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Christopher J. Roederer

University of Dayton, croederer1@udayton.edu

Kevin Hopkins

University of the Witwatersrand

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JUSTICE FOR PERPETRATORS AND VICTIMS OF APARTHEID WHO FALL OUTSIDE THE SCOPE OF THE TRUTH AND RECONCILIATION COMMISSION'S MANDATE*

Christopher J Roederer
BA (Kansas) JD (NYU) MA (Texas)
Senior Lecturer in Law
University of the Witwatersrand

Kevin Hopkins
BA LLB (Rhodes) LLM (Wits)
Lecturer in Law
University of the Witwatersrand

SUMMARY

The legislation that gave birth to the Truth and Reconciliation Commission provides for the possibility of amnesty to the perpetrators of certain crimes and delicts. It also provides for the possibility of reparations to the victims of apartheid who suffered as a result of their human rights being grossly violated. The problem with the legislation is that it is only competent to deal with matters falling within its ambit, but there are numerous issues that still need to be addressed which clearly fall outside of it. One might be tempted to say that such issues falling beyond the scope of the TRC mandate should then be dealt with according to the ordinary principles governing the legal relationship between those who suffer a loss and those that cause their loss. But the difficulty is that the unjust benefits and wrongful burdens imposed and facilitated by apartheid are effectively passed on from generation to generation. The descendants of apartheid's victims continue to suffer a grave disadvantage. And in addition to this it is not only the actual perpetrators of the abuses that have benefited from apartheid but also later generations of white South Africans and corporations who continue to enjoy unequal advantage to springboard themselves ahead of black competitors who are still, for the most part, shackled by the disadvantage of apartheid. Whilst the state has made significant

* The following work was developed out of the two authors' contribution to a submission to the TRC Committee on Reparation and Rehabilitation titled "The Case Against Apartheid's Beneficiaries" by Ben Cashden, Kevin Hopkins, Chris Roederer and others. We would like to acknowledge the help of Roman David, James Grant, Garth Abraham and Ali Chictay in preparing this work.

efforts to address the imbalance in society, and in the process accepted a tremendous burden, no meaningful effort has yet come from civil society and the unjust profiteers of the apartheid system. In this paper, we have attempted to confront some of these difficult issues. This article explores the possibility of converting the moral justification that seeks to hold these unjust profiteers liable into legal argument.

“They were conquerors - nothing to boast of, when you have it, since your strength is just an accident arising from the weakness of others. They grabbed what they could get for the sake of what was to be got. It was robbery with violence, aggravated murder on a grand scale” (From Conrad’s *Heart of Darkness*).

“The United Party comes and whines ‘the constitution’. Anyone listening would think that the constitution was of greater importance to them than the maintenance of white civilization in our country” (Loubser, National Party MP, 1952).¹

1 INTRODUCTION

Much has been written on the legal liability of the South African state for the gross violations of human rights that occurred under apartheid. Most of the debate relating to the state’s obligation to pay reparations to the victims takes place in the context of the Truth and Reconciliation Commission’s mandate. But there is notably very little written on the liability of other parties that have profited from apartheid but who happen to fall outside the scope of the TRC’s mandate. The little material that there is tends to approach this controversial issue from a moral perspective rather than from a legal one. This is hardly surprising since the legal enquiry of who should pay what to whom raises very difficult jurisprudential questions and this is probably the reason such issues have been largely avoided till now.

In this paper, we have attempted to confront some of these difficult issues. Our goal is to begin the process of converting the moral arguments into legal ones and in this way to encourage further debate on those aspects of the topic that have been largely neglected in the literature.²

2 THE APARTHEID STATE’S VIOLATIONS OF INTERNATIONAL LAW

Broadly, the apartheid state violated the rights of black South Africans by

¹ Quoted in Asmal, Asmal and Roberts *Reconciliation through Truth: A Reckoning of Apartheid’s Criminal Governance* (1997) 111.

