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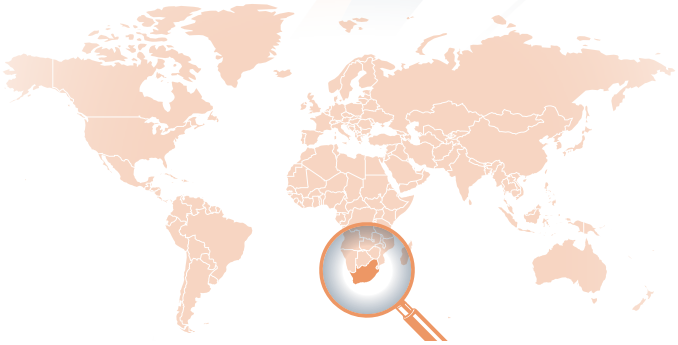

RACISM AS A RISK FACTOR FOR ATROCITY CRIMES:

A Case Study on South Africa[1]

Author: Tshepo Madlingozi

The following case study has been written by an independent consultant on behalf of the Global Initiative for Justice, Truth and Reconciliation (GIJTR). This case study is informed by a combination of desktop research, document analysis and interviews. It therefore reflects these perspectives and findings, as compiled and written by the consulting author(s). Interviewees have been anonymized to ensure their safety and privacy but GIJTR extends its gratitude for the time and participation of all interviewees.

This country is still in the hands of the colonial masters. This country is still in the hands of White people…. The White man has been too comfortable for too long. We are here unashamedly to disturb the White man's peace because we have not known peace. We don't know what peace looks like. They have been swimming in a pool of privilege. They have been enjoying themselves because they always owned our land. They found peaceful Africans here. They killed them. They slaughtered them like animals. We are not calling for the slaughtering of White people, at least for now…

—**Julius Malema,** the commander in chief of the Economic Freedom Fighters, the third largest political party in South Africa, 2016

Introduction

In 1994, South Africa went through an internationally acclaimed process of transition to democracy and adopted an interim constitution that guaranteed civil and political rights as well as justiciable socio-economic rights to all. These processes were followed by the establishment of the Truth and Reconciliation Commission in 1996.

However, as this case study will show, these processes and mechanisms were not decolonizing acts and processes, and thus did not go to the root causes of historical atrocities.

In South Africa, widespread despair and discontent brought about by the state's failure to meet citizens' basic needs together with staggering rates of unemployment (youth unemployment is officially at sixty-six percent) conspire to make South Africa a ticking timebomb for massive social unrest. This anger at the state combined with persisting racial inequality, institutionalized racism, soaring crime rates, and xenophobia has led to rising populism. In the current climate, the state's inability to deal with the afterlives of colonialism and the unfinished business of transitional justice process could be pushing South Africa toward a recurrence of atrocity crimes.

One of the main aims of this case study is to show that in the matter of South Africa, there is a risk for recurrence of atrocity crimes. However racism is merely a symptom. The cause of the risk of atrocity crimes recurring is the history of colonialism and its enduring impact on the lives of South Africans today.

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1 Historical Context

European Arrival and the Creation of the Racial "Other"

There is little to no regard for Black lives and their human rights.[2]

South Africa's colonial history is often framed as starting with the arrival of Jan van Riebeeck in 1652. Van Riebeeck's arrival indeed set the course of European settler invasion, conquest, and racist dehumanization in the territory that later became South Africa.[3] However, the roots of colonization, dispossession, and its abhorrent injustices against humanity had long been planted. As early as the late 1400s, Portuguese explorers such as Bartholomeus Dias and Vasco da Gama had already established trading posts along the coast of what the Portuguese named the Cape of Good Hope. This encounter between the Europeans and the Indigenous people was the start of centuries of European aggression, racial strife, and exploitation.

As early as 1503, various explorers tried to exploit Indigenous peoples by buying livestock with mere trinkets and beads.[4] In the period between 1500 and 1650," at least 1000 Portuguese, 600 Dutch, and

400 English and French ships landed on the South African coast" leading to large-scale plundering of resources and people.[5] For purposes of this case study, it is important to underline that Europeans explained and legitimized the dispossession of African resources and labor on the basis that they were not human beings. Coloniality of power thus went together with coloniality of being. One scholar expounds on the European racist ideas of the 1500s as follows:

> *These [racist] ideas were formulated on the basis of accounts of travelers who were happy to use Khoikhoi as the link between man and animals in the Great Chain of Being. Indeed, these ideas led to flow of racial abuse that has no equal in literature. It was the first obvious and extensive exercise by Europeans of a belief in the sub-strata within humanity: lesser species; and the word Hottentot would long be used as synonym for brute or boor in many Western European languages.*[6]

Divide and Rule: Settler Colonization, Dispossession, and Slavery

The year 1652 is significant "as the genesis of the colonial assault and dispossession of land and resources that changed the lives of so many."[7] Van Riebeeck arrived as part of a scheme by the Dutch East India Company (referred to here as "the Company") to ostensibly establish a refreshment station in the Cape. The disregard by Europeans of the rights of Indigenous peoples was first made apparent when the Company, without any regard for Indigenous people that had occupied the land for centuries, decided to arbitrarily occupy land in the Cape to establish their permanent victualing station (Magubane, 2007).

Within a few years, the Company allowed the importation of enslaved people and thus the Cape became a slave settlement with a code of inequality in practice.[8] The very first shipments of slaves initially arrived from Guinea and Angola in 1658.[9] But those slaves were actually stolen by the Dutch from a Portuguese vessel bound for Brazil. In fact, West African slaves were the exception and not the rule. The vast majority of slaves that arrived in South Africa came from Madagascar, the Indian subcontinent and South-East Asia. They were largely the product of opportunity: when there were wars or famine in that region, prisoners of war or excess family members were sold into slavery. By the time the slave trade ended in 1808, roughly 26% of the slave population in the Cape were from the African continent, another 26% from the Indian sub-continent, 25% from Madagascar, and 22.7% from Indonesia.[10]

By 1657, the Cape had become a settler colony. This was primarily because several ex-Company officials and soldiers were given permission to become "free burghers" with the right to acquire as much of Indigenous peoples' land as they wished in order to make provisions for passing fleets.[11] In 1658, the Company moved towards a position of permanent settlement in the Cape, with clear disregard for the Indigenous people who were already there. In various entries, Van Riebeeck referred to the Khoe and the San as "dull, stupid, and odorous and black stinking dogs."[12] This creation of inferior "other" based on colonialities of knowledge and being persists today despite the official fall of colonialism.

The first anti-colonial war in the territory that became South Africa occurred in 1659. The war was provoked by the Company's awarding of farms to free burghers, the imprisonment of local leaders, and the Company's "divide and conquer" strategy.[13] The war ended with the Dutch cordoning off Khoe lands and expelling them from it. Between 1700 and 1703, the Company removed the prohibition against moving inland. Prospective colonist farmers (later called Boers) only had to apply for grazing permits

for anywhere that they claimed was unoccupied. The Boers' invasion of Indigenous land and seizure of thousands of cattle belonging to Indigenous peoples provoked two European-Indigene wars in 1673–77 and 1701–05. Soon after, between 1710 and 1713, a smallpox epidemic broke out in the Cape leading to the decimation of most of the Khoe population. The epidemic, brought by a docking European ship, spread to other regions of the Khoe leading to pandemic-level deaths of Indigenous peoples. Afterward, the colonists moved into those depopulated areas and claimed them for themselves.

The introduction of slavery in the late 1600s strengthened the foundation of racism.[14] Not only did it reaffirm already existing racist beliefs but created formal racism in the form of policies and laws. Although the Company writ dictated that the Khoe could not be enslaved, their children could be forced into "apprenticeship" until they were eighteen years old in the farms where they were raised—thus securing cheap labor for the colonists.[15] Children who were born of slaves were automatic successors of their slave parents.[16] Enslavement went together with cultural genocide as slaves lost their own customs: "it was an accepted prerequisite of manumission that a slave should be baptized, speak good Dutch...."[17] Therefore, not only people but cultures began to be subject to a racist hierarchy.

