar to a sentence of imprisonment. And while the delay in prosecution

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77 *Sanderson* para 11.

78 *S v Zinn* 1969 (2) SA 537 at 540G-H.

79 *S v Heller* 1971 (2) SA 29 (A) at 55C-D.

80 2017 (1) SACR 309 (SCA).

was regrettable, it "*is not an unusual phenomenon in these types of cases*" and despite the difficulties, "*our courts have ably delivered just decisions*".[81]

83 Similarly, in *S v Barendse*,[82] the Full Court found that the advanced age of the 72 year-old appellant was a factor that justified interference with a sentence of 20 years' imprisonment, which the court recognised, given the age of the perpetrator, would amount to a life sentence, and accordingly reduced it to ten years.

84 In none of these cases was old age even a bar to imprisonment. It can scarcely constitute a relevant form of prejudice to bar *prosecution*.

Foreign case law

85 The same principles apply in foreign law. The best example of this is in the European Union.

86 In 1998, at the age of 88, Mr Maurice Papon was found guilty and sentenced to a ten-year prison sentence by the French courts for aiding and abetting crimes against humanity during World War II.

87 At the age of 90, and following triple bypass surgery, he contended that the conditions of his detention amounted to torture or inhuman or degrading punishment under section 3 of the European Convention on Human Rights.

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[81] *Hewitt* para 17.

[82] 2010 (2) SACR 617 (EC)

88 In *Papon v France*, the European Court of Human Rights explained that age is "*not a bar to pre-trial detention or a prison sentence in <u>any</u> of the Council of Europe's member states*". [83] Instead, it may be taken into account "*together with other factors such as state of physical or mental health, when sentences are being determined*."[84]

89 Given that he was under regular medical supervision, and received treatment from staff in the prison and through hospital consultations, his situation did not attain a sufficient level of severity to come within the scope of Article 3 of the Convention.[85]

90 Although Papon eventually succeeded in the ECHR, this was on the basis that he had been denied the right to appeal his conviction, because the French Court of Cassation dismissed his appeal on the technical basis that he had forfeited his right to appeal on points of law.[86]

91 Another ready comparative example of convictions brought against perpetrators in their old age, many years after the crimes were committed, is in Nazi Germany.

92 In heads of argument, Mr Rodrigues pre-empted this comparison. He suggested that this analogy is inapposite because the delays in prosecution of

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[83] *Papon v France,* European Court of Human, Application No. 6466/01 at 4.

[84] Papon para

[85] Papon para

[86] *Papon v France, European Court of Human, Application No. 54210/00*.

the Nazis was caused by them seeking to flee prosecution. Mr Rodrigues, on the other hand, has resided at the same address for the past 54 years.[87]

93 But it is not true that the reason for the delayed prosecution of Nazi perpetrators was that they sought to evade justice. A recent case illustrates this.

93.1 Oskar Gröning, who was stationed at Auschwitz Concentration Camp, was found guilty by the Luneburg Regional Court in July 2015 of facilitating mass murder, and was sentenced to four years' imprisonment. His application for a postponement of the execution of his sentence based on substantial health impairments was dismissed.

93.2 He approached the German Federal Constitutional Court, contending that the sentence had violated his fundamental right to life and physical integrity.[88]

93.3 The Court held that:

93.3.1 The state's duty to protect the security of the public and confidence in the proper functioning of state institutions required the enforcement of the state's right to punish crimes.

93.3.2 Although this duty must be balanced against the health risks of the accused, the medical reports and expert opinions showed that a four year sentence was proportionate and sufficient means

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87 Rodrigues Heads of Argument para 47.

88 In *dem Verfahren über die Verfassungsbeschwerde* 2 BvR 2772/17 (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-115.html)

existed to ensure proper medical care and avert acute health risks.

93.3.3 The complainant's old age was not, on its own, a sufficient reason for deferring enforcement of the state's right to punish, particularly given the gravity of the offence.