² We wish to point out that this paper is an overview of some of the issues that are raised by the subject material. It is not intended to be more than that, as each one of the topics, on their own, could quite easily form the basis of a substantial thesis.

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- (i) denying them the right to self determination;
 - (ii) discriminating against them on the grounds of race and colour; and through the
 - (iii) widespread infringements of a range of rights including the right to property, the right to life, the right to be free from cruel, inhumane, and degrading treatment, to be free from arbitrary arrest and detention, and the rights to freedom of movement, opinion, expression, peaceful assembly and association.³

Some of these violations are covered by the Promotion of National Unity and Reconciliation Act (the “Act”) while others fall outside the scope of the Act.⁴ The Act only covers gross violations of human rights as defined in section 1(ix): (a) as “the killing, abduction, torture or severe ill-treatment of any person”; or in (b) as “any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a) which emanated from conflicts of the past”. Denial of the rights to self determination, to be free from discrimination and many of the other rights listed in (iii) above are not covered by the Act.

The Act provides for the possibility of amnesty to the perpetrators of these crimes and delicts⁵ while also providing the victims with a right to reparations⁶ - but limited to those who came before the Truth and Reconciliation Commission within the specified time period.⁷ This raises at least three very complex legal issues: first, can those who receive amnesty in South Africa still be brought to justice in other jurisdictions; secondly, what

³ Dugard *Human Rights and the South African Legal Order* (1978) generally and in particular 130-136; and Forster, Davis and Sandler *Detention and Torture in South Africa: Psychological, Legal and Historical Studies* (1987) 86-118; and Mathews *Freedom, State Security and the Rule of Law* (1986) 62.

⁴ The right to hold private property is an extremely complex issue and for this reason the violation of property rights in general lie beyond the scope of this paper.

⁵ Applications for amnesties are provided for in s 18 of the Act. S 20(1) of the Act states:

“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); 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.”

S 20(2) further specifies the meaning of “political objective”.

⁶ S 26(1) of the Act provides for the right of victims of gross violations of human rights to apply to the Committee on Reparation and Rehabilitation in the prescribed form.

⁷ The obligation of the post-apartheid South African state to pay reparations to victims who submitted their cases before the Truth and Reconciliation Commission within the specified time is taken as settled. These claims are unaffected by the discussion that follows in this paper.

of those who are guilty of crimes and delicts that fall outside of the ambit of the Act - can they still be sued or prosecuted either here or abroad; and thirdly, since international law does not recognize statutes of limitations for some crimes, do the victims still have a right to a remedy even if they missed the prescriptive time-limitations period under the Act?

The short answer to the first question is that under certain circumstances it might be possible for other states to prosecute and for victims to seek redress against perpetrators for some of the above violations of international law irrespective of any amnesty given by the South African state.⁸ This possibility is amplified in cases where the foreign state has ratified the Apartheid Convention before the atrocities came to an end in South Africa.⁹

The short answer to the second question is that it may be possible to sue for legal wrongs not covered by the provisions of the Act and it may also be possible for criminal charges to be brought.¹⁰ Section 232 of the 1996 Constitution makes customary international law binding law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. It thus follows that customary international criminal law is law in South Africa. For this reason, those whose actions are not covered by the Act as well as those who either did not apply for amnesty or who were denied amnesty can still be prosecuted for their crimes and sued privately for their wrongs.

However, any argument to this effect could feasibly be met with the following replies. First, it may be argued that the intent and purpose of the Act is to settle the apartheid crime record so that the nation can move on in the spirit of reconciliation. Potential crimes not specifically addressed in the

⁸ This is partially dealt with in the Pinochet case (*R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (No 2) [1990] 2 WLR 272 (HL); [1999] 1 All ER 577 (HL)). One might also wish to consider the right of other states to bring claims on behalf of their own nationals against the South African state under international law governing state responsibility for injury to aliens. There is also the possibility of delictual liability in certain jurisdictions, for example the United States, under the Alien Tort Claims Act 28 USC s 1350 (1789/1994). Some of these issues are considered by Jenkins, "Amnesty for gross violations of human rights in South Africa: a better way of dealing with the past" in Edge (ed) *Comparative Law in Global Perspective* (2001) 345-386.