Wars of Dispossession: The Extermination Impulse, Ethnocide, and the Seeds of Atrocity Crimes

The deeper into the frontier the colonists went, the more conflict ensued. The main preoccupations of colonists became defending themselves against raids by the San and launching retaliation, leading to massacres. This period between the 1700s and early 1800s is now known as the period of the genocide of the San.[18]

In 1806, the British took over the Cape from the Dutch. The arrival of the British caused the Boers to move away from the Cape Colony. The Boers felt oppressed by the British self-proclaimed civilization mission and attendant British laws forcing the Boers to treat the Khoe laborers in certain ways. For example, there were regulations against flogging and prohibiting the docking and withholding of salaries. This culminated in the Great Trek of 1836—the Boers left the Cape Colony and moved deeper inland. On their way, the Boers expropriated Indigenous people of their livestock and kidnapped their children. The Boers established their first inland colony, Natal colony, in 1839. The system between the Boers and Indigenous people was unequal akin to a master-slave relationship. The Boers imposed this rigid system of White supremacy wherever they founded a colony inland.

Once the British determined to rule the Cape, they launched a series of wars of dispossession against the Xhosa kingdoms in pursuit of land to give to British settlers.[19] After three wars, the British were able to expel the Xhosas from their land and expand the colonial boundaries. The wars of dispossession culminated in the dispossession of lands; the outlawing of pivotal African customs and traditions; the fracturing of clans; and the general stupefaction of the worlds of Indigenous peoples.

The eighth war of dispossession (1850–53) has the distinction of being the longest of the nine wars of dispossession and the longest sustained military resistance against colonialism in Africa. The defeat of Xhosa and allied groups in this war further consolidated embryonic beliefs in European invincibility. This defeat and subsequent ones convinced most Indigenous peoples that their salvation would not come from anti-colonial military struggles. Rather, salvation was to come from converting to Christianity, attaining Western education, and thus integrating into colonial society.

The last war of dispossession took place in 1879. The British deemed the subjugation of African kingdoms to be essential for White security. This was achieved in 1879 with the defeat of the Zulus and the last mopping operations against the Sotho groups in 1881. In total, nine wars of dispossession took place between 1779 and 1879. These wars are central to understanding the atrocity crimes that took place in South Africa including "ethnic cleansing", "ethnocide", "genocide", and "crimes against humanity."[20]

The Founding of South Africa as a "White man polity": Ethnic Cleansing, Crimes Against Humanity, and the Foundations of Institutionalized Racism

> *Forced removals were not just physical displacements. They dislocated people's identity. This is because, for Africans, identity is tied to land and space. physical displacement dislocates much more than just the material.*[21]

Soon after the colonists' military triumph against the Zulus, the British and the Boers signed a treaty of peace which paved the way for the establishment of the Union of South Africa. British and Boers constitution-makers decided that the Union constitution would not extend the restricted franchise that Africans historically enjoyed in the Cape Colony to the rest of the envisaged Union. The 1910 Constitution of the Union of South Africa, therefore, created South Africa as White man's polity where conquered people did not have basic civil and political rights. Over the next several decades, a number of laws were passed to further restrict the movement, settlement, and economic opportunities of Africans.

In 1913, the colonial government passed the Natives Land Act. This act designated only seven percent of the land for Africans. The act legalized land dispossession, segregation, and mass removal of Africans to "tribal" reserves. In 1923, the state introduced the Native Urban Areas Act with a requirement that African males should carry "passes" showing that they had permission to be present in urban areas. This 1923 act also declared cities to be White areas and made provision for the establishment of "Black locations." In 1934, in response to widespread White anxiety about the presence of Africans in the city, the colonial state passed the Slums Clearance Act with the view of making, "comprehensive provision for the elimination of slums." Under this law, "African people were rounded up and sent to reserves."[22] The 1936 Native Trust and Land Act consolidated land dispossession—a "final deed of disinheritance."[23]

The post-1939 economic boom saw more Africans being drawn into urban areas. This increased White anxiety and provoked fear of labor competition. It was in this context that the National Party won the 1948 elections on the ticket of poor Afrikaners. The National Party came to power on the ideology of apartheid. The apartheid regime quickly set about consolidating colonial segregation through a raft of laws. The Population Registration Act categorized people into four races: White, Colored, Indian/Asiatic, and Native. In 1950, the apartheid government enacted the Group Areas Act providing for the segregation of residential areas into four race groups. This act mandated local authorities to remove "Black spots" (Black and multi-racial residential areas adjacent to or in between "White residential areas"). This led to unprecedented mass removals of Africans to newly established townships on the periphery of cities. In 1951, the Prevention of Illegal Squatting Act obligated land owners to evict "illegal squatters" and build "transit camps" to which evictees could be relocated. The Reservation of Separate Amenities Act of 1953 imposed social segregation in all public amenities.

In rural areas, the Bantu Authorities Act of 1951 sought the re-tribalization of conquered people by imposing a system of distinct African politics with an associated system of "traditional authorities." The apartheid state followed this segregation effort with a doctrine of separate development. This doctrine "implied that every South African must be assigned to an ethnic group, nation, or tribe, and that each of these must have its own site of self-government. Ethnic categories were enforced on a largely unwilling Black populace by means of comprehensive social engineering. Communities, and even families, were divided as the bureaucracy of apartheid categorized an entire people in accordance with the rules of descent."[24] The regime buttressed these efforts by setting up a "homeland" system through the Promotion of Bantu Self-Government Act of 1959. The act converted existing reserves into eight (later ten) distinct "Bantu Homelands." Africans living in declared homelands were thus denationalized—no longer South Africans but citizens of "homelands." The homeland policy was a culmination of a policy of ethnic cleansing through mass removals: "between 1960 and 1989, there were 3.5 million forced removals of people who were found to be of 'incorrect' ethnicity for their location."[25]

In 1960, the Pan-Africanist Congress of Azania (PAC)—a breakaway political party from the Africa National Congress (ANC)—organized a protest march against the passes. The police responded to this peaceful march by shooting protestors. According to official records, 69 people died with a further 180 wounded. After this massacre (known as the Sharpville massacre), the apartheid regime banned the ANC and the PAC and gave police-wide powers to detain and ban political activists. The banning of the ANC and the PAC meant that there was no effective national opposition against apartheid. In the late 1960s and early 1970s, Black students at universities formed the Black Consciousness Movement to advocate for the reclamation of black humanity and the setting up of self-reliance programmes. The Black Consciousness Movement influenced students to revolt against the apartheid education system—culminating in the Soweto Uprising of 1976. Between 200 and 700 people died during this uprising. In 1977, the apartheid police killed Steve Biko, the leader of the Black Consciousness Movement, and banned Black consciousness newspapers, youth groups, and other associated entities.

A national movement against apartheid finally came into being in 1983 with the formation of the United Democratic Front (UDF). UDF affiliates instigated unprecedented nationwide uprisings in the early 1980s. In response, a scared and desperate regime declared a series of formal states of emergency, beginning in 1985. On June 12, 1986, then-prime minister P. W. Botha extended the state of emergency to the whole country and gave the securocrats free rein to implement their own counter-revolutionary strategy. By the end of that year several thousand activists faced arrests, indefinite detention, and in some cases, assassinations. On February 24, 1988, the Minister of Law and Order effectively banned the UDF and several of its affiliates. Despite this ban the UDF continued to operate quietly, maintaining and rebuilding structures and engaging in discrete campaigns against the repression.

Widespread unrest, high inflation, international ostracization, and pressure from big business forced the state to start negotiating with the ANC. On February 2, 1990, F.W. de Klerk, the last colonial-apartheid president, announced the unbanning of the ANC and other liberation parties and organizations and the release of political prisoners. On the one hand, the apartheid regime was negotiating with the ANC, and on the other hand, it was fermenting a "Black-on-Black violence"—it plunged parts of the country into a civil war between the ANC and the apartheid-aligned Zulu ethnonationalist party called Inkatha.

Political negotiations culminated in an Interim Constitution of 1993 and the first non-racial general election in 1994.