93.3.4 The sentence was accordingly upheld. There was never any suggestion that the delays were as a result of Gröning having fled justice. On the contrary, Oskar Gröning lived a normal life in Germany for 40 years before his prosecution, which came after he decided to make known publicly his activities at Auschwitz.[89]

SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATIONS

94 Section 39(1)(b) of the Constitution provides that, when interpreting the Bill of Rights, a court must consider international law. In addition, section 233 of the Constitution requires courts to prefer an interpretation of legislation that is consistent with international law.

95 This matter plainly involves the interpretation of the Bill of Rights. On the applicant's version, his section 35 rights are implicated. As explained above, various constitutional rights of victims and their families are also implicated. This matter also involves the interpretation of the Criminal Procedure Act.

96 International law is accordingly plainly relevant. In short, we submit South

[89] Confirmatory affidavit of Mary Burton, para 8; Annexure "MB1".

Africa's international law obligations require that special regard is had to the victims of apartheid crimes, and their families, and that allowing impunity would constitute a direct violation of these international law obligations.

97 Article 2(3) of the **International Covenant on Civil and Political Rights** provides that each State Party, which includes South Africa, undertakes to:

97.1 ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

97.2 ensure that any person claiming such a remedy shall have his or her right to the remedy determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and

97.3 ensure that the competent authorities shall enforce such remedies when granted.

98 The jurisprudence of the Human Rights Committee has made considerable contributions to defining and clarifying victims' right to redress arising under the provisions of the ICCPR.

98.1 For example, in Rodriquez v Uruguay[90] the Committee held that Uruguay's failure to conduct an investigation into human rights violations constituted

[90] Rodriguez v Uruguay, Communication No. 322/88, CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995)

a considerable impediment to the pursuit of civil remedies such as compensation. It also declared the adoption of amnesty laws in cases of gross human rights violations incompatible with the obligations of states arising under Article 2(3).

98.2 In Bautista de Arellana v Colombia,[91] the Committee found that the family of a victim of detention, disappearance, torture and death had been denied an effective remedy. It explained that, while the ICCPR does not provide a right for individuals to require that a state criminally prosecute another person, Colombia was under a duty to investigate thoroughly alleged violations of human rights "*and to prosecute criminally, try and punish those held responsible for such violations*." It accordingly urged Colombia to expedite the criminal proceedings and convict the persons responsible promptly.

99 We submit that the ICCPR requires states to provide effective remedies to victims of rights-violations with effective remedies, notwithstanding that the violation has been committed by persons acting in an official capacity. In particular, the denial of victims' and their families' effective criminal justice remedies is a clear violation of South Africa's international law obligations.

100 Article 4(m) of **The Constitutive Act of the African Union** requires the promotion and protection of human and peoples' rights in accordance with the African Charter. In addition, Article 4(o) requires states to respect the sanctity of

[91] Bautista de Arellana v Colombia, Communication No. 563/93, CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996)

human life, condemn and reject impunity and political assassination, acts of terrorism and subversive activities.

101 In addition to obligations arising from Treaty law, we submit that South Africa bears obligations arising from customary international law.

101.1 The **Universal Declaration of Human Rights** provides that "*everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*."

101.2 Since its inception, the United Nations has adopted two General Assembly resolutions concerning the rights of victims.

101.2.1 The **1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power** set out comprehensively states' duties to provide remedies to individual victims.

(a) One of its purposes is to establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crimes (Resolution, para 4(d)).

(b) It provides that victims are entitled to "*prompt redress*" for the harm that they have suffered (clause 4)

(c) It speaks of the strengthening of judicial mechanisms where necessary to enable victims to obtain redress (clause 5).

101.2.2 **The 2006 Basic Principles and Guidelines on the Right to a Remedy** concerns violations of international human rights law and international humanitarian law. Given its connection with the international law crime of apartheid, we submit that the murder of Ahmed Timol was indeed a violation of international human rights law.