⁹ The Convention on the Suppression and Punishment of the Crimes of Apartheid, United Nations GA Resolution 3068 of 30 November 1973 (the Apartheid Convention). Article V of the Apartheid Convention stipulates that perpetrators may be prosecuted by any state party which may acquire jurisdiction or by an international tribunal with jurisdiction and article VI requires state parties to adopt legislation and other measures to bring perpetrators to justice through trials and punishment regardless of the perpetrators' residency status or nationality.

¹⁰ We are not referring here to those people who either did not apply for amnesty under the Act for wrongs covered by the Act, nor to those who were denied amnesty, but rather to those who committed wrongs that fall outside the scope of the Act.

Act were arguably left out because they were considered to be either too diffuse (*ie* the responsibility of all rather than specific individuals and to the detriment of all rather than specific victims) or else because they were not considered to be as important. Thus, pursuing prosecutions for crimes not specifically addressed by the Act could arguably be inconsistent with the intention behind the TRC legislation. This would undermine any claim under section 232 of the Constitution that this aspect of customary international law was binding in South Africa. The second reply would be that holding such people liable violates the doctrine of *nullum crimen sine lege* (no crime without law). Although South Africa is a common law criminal jurisdiction, the courts tend to regard this part of the common law as a closed book. Any attempt to introduce new crimes (since 1915) is generally regarded as a violation of the “no crime without law” principle.¹¹

The first reply might carry some weight with regard to pursuing criminal prosecutions within the Republic but the arguments do not have the same force when considering the question of delictual liability. There are numerous factors that may inhibit the state from pursuing criminal prosecutions and the above may provide a valid consideration for prosecutorial discretion. However, in order to oust a victim’s right to a remedy in private law, the legislation ought to be clear and unequivocal. As the Act is silent on the matter, the presumption is that the right has not been limited further than that stipulated in the Act.¹² It is one thing to oust victims’ rights to claim in delict against their perpetrators (as was done by the Interim Constitution and the Act), but it is quite another to oust potential claims not specifically stipulated in the Act.¹³

The second reply should fail for the same reason that it failed at the Nuremberg trials; the courts would not be creating a new crime that retroactively applied to conduct that was legal at the time it was committed because the conduct was always illegal under binding rules of customary international law.¹⁴

¹¹ *R v M* 1915 CPD 334.

¹² The presumption that the legislature is presumed not to have intended to deprive an individual of existing common law and statutory rights is well established in South Africa (see, *eg Transvaal Investment Co v Springs Municipality* 1922 AD 337 347; and *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 552).

¹³ See *Azanian Peoples’ Organization v President of the Republic of South Africa* 1996 4 SA 671 (CC), 1996 8 BCLR 1015 (CC).

¹⁴ In South Africa this would mean having to circumvent the decision in *S v Petane* 1988 3 SA 51 (C). This could be achieved by developing the common law - a duty that the courts are charged with under s 39 (1) of the 1996 Constitution.