2 After Apartheid: Laws, Institutions, and Processes in Response to Racism

Despite more than 25 years of Constitutionalism and the enactment of several laws and policies that give effect to the rights and values enshrined in the Constitution, the effects of systemic, structural, or institutional racism can still be felt and are experienced daily in the lived realities of the majority of South Africans.[26]

After the legal end to colonialism and apartheid in South Africa, there was recognition that much more additional work was necessary to bearing on racism and the dismantling of the legacies of colonialism, including: the Constitution of South Africa, the Employment Equity Act (mandating affirmative action policies); the Broad-Based Black Economic Empowerment Act (BBBEEE) (mandating the inclusion and participation of Black entrepreneurs and companies in the economy) and the Promotion of Equality and Prevention of Unfair Discrimination Act (whose title is self-explanatory). This section will also focus on institutions that were established to support democratization and ensure a move from a culture of authority to a culture of accountability and human rights. The following section will explore the disjuncture between these laudable legal provisions and policies and actual practice. This section will end with a consideration of the Truth and Reconciliation Commission and its contribution towards the non-recurrence of atrocity crimes.

The Constitution of 1996

The current Constitution of South Africa is founded on the principles of equality, human dignity, and non-racialism. As this study discusses, the history of the country has formed its present, and continuing to acknowledge that history is integral to its future efforts to address racism. And so, it is worth pointing out that the words "colonialism" and "apartheid" are missing in the Constitution. And although the term "ubuntu" (humanity)—the living philosophy of Indigenous peoples—was mentioned in the Interim Constitution, it is perhaps telling that it was not included in the Final Constitution.

The Constitution includes the Bill of Rights in chapter 2. This chapter enshrines classic civil and political rights such as the rights to freedom of movement, peaceful assembly and expression, religion and conscience, culture, and bodily integrity. Section 16 guarantees the right to freedom of expression but excludes hate speech and incitement to violence. The Constitution contains a bouquet of socio-economic rights with the proviso that *access* to those rights is provided *within available resources*. Section 26 is the longest clause in the Bill of Rights. That section guarantees the right to property and allows the state to expropriate land (in limited cases) to enable restitution and redistribution of land. Section 9 is the right to equality, and guarantees the fundamental right to equal protection and benefit of the law. This section outlines an extensive list of prohibited grounds for discrimination including nationality, sexual orientation, and ethnic or social origin. This section also mandates the adoption of "legislative and other measures" to benefit historically disadvantaged groups. Section 9 led to the enactment of the Employment Equity Act (EEA), the BBBEEE, and the Promotion of Equity and Prevention and Prevention of Unfair Discrimination Act (PEPUDA).

Employment Equity Act 55 of 1998

As discussed earlier, the history of Europeans (initially as traders who eventually became settlers and undemocratic rulers) in South Africa began with unequal and unlawful economic exchanges. The race-based legal and social structures of the country extended to all areas of life including employment

opportunities. The purposes of the EEA are to eliminate discrimination in the workplace, to ensure fair levels of equitable representation in all categories in the workplace, and to take affirmative action measures to redress disadvantages in the employment of designated groups. Designated groups are Africans, Coloreds, Indians/Asians, women, and people living with disabilities. A parliamentary researcher for the ANC pointed to this policy as one of the post-1994 success stories.[27]

The Broad-Based Black Economic Empowerment Act 53 of 2003

BBBEE is a government policy aimed at redressing apartheid's legacy of economic exclusion and inequality through economic transformation that would increase Black participation in the economy. The act promotes equal opportunity and equal access to government services and procurement. The act includes the BBBEE Codes of Good Practice that makes provision for a scorecard to measure progress. The codes are binding on all state bodies and public companies, and the government is required to apply them when making decisions on procurement, licensing and concessions, public-private partnerships, and the sale of state-owned assets or businesses. These codes help monitor, for example, the racial make-up of companies bidding on procurement agreements from the government, and award these contracts to those who meet a certain mix of Black employees. Black is defined in the BBBEEE to include African, Indian, and mixed race individuals, and in 2008 Chinese South Africans were added to this definition. The goal is to help redistribute the traditionally White-dominated access to wealth to these historically excluded groups.

Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

PEPUDA is one the most important pieces of legislation designed to facilitate the transition from a racial apartheid state to a democratic society guided by principles of equality. The law aims to prevent and prohibit unfair discrimination while simultaneously promoting equality. Chapter 2 of the act deals with the prevention, prohibition, and eradication of unfair discrimination, hate speech, and harassment. Besides the general listed grounds identified in section 9 of the Constitution, special attention is given in chapter 2 to unfair discrimination on the basis of race, gender, and equality. This is emphasized in the preamble which states that "the purpose of the Act is to give substance to the constitutional commitment to equality by providing a legal mechanism with which to confront, address and remedy past and present forms of incidental, as well as institutionalized or structural, unfair discrimination and equality." Section 10 prohibits hate speech and section 11 proscribes harassment of any person based on listed grounds. A unique aspect of this act is that it also provides a legal mechanism specifically to address discrimination. The law established the Equality Courts, special courts that hear only cases relating to unfair discrimination, harassment, and hate speech. They are meant to be forums for accessible and quick justice. In an effort to make these courts more affordable for all, one does not need to engage a lawyer to approach these courts.

State Institutions to Support Constitutional Democracy ("Chapter 9" Institutions)

In addition to the Equality Courts, chapter 9 of the constitution establishes several state institutions to support democracy including the Human Rights Commission, the Commission for Gender Equality, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities. The mandate of the South African Human Rights Commission is to promote a culture of human rights, to monitor the implementation of the Bill of Rights, and to embed a culture of human

rights. The primary objectives of the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities are to promote respect for the rights of cultural, religious, and linguistic communities and to promote and develop peace, friendship, humanity, tolerance, and national unity among cultural, religious, and linguistic communities, based on equality, non-discrimination, and free association. The Commission for Gender Equality is tasked with promoting respect for gender equality and the protection, development, and attainment of gender equality.

3 Transitional Justice and the Truth and Reconciliation Commission

In South Africa, transitional justice began in the second half of the 1990s. First, it is important to recognize that transitional justice is often a question of timing—get the timing wrong and the eventual result is a mess. A common narrative is that South Africa underwent a peaceful transition—even a miracle transition. The reality is that between 1988 and 1994 more people were killed in political violence than during any other comparable recent period of South African history. It was a very bloody transition. The story of a peaceful—or miracle—transition is a myth.

The Goals of the Truth and Reconciliation Commission

South Africa's transitional justice process began in the second half of the 1990s with the Truth and Reconciliation Commission as its main vehicle. In 1995, the new Parliament enacted the Promotion of National Unity and Reconciliation Act (TRC). The goals of the TRC were to establish the truth about the past, grant amnesty where appropriate, and establish measures for reparations. To that end, the TRC was comprised of three committees: the Amnesty Committee, the Reparation and Rehabilitation Committee, and the Human Rights Violations Committee (HRV). The Amnesty Committee was responsible for deciding upon amnesty applications for crimes associated with a political objective. The Reparation and Rehabilitation Committee enabled individual and community reparations. Lastly, the Human Rights Violations Committee afforded a platform to victims and survivors to tell their stories. This committee also identified who qualified as a victim of gross violation of human rights and was thus entitled to reparations.

The TRC was the biggest commission to date: it received more than 22,000 statements and conducted 100 hearings. Eventually just under 17,000 of the submissions were deemed worthy of being declared victims. Bear in mind that South Africa has a population of more than 50 million people and legal apartheid began in 1948. It is very limiting, at best, to declare only 17,000 people were victims. First, many people were excluded from even engaging in the TRC process. When the TRC started, violence was still raging in some parts of the country. Many people could not engage with the commission because they were still traumatized or displaced. Secondly, many people fell through administrative gaps due to language-based miscommunications and incorrect classification of those who gave statements. Khulumani Support Group, the national movement of victims and survivors of gross human rights violations, estimated that only 10% of people who fit the TRC's own narrow and legalistic definition of "victim" were able to participate in the process.[28]

What Did the South African Transitional Justice Process Achieve?

For purposes of this case study, we will set aside the lens of a post-conflict paradigm which would suggest that a transition should lead to decolonisation and historical justice in the context of settler colonialism. Instead, we will use the United Nations framework of transitional justice. And yet, we still find that not much was achieved.