(a) It recognises that international law contains the obligation to prosecute perpetrators of international crimes in accordance with international obligations of States (Preamble)

(b) It provides that, in respect of gross violations of international human rights law states have a duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him (clause 4).

102 We submit that, taken together, South Africa's treaty obligations, as well as customary international law, require equal and effective access to justice, the availability of judicial remedies to victims, and, most importantly for present purposes, the investigation, prosecution and punishment of human rights violations.

103 In these respects, the NPA has, of course, failed dismally. However, it seeks now to comply with its constitutional and international obligations. We submit that the Court should not prevent it from doing so.

CONCLUSION

104 For the reasons set out above, the TRC Commissioners submit that granting Mr Rodrigues a permanent stay of prosecution would do a profound disservice to the TRC's vision; would undermine the rule of law; would be inconsistent with the principles developed in the judgments of the Constitutional Court and the Supreme Court of Appeal in relation to stays of prosecution; would be out of step with comparative jurisdictions; and would be contrary to South Africa's international law obligations.

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20 March 2019

LIST OF AUTHORITIES

South African authorities

Legislation

1. Promotion of National Unity and Reconciliation Act 34 of 1995
2. Constitution section 35

Cases

1. Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293
2. Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others 1996 (4) SA 671 (CC)
3. Bothma v Els and Others 2010 (2) SA 622 (CC)
4. Centre for the Study of Violence and Reconciliation v The President of the Republic of South Africa 2009 JDR 0380 (GNP)
5. Democratic Alliance v President of the Republic of South Africa and Others 2012 (1) SA 417
6. Democratic Alliance and Others v Acting National Director of Public Prosecutions 2012 (3) SA 486
7. Democratic Alliance v President of the Republic of South Africa and a related matter [2019] 1 All SA 681 (GP)
8. Du Toit v Minister for Safety and Security and Another 2009 (6) SA 128 (CC)
9. Hewitt v S 2017 (1) SACR 309 (SCA)
10. Minister for Justice and Constitutional Development v Chonco and Others 2010 (4) SA 82 (CC)
11. Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC)
12. Nkadimeng and Others v National Director of Public Prosecutions and Others [2008] ZAGPHC 422 (12 December 2008)
13. Pikoli v President 2010 (1) SA 400 (GNP)

14. President of the Republic of South Africa and another v Hugo 1997 (4) SA 1 (CC)

15. S v Barendse 2010 (2) SACR 617 (EC)

16. S v Basson 2005 (1) SA 171

17. S v Heller 1971 (2) SA 29 (A)

18. S v Mamabolo (E TV and Others Intervening) 2001 (3) SA 409 (CC)

19. S v Zinn 1969 (2) SA 537

20. Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC)

21. South African Police Service v Public Servants Association 2007 (3) SA 521 (CC)

22. South African Post Office v De Lacy 2009 (5) SA 255 (SCA)

23. Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC)

Other

24. TRC Report, Vol 6, Sec 5, Ch 1, “Findings and Recommendations”

Foreign authorities

Cases and decisions

25. Papon v France, European Court of Human Rights, Application No. 6466/01

26. Papon v France, European Court of Human Rights, Application No. 54210/00

27. In dem Verfahren über die Verfassungsbeschwerde 2 BvR 2772/17

Other

28. Emilio Crenzel ‘Argentina’s National Commission on the Disappearance of Persons: Contributions to Transitional Justice’ *The International Journal of Transitional Justice* 2 2008 173-191

International authorities

Treaties and instruments

29. International Covenant on Civil and Political Rights

30. The Constitutive Act of the African Union

31. Universal Declaration of Human Rights

32. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

33. The 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 , 2006

Decisions

34. Bautista de Arellana v Colombia, Communication No. 563/93, CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996)

35. Rodriguez v Uruguay, Communication No. 322/88, CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995)