Although the answer to the third question is in no way simple, there is a very strong argument to be made that the prescriptive time limitations (within which victims must bring their claims) are invalid under international law.¹⁵ For instance, from 1991 to 1993 Hungary's parliament drafted a number of laws that allowed for the prosecution of crimes committed by the previous regime in putting down the uprising of 1956 even though they clearly violated the Statute of Limitations set by the previous regime.¹⁶ Although in a series of cases most of this successive legislation was struck down by the Hungarian Constitutional Court, parts of the 1993 law "Concerning the Procedures in the Matter of Certain Offenses During the 1956 October Revolution and Freedom Struggle" were eventually upheld with regard to international crimes.¹⁷

Admittedly this bar on time limitations for international crimes does not automatically apply to time limitations on private law claims. Nonetheless, it would be anomalous to have a bar on time limitations for international crimes, thus allowing for the prosecution of international criminals no matter when they committed their crime, while at the same time allowing for a time limitation on private remedies for the private wrongs that followed from those same international crimes. It is not clear that the state's interest in settling its liability and closing the book on the past is sufficient to outweigh the rights of victims to appropriate relief. It is harsh enough that the state is granting amnesties for those crimes and the resulting delicts and thus denying victims rights to a remedy from the perpetrators of those crimes. At the very least there is a powerful constitutional case that can be made on the grounds that without a condonation mechanism affording victims an

¹⁵ Apartheid is specifically referred to as a crime against humanity in Article I(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations on War Crimes and Crimes Against Humanity 754 UNTS 75. The French Cour de Cassation found the non-applicability of statutory limitations for crimes against humanity to be a part of customary international law in *Federation Nationale des Deportés et Internes Résistants et Patriotes v Barbie* 78 ILR 125 135. There is also academic support for this view: Bierzanek, "War Crimes; History and Definition" in Bassiouni (ed) *International Criminal Law* (1986) 47-48; but for the contrary view see Van den Wijngaert, "War Crimes, Crimes Against Humanity and Statutory Limitations" in Bassiouni (ed) *International Criminal Law* (1986) 94-95.

¹⁶ See Judgment of March 5, 1992 Magyar Kozlony No 23/1992 (Hungarian Constitutional Court, 1992) translated in *Journal of Constitutional Law in Eastern and Central Europe* 1 1994 136 cited in Teitel *Transitional Justice* (2000) at fn 21 16 discussed 41; see also the discussion of this case and the series of cases on legislation leading up to it in Halmai and Scheppele "Living Well is the Best Revenge: The Hungarian Approach to the Past" in McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (1997) 160-171.

¹⁷ In the Hungarian Constitutional Court decision 53/1993(X.13)ABh which resulted in Act CX of 1993 and investigation into some fifty episodes of mass shooting that took place between October 23 and December 28 1956 (cited and discussed in Halmai and Scheppele 165-169).

opportunity to show good reason why their claims were not brought timeously, the prescriptive periods in the Act are unconstitutional because they violate section 34 which provides that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

It is clear that a number of very difficult legal issues arise with regard to the rights of apartheid’s victims. These include, but are not limited to, their right of recourse against the state and parastatals, as well as against individual perpetrators. Such perpetrators are also not necessarily limited to South Africans and South African corporations but may also include claims against other states, transnational corporations, and overseas money-lending institutions.

Two further issues that arise include the legal obligations of the post-apartheid state for debts incurred by the apartheid regime; and the possible obligation of those institutions that benefited from apartheid wrongs to make reparations to the people of South Africa who suffered from those wrongs.

In the pages that follow we will briefly address (a) violations of rights not specifically covered by the TRC; (b) debt owed to international legal entities; (c) debt owed to private money-lending institutions; (d) the violation of international labour standards in the apartheid state; and (e) the unjust enrichment of foreign corporations at the expense of black South Africans.¹⁸

3 THE VIOLATION OF RIGHTS NOT SPECIFICALLY COVERED BY THE ACT

The right to self-determination and the right to be free from systematic racial discrimination are not specifically covered in the Act although both of these rights form part of the basis for the crime of apartheid. The right to self-determination is defined in a 1970 General Assembly declaration as including the right of people within sovereign states to be governed by a “government representing the whole people belonging to the territory without distinction as to race, creed or colour”.¹⁹ This unanimously-adopted declaration may be seen as the crown on a series of resolutions and treaties starting with the UN Charter itself (Article I and Chapters XI and XII). The

¹⁸ This is in no way intended to be an exhaustive list of potential liability.