For example, the overall sense of satisfaction—in terms of recognition and financial remuneration—from those who were victimized is poor**.** Some victims felt better because they received official recognition and public acknowledgment after years of denial of their victimization. However, because the focus was on the stability and reconciliation of elites (a perpetrator-centric process), many felt that their tears and testimonies served to legitimize the elite compromise. The commission did not provide adequate proper psycho-social support and some victims felt re-traumatised. Related, victims' wounds were opened without any balm to soothe them. While perpetrators got amnesty immediately, victims had to wait many, many years for financial restitution. The catharsis was for the nation as a whole rather than victims. Furthermore, there were only a handful of cases of victim-perpetrator reconciliation. This is all the more significant because of the TRC focus on individual harms, it did not enable social reconciliation.[29]

Another challenge is the ongoing pain of victims. More than ten years after the end of the TRC hearings, Khulumani members reported that they still had bullets in their bodies, they continued to need wheelchairs and prosthetic equipment, and their psychosocial needs remained unmet.[30] To make matters worse, victims have no guarantee that these traumas and crimes will not happen again. While there have been some institutional reforms such as the establishment of "institutions of democracy" mentioned above, a culture of impunity continues. In part, this is because perpetrators who did not go to the TRC have not been prosecuted. Another challenge is the lack of restitution. Only eight percent of the land has been redistributed. Poverty in South Africa is endemic, and remains most pervasive among the Black population. In short, South Africa is the most unequal country in the world.

In terms of actual financial compensation, there was only a one-time payout of R30,000 ($1,600USD) was given to victims of human rights abuses, meaning those fortunate enough to be determined as victims by the TRC. The state still operates on the basis of this "closed list" in making decisions about which victims to help, therefore victims and survivors who did not go to the TRC are excluded. And although the TRC recommended a program of community reparations for the worst affected communities, this has not been done to date.

Revisiting Reconciliation: Is Another Reckoning with the Past Necessary?

A member of the TRC Amnesty Committee shared that he did not think that the TRC achieved either truth or reconciliation:

> *The TRC was an attempt to reconcile various groups in South Africa. But, I will not say it has been a 100% success. I was fortunate to serve as a member of the Amnesty Committee of the TRC. The people who came forward to seek forgiveness and reconciliation were from the Black or African side. There were very few who were from the White group. Also, those from the White group who came to apply for amnesty were so economic insofar as they were disclosing the extent of the atrocities of the past.*[31]

Some maintain that the TRC produced a particular "past": it generated, beyond its implementation and operation, a set of concepts and discourses which shaped the ways in which the "past" is produced, presented, and understood, and the "everyday" is inhabited. More specifically, the TRC "produced" a past not of conquest and colonization, but softer narrative—one of "conflict" and "division."[32]

Some interviewees believe that there is a need for another commission to reckon with the past. One of them is of the view that the TRC "perpetuated White supremacy" because it did not go to the core of the problem, which is White privilege and colonization.[33] Britannica defines White supremacy as "beliefs and ideas purporting natural superiority of the lighter-skinned, or 'White,' human races over other racial groups." [34] As discussed in the history section above, the entire project of settler colonization in South Africa was based on and justified by these ideas and beliefs. Settler colonizers committed atrocity crimes such as genocide, ethnic cleansing, and apartheid to consolidate and perpetuate White supremacy. Commentators accuse the TRC, firstly, of unwittingly perpetuating White supremacy by not addressing beneficiaries of that supremacy and colonialism.[35] As mentioned above, the TRC's overwhelming focus on individual perpetrators and victims jettisoned structural racism and White supremacy. Second, (and related), the TRC is alleged to have "perpetuated racism" by not having a clear conception of how atrocities were related to racism. One of the key architects of the TRC, Charles Villa-Vincenio, puts it as follows: "The limitation of the South African TRC was that it did not have the mandate, the time, or perhaps the will to address the underlying problems of racism and privilege that underpinned the gross violation of human rights that it sought to uncover."[36]

Attitudes towards the reconciliation project and the Rainbow Nation myth are particularly stark among young Black people. For example, qualitative research carried out at the University of Pretoria showed that Black students have given up on the Rainbow Nation, squarely laying the blame on Mandela. Various responses illustrated the lack of confidence. One respondent stated that Mandela is a non-starter in their discourse: "if you're having a political debate and somebody mentions Mandela, it's very common to hear somebody say, 'Ah, don't tell me about that guy'." Another was even more dismissive of Mandela's strategy, stating: "Mandela opted for peacemaking, which found us compromising us." Some views not only disregarded Mandela specifically but expanded more broadly on the idea of why a "post-apartheid" lens did not resonate:

> *I'm really indifferent to the term [post-apartheid] because it changes nothing for me, at least [in] how I view the world. [J]ust like the 'born free' term it invokes a lot of: "We're good now. We are fine." [...] You know every time you bring up anything that can be associated with apartheid they will tell you, "Oh, we're past that, we are in the post-apartheid era," and it's used to shut people up.*

Another echoed the disbelief of a post-apartheid freedom in light of the generational racism they experienced:

> *But the older I got, it was just like, is this what freedom really looks like? If I was born free, why am I still facing some of the challenges that my mom faced, and my grandmother faced? Why is it so hard for me to find my identity in my country, in my community? Why are all these things contending against me? So as you grow older you start to ask, am I really free?*[37]

Responding to the question whether there is a risk of occurrence of atrocity crimes, a commissioner at the South African Human Rights Commission said that he did not think that would happen. He elaborates:

> *I don't think racial conflict will escalate to that extent as to become genocide. I'm saying that because the conflict is not of such a large scale that it defaults into genocide or any large scale of racism. I also don't think that there will be any tribe or group that will be cleansed or removed because when these incidents take place, they don't place directed to an ethnic group or a crowd, but we have incidents where one individual is directing racist utterances against another individual of a particular group. The TRC was an unfinished business.*[38]

4 State of Racial Injustice and Other Forms of Discrimination Against Marginalized Groups

> *The colonial and apartheid hierarchy of race in relation to privilege and access has not fundamentally changed.*[39]

Stats SA 2022 mid-year estimates indicate that there were just over 60 million people living in South Africa.[40] In its 2026 Community Survey (Census) Report, Stats SA pointed out that it retains the categorization of South Africans into four distinct groups: Black, Colored, Indian/Asiatic, and White people.[41] Stats SA justifies this decision as follows: "The classification … by population group is useful as a means of stratifying the population given the country's [historical classifications have] been accepted as the best measure of previous socio economic deprivation."[42] Stats SA 2022 estimates indicated that Black people comprised 81% of the population, Colored people are 8.8% of the population, people of Indian/Asian descent was 2.6%, and White people constitute 7.7% of the population.[43] In addition to the many historical and current atrocities to race-based groups by race, there are two other very vulnerable and marginalised groups: the LGBTQI+ community and non-nationals.

The LGBTQI+ Community Path to Protection: Recent Successes and Ongoing Risks

Though adequate protection of the LGBTQI+ group is yet to be achieved, the country's legal regime has made a few remarkable strides for the legal recognition and protection of queer people. The ruling in *National Coalition for Gays and Lesbian Equality v Minister of Justice*[44] de-linked homosexuality from the crime of sodomy. In *Du Toit and another v Minister for Welfare and Population Development,*[45] the court confirmed the rights of same-sex life partners to jointly adopt children where they are deemed fit parents. In *Gory v Kolver,*[46] a partner in a permanent same-sex life partnership was included in the Intestate Succession Act's definition of a spouse. And the case of *Minister of Home Affairs and Another v Fourie*[47] resulted in the enactment of the Civil Union Act to address the lack of effective protection of homosexual relationships.

Recognition of the above legal reform over the years, does not negate the current ongoing persecution of queer people. Particularly relevant to this case study is South Africa's unique case of queer Black women being a marginalized group within an already vulnerable group. "This was because, firstly, although all women in South Africa were vulnerable to violence, there was a correlation between increased poverty and increased vulnerability, and, in South Africa, being Black meant there was a greater association with being poor or having less access to resources. Not only did Black women live in environments in which, just as other Black women, they were vulnerable to attack, they also lived in places where cultures were often deeply homophobic and in which sexual violence had become a 'popular weapon'."[48] Hate crimes against Black lesbians include "corrective rape", intentional HIV infection, grievous bodily harm, and murder.[49] Research shows at least 20 Black lesbian hate murders took place in a space of eight months in 2021.[50]

It is important to stress that the ongoing oppression of Black lesbians and broader societal homophobia are also continuities of colonial legacies. To be sure, several studies have shown that colonization either introduced homophobia or buttressed it.

> *Colonialism served to introduce puritanical, heteronormative Christian beliefs into South African society... Therefore, it is argued that it was through the Christian assertion that homosexuality was an abomination that homophobia first arose within African communities. These conservative colonial-Christian values carried through to the apartheid era and were further entrenched through the criminalizing of homosexuality. Furthermore, by characterizing Black sexuality as rampant, it was assumed that the only form of sexuality the Black population ascribed to was heterosexuality. The essentialist view of African sexuality has continued to influence assumptions regarding homosexuality in democratic South Africa.*[51]

The systemic oppression of sexual minorities was not part of the TRC's purview and TRC did not make specific recommendations around it. The widespread pattern of abuse of Black lesbians has been recognized as a "hate crime."[52] Hate speech and hate crimes, as is well known, are often precursors of atrocity crimes.

Non-nationals in South Africa: the Risks and Perils of Xenophobia

A professor stated in their interview that they believe that while racism is a serious issue in South Africa, it is xenophobia that is likely to end in heinous crimes against humanity.[53] The results of Stats SA's 2016 Community Survey indicated that approximately 1.2 million non-nationals were living in South Africa.[54] Non-nationals are an especially vulnerable and marginalized group in South Africa. Despite the fact that the ANC received a lot of military, monetary, and other assistance from other African countries, the post-1994 state and large swathes of South Africans are xenophobic.[55] Since 1994, shopkeepers from Somalia and Ethiopia have suffered regular attacks and harassment. This all came to a head in 2008, when Afrophobic pogroms resulted in the killing of more than 60 people and the displacement of over 100,000 people. Since then, the state has done little to weed out xenophobia. A study by the Rosa Luxemburg Foundation found that "since the transition to democracy in 1994, a total of 1,028 xenophobic incidents have been recorded, resulting in 659 deaths."[56]

In 2022, three UN Special Rapporteurs released a joint statement raising alarm about increasing xenophobic sentiments in South Africa. They warned that xenophobic sentiments had reached fever proportion with self-styled vigilante groups openly conducting raids against "illegal migrants."[57] A leading example is a group that was formed two years ago in Soweto and calls itself Operation Dudula. The name Dudula (literal translation: "force out") makes it clear that the mission and vision of this "civic group" is to cleanse South Africa of immigrants. Its modus operandi is circulating information on social media blaming non-nationals of committing various crimes or "stealing jobs" and then mobilize members of the public to carry out raids at shops, informal traders' sites, and shack settlements in search of "illegal foreigners." Operation Dudula and its offshoots clothe their hate speech in the rhetoric of South Africa being overrun by those who are "too alien." The president of Operation Dudula, who is a Black African woman, stated: "we must be realistic here that most of the problems that we have are caused by the influx of foreign nationals. Our country is a mess. Foreign nationals are working on a 20-year plan of taking over South Africa."[58]

Hoping to capitalize on anti-foreign sentiments, Operation Dudula has registered as a political party to contest the 2024 general elections. It should be noted that established political parties such as the ANC have also been known to make anti-foreign statements. The most recent former ANC spokesperson endorsed Operation Dudula declaring it as a "progressive and constructive community forum." He further alleged that undocumented non-nationals "... come here to sell drugs, seat [sic] here illegally, undermine our sovereignty, create illegal business."[59] Newly-formed political parties such as the Patriotic Alliance, Action SA, and the African Transformation Movement have also mobilized electoral support on the basis of xenophobia under the banner of "#putSouthAfricafirst." The Economic Freedom Fighters is the one party that has explicitly and consistently rejected and condemned xenophobia and Afrophobia.[60]

The state has not done enough to curb anti-foreign hate speech or to prosecute inciters of xenophobic violence. Indeed, UN experts mentioned above blame the state for failing to adhere to its positive obligations to promote and protect the rights of non-nationals. They condemned political parties for campaigning on the ticket of xenophobia and the state for having xenophobic policies and practices.[61] It is important to point out there is a racial element to xenophobia in South Africa: xenophobic sentiments and attacks are mostly reserved against Black non-nationals. It is also worth noting that Black South Africans have sometimes been victims of xenophobia because their skin is "too dark." In the words of Michael Neocosmos they are treated like "native foreigners."[62] It is on this basis that some commentators choose to refer to this form of discrimination as Afrophobia or a "new racism."[63]

Rising xenophobia in South Africa is often explained in the same way as elsewhere: that non-nationals are "stealing our women", "they are into human and drug trafficking," "they are stealing our jobs" or that it is an outcome of frustrations with the lack of service delivery by the state.[64] As one interviewee notes "xenophobic attacks are due to competition for limited and constrained resources."[65]

5 The "New" South Africa: The Legacy of Racism in Wealth, Education, and Safety

While immigrants are an easy yet misplaced target for South Africa's problems, it is a fact that inequality, joblessness, and impoverishment continue to bedevil South Africa—a result not of new arrivals but old legacies.

The Inequality of Race and Wealth After Apartheid

Economic inequality in South Africa is one of the clearest manifestations of racial injustice. A study composed by the *Journal of Southern African Studies,* demonstrated how "from 1994 to 2014, the proportion of Black workers occupied in positions considered 'skilled' rose by 3%, a rise which appears paltry compared to the 19% increase in the proportion of White workers in skilled positions."[66] While the social grant/social security system has led to a modest drop in poverty levels, structural impoverishment and, more importantly, income inequality remain stubborn features of South Africa. In 2019, the Studies in Poverty and Inequality Institute reported that more than 55.5% of South Africans live in poverty and that one in four of them live below the poverty line.[67] A 2020 study revealed that the wealthiest ten percent of the population owned eighty-six percent of the country's wealth.[68] In addition, the 3,500 wealthiest individuals (approximately 0.006 percent of the population) had a combined wealth greater than the total wealth of fifteen percent of the population, some thirty-five million people. In 2022, a multi-country study by the *Journal of Pharmaceutical Negative Results* revealed that "in 2019, the top 1% of South African earners controlled almost 20% of national income, while the top 10% earned 65%. On the other hand, the remaining 90% of South African earners acquired 35% of national income."[69]

The detrimental legacy of the apartheid era persists in economic power as well as educational opportunity. Quality of education and inadequate access to educational facilities and resources disproportionately affect Black communities throughout the nation. A *Geographical Review* article found that "some 80% of children in Cape Town continue to attend schools intended for their race group under apartheid…most such schools have poor resources and have enjoyed little improvement in their facilities since the end of apartheid."[70] These inequities, alongside poor access to quality healthcare benefits, perpetuate the cycle of poverty and further exacerbate the detriments of South Africa's socio-economic discrepancies.