¹⁹ Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Resolution 2625 (XXV).

right can be also found in the International Covenant on Civil and Political Rights (Article 1); the International Covenant on Economic Social and Cultural Rights (Article 1); and in the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples.²⁰ This has led Dugard to the conclusion that the right to self-determination is a peremptory norm of international law *jus cogens* - from which no derogation by the state is permitted.²¹

Similarly the prohibition on systematic racial discrimination (which also has its source in the UN Charter and a number of conventions)²² was considered to be an obligation *erga omnes* - one owed by every state to the entire international community - by the International Court of Justice in the *Barcelona Traction* case.²³ The prohibition on systematic racial discrimination is also considered to be *jus cogens*.²⁴

Although South Africa may claim to be a persistent objector (persistent objectors are generally exempt from being bound by the relevant customary rule of international law)²⁵ such exemption is not permissible when the norm in question is peremptory, that is, *jus cogens*.²⁶ Thus, from at least 1970 onwards South Africa was in violation of international law in spite of its failure to ratify the above treaties or take part in the above General Assembly resolutions.

Article III of the Apartheid Convention provides for individual criminal responsibility - not only for those who commit, participate, incite and conspire to commit the crime of apartheid as provided for in Article III(a), but also for those who directly abet, encourage or co-operate in the crime of apartheid as provided for in Article III(b). Article IV(a) places a duty on state parties "to adopt any legislative or other measures necessary to suppress as well as prevent any encouragement of the crime of apartheid and any segregationist policies or their manifestations and to punish persons

²⁰ Resolution 1514 (XV).

²¹ Dugard *International Law: A South African Perspective* 2ed (2000) 460.

²² International Convention on the Elimination of All Forms of Racial Discrimination (1966); the International Convention on Civil and Political Rights (1966); and the Convention on the Suppression and Punishment of the Crime of Apartheid (1973) which came into force in 1976.

²³ *Barcelona Traction, Light and Power Co Ltd* 1970 ICJ Reports 3.

²⁴ Brownlie *Principles of International Law* 4ed (1990) 513; and Dugard (2000) 90-92.

²⁵ *S v Petane supra* 64A-B; the *Nicaragua Case* 1986 ICJ Reports 107; also Brownlie *Principles of International Law* 5ed (1998) 10; and Shaw *International Law* 4ed (1997) 70-72.

²⁶ Wallace *International Law* 3ed (1997) 12; Dugard (2000) 31; and also Akehurst *A Modern Introduction to International Law* 6ed (1987) 32 and 33.

guilty of that crime". There is also a duty, in Article IV(b) "to adopt legislative, judicial and administrative measures to prosecute or bring to trial those accused of such acts wherever the acts occur and regardless of the nationality of the perpetrator".

4 APARTHEID DEBT

The general rule in international law is that a change in government within a state does not affect its treaty obligations and, according to Dugard, this even applies to the legal revolution that took place within South Africa in 1994.²⁷ This legal fact is confirmed in both the 1993 and 1996 Constitutions.²⁸ The 1993 Constitution allowed for Parliament to pass legislation specifically repudiating pre-1994 treaties. Thus, there was a window of opportunity for the new regime to back out of its treaty obligations between the 1993 Constitution and the 1996 Constitution. But the window was closed in section 231(5) of the 1996 Constitution which states that:

"The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

While there are perhaps good moral reasons for arguing that South Africa should not be bound to pre-1994 treaties, there is little legal room for the argument given that South Africa has committed herself in her own Constitution. Thus, in general, it seems safe to accept that South Africa is bound. Nonetheless, it does not follow that every pre-1994 treaty is binding on the South African state. There may be cases in which pre-1994 treaties (although signed and ratified) were not previously legally binding on the apartheid state. If it can be argued that those treaties were not legally binding on the apartheid state, then it follows that they are also not legally binding under the 1996 Constitution - because the Republic is only bound after 1996 by treaties that were *binding* prior to 1996.