The legacy of forced removals is still obvious today—all races predominantly remain in the geographical areas in which previous racist systems placed them.[71] Black people, without ownership of and financial means to purchase land in economically conducive areas, remain in inner city informal settlements and township squalor when not confined in economically barren rural areas.[72] These areas are often characterized by, *inter alia*, poverty, lack of public and private investment, environmental racism, and social stress.[73] Some interviewees argued that the state was unintentionally reinforcing racism by failing to dismantle this spatial colonization.[74]

Income distribution is glaringly tied to race lines, and further exacerbated by by gender and age. Along racial lines the gap is clear: in 2015, "the annual median expenditure for Whites was more than ten times higher than that of Black Africans."[75] Gender adds yet another component. In 2015, the average annual income of male-headed households was double that of female-headed households.[76] And age-based wealth distribution further illuminates the same story: a recent Human Rights Watch study found that "87 percent of Black African, 81 percent of Colored, and 58 percent of Indian/Asian older people received means-tested social security entitlements in 2020, compared to only 30 percent of White older people."[77] This has led some to conclude that "despite having a progressive constitution and policy mandate, post-apartheid democratic society seems to have reproduced inequality along the same [racial] lines."[78] A study by the state-funded Human Science Research Council effectively concluded that the lives of many (nominally) South African citizens, "remain constituted as bare life, disempowered and …'marginal' to society…."[79]

Public Safety, Policing, and General Welfare: The Everyday Racism of "Modern" South Africa

Abahlali baseMjondolo (the Shack Dwellers Movement) of South Africa, the largest social movement of impoverished people, refuses to recognize the present dispensation as a state of post-apartheid. Abahlali names the current situation as a state of "unfreedom", and they explain it as follows:

> *Twenty years after apartheid we live like pigs in the mud, our children die of diarrhea, we are forced into transit camps at gunpoint, the police beat and shoot us in the streets and the assassins kill us with impunity. If we stand up and demand that our humanity is recognised we are removed from the housing list and placed on the death list.*
>
> —**Abahlali baseMjondolo**/the Shackdwellers Movement of South Africa, Mourn Unfreedom Day Rally, 2014

Abahlali's point is that Black political leaders are "Black boers" [Black colonialists] in the sense that they have internalized their historical oppressors' mode of thinking and governance.[80] To be sure, spectacular incidents involving the death of Black people serve as reminders of the continuing precarity of Black life in the "new" South Africa. Some examples:

- **2008:** sixty-two people are killed in the Afrophobia pogroms
- **2012:** thirty-four protesting mineworkers are killed by the police
- **2016:** a hundred and fourteen mental health patients in state care die from hunger, dehydration, and neglect
- **2021:** more than three hundred and fifty people die during two weeks of social unrest, rioting, and looting
- **2023:** seventy-seven migrants die in a fire blaze in a derelict and abandoned state building.

The 2012 mineworker incident mentioned above is an illustration of both the continuing fungibility of Black life and the continuing need for further reform of the state security system. In 2012, the South African Police Services (SAPS) opened fire at mineworkers who were protesting a mining company for better working conditions and fair remuneration.[81] Police shot and killed 34 miners during this ordeal. At the time of the massacre, the miners had decided to withdraw from their strike position but the SAPS had already fenced them in so they would have no way to run.[82] Gunfire was opened against mine workers who were already walking away from the strike, forcing them to run for their lives.[83]

A commission of inquiry, the Marikana Commission, was established to investigate the causes of this incident and concluded, among other things, that police had exceeded the bounds of lawful and reasonable policing. It found that some victims were hiding or already on the ground when police shot them.[84] The Marikana Commission made several recommendations to improve public order policing including the proscription of the use of automatic rifles in crowd control situations and the training of SAPS members to carry out public order policing within the prescripts of the law. The Commission also recommended that a panel of experts in public order policing, with specialized expertise and extensive experience, be appointed to revise the current prescripts of public order policing and determine the best possible measures to ensure that public order policing is discharged by adequately equipped personnel.

The Commission's 2015 report mirrored the Policy Ministry's own 2011 finding that the model of public order policing in South Africa "leans too easily in resorting to the use of force especially where crowds would overstep boundaries set by police which in most instances construed as posing a threat to the Police."[85] Per the recommendations of the Marikana Commission, the state appointed a panel of experts in 2016. The Minister of Police released the panel's report in 2021—three years after he had received it in 2018.[86] The panel's main recommendation centered on the need to professionalize and demilitarize the SAPS and ensure greater internal and external accountability of SAPS. The Panel echoed and supported the National Development Plan's sentiments that "the police should be demilitarized and that the culture of the police should be reviewed to instill the best possible discipline and ethos associated with a professional police service."[87]

However, in reporting to Parliament in 2021, the Panel expressed regret that some of its recommendations had not been implemented and that the major police failings during the 2021 social unrests indicated there was still a long road to the necessary reforms.[88] In this regard, A 2022 report by the Centre for Applied Legal Studies has shown a trend by police to use violence against protestors. Interviewees for this case study also pointed out that protests by community members is often met with violence by police:

> *Working-class citizens in townships remain the most affected by poor service delivery within their communities, as such more protests would naturally occur within these communities, and protesters are met with varying levels of physical violence from SAPS [South African Police Services] compared to protests in the varying middle class communities...*[89]

Some interviewees expressed the opinion that the "Black state" was racist toward Black people. For example, one interviewee stated that: "The state operates under the guise of neutrality but the effect of its actions are inherently anti-poor and thereby antiblack."[90] An academic insisted in her interview that these ungrievable deaths and general living conditions of Black people constitute "slow genocide."[91] She asserted that these deaths are not an accident but that "the system" has designed things that way because Black people are still not regarded as full humans, they are "just surplus": "Black people live in the liminal space. A space where you are just waiting to die or like, you know, waiting for your turn to die."[92]

In its *Information Sheet on Hate Speech*, the South African Human Rights Commission (SAHRC) reported complaints of racist hate speech to have constituted the highest number the overall complaints received in 2016-17. Further, Black people were often at the receiving end of racial slurs because all the other races believe themselves to be above the Black race.

An interviewee who sits on the South African Human Rights Commission believes that racism perpetrated by White people against Black people is overtly alive.[93] Persisting racial injustice and the failure to address historical injustices obviously have an impact on the state of race relations. Mutual mistrust, fear, and in some instances, antipathy continue. A 2021 annual Reconciliation Barometer carried out by the Institute for Justice Reconciliation (IJR) found that 72% of respondents believe South Africa is still in need of reconciliation.[94]

Telling the Story of Racism: The Role of Media in South Africa

Various interviewees blamed the media for sometimes fanning racial tensions, homophobic sentiments, and xenophobic attitudes. One researcher put it this way: "In my opinion, media has largely not played

a developmental role in mitigating current racist discourses and this is evident in the manner in which stories relating to Black people are written about and sensationalized."[95] An advocacy specialist pointed out that the media continues to perpetuate racist tropes even though media ownership has shifted in favor of Black people.[96] On the other hand, a lawyer responded as follows: "Mainstream media largely follows a neoliberal narrative that foregrounds individualism and contempt of the poor. Yet this is not always the case as there is a burgeoning sector of activist journalists which showcase the plight of affected people and this is picked up by mainstream media."[97]

During 2021 and 2022, the South African Human Rights Commission convened an Inquiry into Discrimination or Discrimination in Advertising. The commission received numerous complaints about racist or discriminatory advertising. The commission decided that "instead of having to react to each discriminatory advert as and when they occur, the... [Commission] decided to convene an Inquiry to establish a genuine culture of human rights and prevent discriminatory adverts which discriminate and impair the dignity of people living in South Africa."

6 Resistance to Racism

> *There is a pervasive internalized oppressive view of self by the dispossessed in accepting their fate as marginal aspects of society, superfluous appendages. But the tide is changing, the younger generations are throwing off the shadow of previous generations' inaction and asserting their right to the city and spaces where they can make their livelihoods.*[98]

Racism in South Africa today manifests itself through, *inter alia*, microaggressions, racial profiling, denial of White privilege, disparity in access to jobs and in earnings, cultural erosion, coerced conformity, police brutality, watered down history in education curriculum, and pretense that racism is in the past.[99] Confrontation of this kind of racism is sometimes frowned upon by victims as well, because those who point out racist actions masquerading as "legitimate" goals (school rules, crime rate policies, social cohesion arguments, state fund limitations, and work ethics), are sometimes labelled "aggressive", "stuck in the past" or "hooligans" by the society and state.[100]

Confrontation of racism is usually against institutions such as former model-C and predominantly White private schools, places of employment, leaders of faith-based organizations, and individuals. Physical gatherings and marching protests are the most common forms of resisting racism. However, there is a growing culture of social media mobilization against racism.[101] Twitter (now referred to as X) has been a strong platform for Black people to advocate against, expose, and confront racism. Non-nationals have also formed civic groups to advocate for their rights and to challenge hate speech and xenophobic policies. Prominent groups in this regard include the Zimbabwe Exiles Forum, the African Diaspora Forum, and the Consortium for Refugees and Migrants in South Africa. Kopanang Africa against Xenophobia is a strong coalition of civil society organizations that was recently formed to combat xenophobia.

South Africa has a vibrant social justice sector that campaigns against racism and other legacies such as spatial justice, police brutality, corporate impunity and environmental racism. Civil society organizations and movements such as Lawyers for Human Rights, Centre for Applied Legal Studies,

Legal Resources Centre, Centre for the Study of Violence and Reconciliation, the Institute for Justice and Reconciliation, the Foundation for Human Rights, Abahlali baseMjondolo, Fees Must Fall, Rhodes Must Fall, and other student movements are some of the noteworthy groups that combine legal and social mobilization against racism and existing injustice emanating from pre-democracy racism. It is important to note that most of these groups' injustice frame is conceptualized on the basis of non-racism and they do not have explicit anti-racist campaigns or projects. The South African Coalition for Transitional Justice brings together organizations and persons who advocate for the "finishing of the unfinished business of the TRC."

One interviewee explained that NGOs can play a significant role in confronting racism by carrying out research that helps society understand the deeper problem.[102] NGOs can also help dismantle racism through reconciliation dialogues with affected communities and persons.[103] A lawyer elaborates in her interview on the role that public interest law organizations can play in resisting spatial apartheid and thus undo some legacies of apartheid: "We're an activist organization and law centre that challenges the reproduction of spatial apartheid in Cape Town and promotes social, economic, and racial justice through increased access to land and dignified homes. We work to broaden access to well-located land and affordable housing. Through our campaigns, Ndifuna Ukwazi combines community organising, research, advocacy, and litigation to advance urban land justice and fuel systemic change."[104] For its part, the Human Rights Commission has set up a program to facilitate dialogue and national cohesion.

> *I think the program that the SAHRC is having now will bear some fruit. The SHINE—Social Harmony Through National Efforts—will be trying to teach people about social cohesion and then and thereafter it would be followed by trying to make towards letting the people be equal in various respects in terms of resources.*[105]

Political parties such as Black First/Land First and the Economic Freedom Fighters mobilize explicitly on anti-racist terms. However, it is also important to point out these groups have been successfully reported for anti-White hate speech to the South African Human Rights Commission. A frontal resistance to racism in the contemporary era has been led by the Black "born-free" generation. Starting from 2015, this young Black movement inaugurated a "decolonial turn" in political discourse and praxis. A "decolonial turn" was necessary because, as the first section of this case study indicated, ongoing and institutionalized racial injustice is a symptom of the unfinished business of decolonization. A comprehensive and multi-layered decolonization program would have attended to the aftermath of conquest and colonization including land dispossession, White supremacy, institutionalized racism, internalized racism, cultural subjugation, and epistemicide.

The #RhodesMustFall Movement and Promising Success

In March 2015, a movement emerged against symbols of colonial oppression, anti-Black alienating institutional culture and institutional racism at the University of Cape Town.[106] This movement eventually organised under the hashtag #RhodesMustFall, culminating in the removal from campus of a prominent statue of Cecil John Rhodes. The twin animating impulses of this nascent movement were White cultural supremacy and Black dehumanization. Historical and contemporary "Black pain" was thus the main organizing principle of #RhodesMustFall. The #RhodesMustFall movement adopted Pan-Africanism, Black Consciousness, and Black Radical Feminism to forge a unique decolonial

ideology and praxis.[107] Interestingly, the #RhodesMustFall mission statement explicitly rejected human rights discourse, and by extension South Africa's constitutional dispensation, on the basis that human rights cannot ameliorate "Black dehumanization" and that the Constitution "has systematically been used to deter irrepressible urges by Black South Africans to challenge racism and violence."[108] #RhodesMustFall, then, brought into sharp relief questions of on-going cultural supremacy of Whiteness; the economic, racial and cultural subjugation of historically oppressed people; and the role of institutions of higher learning in legitimizing this post-1994 set up.

The #RhodesMustFall movement, directly or indirectly, inspired similar campaigns at other historically White universities such as #OpenStellenbosch (at the University of Stellenbosch), #TransformWits (at the University of the Witwatersrand) and #TuksSoWhite (at the University of Pretoria).[109] A common thread running throughout these campaigns was the need to decolonize universities and eventually society. "Black students' protest was against their own alienation inside the White institution, but also against their assimilation as new elites into a society that remains stuck in White institutional time."[110] Students thus understood that in South Africa racial capitalism was still the primary mode of oppression. This meant that the struggle to decolonize universities and society had to confront both White supremacy and socio-economic marginalization.[111]

In October 2015, student activists called for a nationwide campaign to demand a zero percent tuition fee increase in 2016. This campaign was organized under the banner of #FeesMustFall (#FMF). Many activists assert that #RhodesMustFall directly influenced and shaped the formation of #FMF.[112] Initially sparked by a government announcement of a proposed fee increase of more than ten percent in one year, relating back to #RhodesMustFall, #FMF later came to call for broader university and societal change. As one researcher confirms in their interview, "issues we were addressing were structural and systematic racism."[113] Demands included a call for free higher education (a promise made in various ANC election platforms and the 1955 Freedom Charter), for decolonized higher education, for changes to language of instruction (i.e. cessation of teaching in Afrikaans), an end to outsourcing on university campuses, "the decriminalization of protests and protesters," "an end to debt," and "an end to all oppressive systems including racism, exploitation, sexism, homophobia, xenophobia, and ableism, amongst others." Ultimately, the students did not get everything they fought for: fees have not fallen and the movement towards decolonization and Africanization of the curriculum has stalled at most universities. However, the students were successful in influencing a move away from liberal discourse that focused on interpersonal racism to a focus on the coloniality.

Conclusion

The violence that is going to happen in South Africa is because the elite is disappearing [getting richer and more isolated] and the poor are becoming more poorer. Therefore there's going to be something that looks like an Arab Spring. That, we are guaranteed.

When the unled revolution comes... the first target is going to be White people...

—**Julius Malema,** 2023

Whenever people talk about the fear of upcoming racial conflict, I always ask: What do you mean? Racial violence is there every day. Black people live under racial violence in the ghetto. Their living conditions are violent. And those conditions are violent because they are Black conditions. When people talk of the fear of racial violence, they mean they fear the decentralization of violence from the peripheries to the areas where White people and the Black elite live. There is racial violence now![114]

In July 2021, social unrest broke out in two of the nine provinces of South Africa. When the riots, looting, and protest came to an end more than 350 people had been killed, and thousands injured. Billions of rands had been wiped off the economy. This period of unrest was the most violent and widespread in the post-1994 South Africa era. The Presidential High Panel of Experts appointed to carry out a fact-finding mission into the causes of the unrest concluded that the unrest was caused by several inter-related crises plaguing the country. They cited the responsibility of the government including the general weakness of state institutions, rampant corruption, and the phenomenon of sponsored state capture. They also recognized the impact of the high levels of current unemployment, exacerbating generational poverty and deep inequality, as well as poor spatial planning. In addition, they identified the frustrations caused by the COVID-19 restrictions, adding to the feelings of despair among the population.[115]

More significantly, the High Panel finds that the state does not seem to have ideas and plans to address the above challenges and crises, and that "the looting, destruction and violence have come and gone, but we found that little has changed in the conditions that led to the unrest." For purposes of this case study, it is important to highlight this sobering conclusion by the Presidential High Panel: "The question, many argue, is not if and whether more unrest and violence will occur, but when it will occur."

The warning by the High Panel together with Julius Malema's forecast in the epigraph to this section makes the situation in South Africa very urgent.

9 Recommendations

The recommendations that follow seek to propose solutions that go to the heart of the colonial and apartheid legacies, the insufficient attempts at transitional justice, and the social plague of racism that is reflected in so many of South Africa's problems.

Constitutional Changes

Amend the constitution to more explicitly recognize the history of colonialism and apartheid. We recommend that the legislature amend the preamble of the constitution to make it explicit that the constitution responds to and seeks to dismantle the legacies of colonialism and apartheid. This will become the guiding spirit for interpreting the Constitution. As it currently stands the constitution does not mention colonialism, conquest, and apartheid at all. The constitution only talks about "conflict of the past" thus masking the facts of conquest and colonization.

Amend the property clause to make it explicitly clear that the state can expropriate land without compensation. Such an amendment must contain strong principles of administrative justice to ensure transparency, legality, and fairness. The current clause is not clear on this issue and has thus been interpreted in the spirit of "willing buyer-willing seller." This has hamstrung land restitution and land redistribution.

Introduce ubuntu as a fundamental value of the Constitution. A constitution is a mirror of society. The majority of South Africans—Black people—don't see themselves when they look at the constitution, an overwhelmingly Euro-American liberal document. Introducing ubuntu will go a long way to countering ongoing epistemicide.

Introduce a Wealth Tax

A wealth tax levied in respect of beneficiaries of apartheid and colonization —White people—will be a start of reparative justice. Reparation is the route towards dismantling White privilege and a way of demonstrating penance. This sends a powerful message to those who profited from the history of racism, but also elevates public awareness of the historical disenfranchisement of the majority of South Africans.

Recommendations to Civil Society Actors, Universities, and the Department of Education

Africanize the curriculum to better reflect the stories and histories of Black Africans. As the #FeesMustFall movement demonstrated, the education system at both lower and higher levels continues to reinforce White supremacy, internalized racism, the marginalization of African lifeworlds, and institutional racism by continuing to center and privilege Western knowledge. It is true that "there is no social justice without epistemic justice." The curriculum should endeavor to tell factual history and to foster active citizenship.

Improve and Professionalize the Civil Service

This case study has demonstrated that institutionalized corruption and the state's inability to deliver basic services contribute to deepening Black impoverishment and thus perpetuate the legacy of apartheid and colonialism. Professionalize the civil service and strengthen accountability mechanisms to reduce a culture of impunity. Rather than "cadre deployment," there is a need for a professional civil service. A capable state will also be able to monitor and enforce the implementation of laudable policies aimed at affirmative action and redress.

Reconsider the Work of the TRC

The work of the TRC was insufficient. We recommend that the *National Prosecution Authority* prosecute perpetrators who did not seek or obtain amnesty from the TRC. The TRC recommended that hundreds of individuals be investigated and prosecuted for the gross violations of human rights that occurred during apartheid. Evidence has since come to light that the post-1994 cabinet interfered in the work of the prosecution authority for it not to pursue this case. Prosecuting apartheid criminals will go a long way in dismantling a culture of impunity and it will contribute towards healing and reconciliation. We recommend organizations like *the UN Committee on the Elimination of Racial Discrimination* play an active role monitoring and holding accountable efforts to address these gross violations.

We also believe that the Department of Justice and correctional services should introduce measures to ensure that all victims and survivors of apartheid receive acknowledgment and reparations. This case study discussed how only a tiny minority of people who qualified under the TRC Act's definition of "victim" were able to participate in the TRC process. Whether through a re-opened TRC or another process, it is important that measures are put in place to allow all victims and survivors to receive acknowledgment and reparations. This case study demonstrates that the limited success of the TRC process undermines the emotional healing necessary and the lack of recognition of individual and community traumas of the past.

Promote Initiatives That Will Foster Harmony: Endorse SHiNE

Endorse and resource the SAHRC's social harmony through national effort. The TRC did not move the country towards social reconciliation. Studies show that racial groups and various ethnic groups continue to grapple with mistrust and sometimes antipathy. The state needs to formally endorse the South African Human Rights Commission's Social Harmony through Nation Effort (SHiNE) initiative which seeks to use positive dialoguing to foster harmony in our diversity. It encourages self-reflection, family meetings and organizational dialogues, and acts of humanity. The interviewed SAHRC commissioner noted that SHiNE has already been launched in seven provinces and has been positively received by community members. People want harmony and social cohesion, but they need inclusive guidance of communal nature. The state needs to formally endorse and resource it. This program must also attend to the problems of Afrophobia and homophobia. ShiNE could then partner with like-minded NGOs and CBOs. This effort must also review national days and other memorialization measures.

Large Scale Private Economic Actors and State Regulatory Actors Should Increase Black Enterprise

Replace the Black economic empowerment model with inclusive and broad-based redistribution programs. The current Black economic empowerment program has failed. It only benefits politically connected business people. There is a need for a comprehensive and intentional growth and redistribution program. This program must focus on breaking the monopoly of White businesses, stimulating youth employment, and supporting small and medium enterprises. The ongoing enormous wealth disparity discussed in this case study exemplifies the insufficient lack of opportunity for Black South Africans.

To the Executive and the Judiciary, and "Chapter 9" Institutions: Enhance Access to Justice

The state and civil society actors need to ensure access to justice through expanded legal aid services, support for public interest law organizations, constitutional literacy programs and a conducive environment for social movements and other human defenders to protest and dissent. As part of this endeavor, there is a need to increase capacity, resource, and strengthen "Chapter 9" institutions such as the Human Rights Commission, the Commission for Gender Equality, the Office of the Public Protector, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities.

Reform the Security Cluster

Finally, we recommend that the Ministry of Police and the African Commission on Human and Peoples' Rights make efforts to appoint a special rapporteur on prisons, review conditions of detention, and revise policing in Africa. There is a need to overhaul or reform the police services, the army, and the prisons to ensure that they do not continue to perpetrate torture, discrimination, and other such conduct. Policing in South Africa, like so many other institutions, carries a legacy of racism and colonialism that leads to disproportionate behavior toward Black Africans and less accountability among White people. It is important that the African Commission continue to insist that the state implements reform initiatives stemming from the Marikana Commission and monitor such activity.

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Endnotes

1 The following case study has been written by an independent consultant on behalf of the Global Initaitve for Justice, Truth and Reconciliation (GIJTR). This case study is informed by a combination of desktop research, document analysis and interviews. It therefore reflects these perspectives and findings, as compiled and written by the consulting author(s). Interviewees have been anonymized to ensure their safety and privacy but GIJTR extends its gratitude for the time and participation of all interviewees.
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3 Magubane, 2007.
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27 Interview with researcher, September 2023.
28 Bryne, (2010: viii).
29 Mamdani, 2002; Madlingozi, 2007.
30 Bryne, 2010.
31 Interview with politician, August 2023.
32 Grunebaum 2011.
33 Interview with researcher, August 2023.
34 Charles Mills' definition of White supremacy includes the following dimensions: "Juridico-political: the state and the legal system; economics: access to and accumulation of wealth; Cultural: 'non-White' peoples' contributions are either appropriated or minimized so that Europeans become the only people capable of culture; metaphysical: 'people of color have always recognized that racial subordination is predicated on regarding them as less than fully human, as subpersons rather than persons." (cited in Garner, 2007: 24)
35 Interview with researcher, August 2023.
36 Villa-Vincenio, 2009.
37 Kenyon and Madlingozi, (2022: 9-11).
38 Interview with politician, August 2023.
39 Interview with researcher, September 2023.
40 BusinessTech, 2022.
41 People classified as Black are mainly indigenous African people. White people are mainly descendants of European colonists. Indian/Asiatic are people of Asian descent, and Coloured people refer mainly to "mixed raced" people or people of "mixed ancestry."
42 Stats SA (2016: 20)
43 BusinessTech, 2022.
44 National Coalition for Gays and Lesbian Equality v Minister of Justice (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517
45 Du Toit and another v Minister for Welfare and Population Development (CCT40/01) [2002] ZACC 20; 2002 (10) BCLR 1006 ; 2003 (2) SA 198 (CC)
46 Gory v Kolver, (CCT28/06) [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC)
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48 Brodie, 2021.
49 Ibid.
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51 Westman (2023:1-4)
52 Dowling, 2022.
53 Interview with international law professor, August 2023.
54 Stats SA, 2016: 30
55 Interview with international law professor, August 2023.
56 Guilengue, 2023.
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99 Pirtle, (2022: 11).
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101 Bosch, Wasserman & Chuma, 2018.
102 Interview with advocacy specialist, August 2023.
103 Ibid.
104 Interview with lawyer, September 2023.
105 Interview with politician, August 2023.
106 The following passages borrow from Kenyon and Madlingozi, 2022.
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108 Ahmed, (2017: 10).
109 Swartz, (2016: xviii).
110 Gillespie and Naidoo (2019: 233).
111 Stuurman, (2018: 2).
112 Ahmed, 2019: (36-37).
113 Interview with researcher, September 2023.
114 Interview with political science academic, August 2023.
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