There may, on this thinking, be room to argue that some of the debts incurred by the apartheid regime through international agreements with states, international organizations and other subjects of international law are unenforceable due to the fact that such treaties were always invalid. The validity of treaties is governed by the 1969 Vienna Convention on the Law of Treaties (which is considered as a codification of the customary international law of treaties). Article 53 of the Vienna Convention provides that:

²⁷ Dugard (2000) 341.

²⁸ Ss 231(1) of Act 200 of 1993 and 231(5) of Act 108 of 1996. For an interesting challenge on this position, see Motale, "Under International Law, Does the New Order in South Africa Assume the Obligations and Responsibilities of the Apartheid Order? An Argument for Realism over Formalism" (1997) 30 *CILSA* 287.

“A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

It is our submission that any treaty which effectively provided financial, military or other assistance to the apartheid state in furtherance of its criminal regime would conflict with the peremptory norms against systematic racial discrimination and the denial of the right to self-determination. An argument to this effect would require a showing that the contents of the international agreement aided or abetted the regime in its policies and or practices.²⁹

There are also arguments based on the doctrine of odious debt.³⁰ The underlying principles of the doctrine are very similar to those underlying the notion that treaties contrary to a *jus cogens* are invalid. The principle is that debts incurred for illegitimate purposes by illegitimate parties are unenforceable. Debts incurred in the furtherance of apartheid would fall squarely within this exclusionary principle. The fact that the General Assembly did not recognize the apartheid government's delegation as legitimate representatives of the South African state lends even more credibility to the argument.³¹

²⁹ As stated earlier in this paper, it is, under the Apartheid Convention, a crime to directly abet, encourage or co-operate in the crime of apartheid and all state parties to the Convention in fact have a duty not only to refrain from such activity but also to suppress and prevent any encouragement of the crime of apartheid or its segregationist policies.

³⁰ This doctrine is relatively unknown in international law. Adams, the director of Probe International, has published a book on the subject through her organization, *Odious Debts: Loose Lending, Corruption, And the Third World's Environmental Legacy* (1991). The precedent for the doctrine provided by Adams 162-170 is not strong as it is limited to a 1923 arbitration case between the Costa Rican Government and the Royal Bank of Canada largely on the basis of loans that were for the private benefit of the previous Chief of State and his family (*ie* they were not used for any state purpose); Williams and Lauterpacht (eds) *Annual Digest of Public International Law Cases* (October 18/1923 *Great Britain v Costa Rica*); a case wherein the US repudiated the debt incurred by Cuba owed to Spain in its peace treaty after the US had taken sovereign control of Cuba at the end of the Spanish-American war (in a victor state's treaty); and the Soviet government's repudiating the debts incurred by the Tsar in the previous Russian regime and the scholarly treatment of the situation by Sack, a minister from the previous Tsarist regime. Adams also refers to an article in a professional journal written by lawyers at the First National Bank of Chicago in 1982 warning lenders of the potential risks of making loans that infringed the upon doctrine (*ibid* 169).

³¹ According to Dugard, the credentials of the delegation from South Africa were not given approval by the General Assembly in 1965 and were completely rejected from 1973 onwards. In 1974 the president of the GA ruled that South Africa could no longer participate in the General Assembly as a result of the rejection of her credentials - Dugard, "Sanctions Against South Africa: An International Law Perspective" in Orkin (ed) *Sanctions Against Apartheid* (1989) 119-120. It is important to observe that it was not the state which was not recognized, but merely the apartheid government.

5 FOREIGN LOANS MADE TO THE APARTHEID STATE BY PRIVATE LENDERS

Private law rules governing the enforcement of contracts are heavily influenced by public policy considerations. The common thread that runs through private law systems is that contracts concluded contrary to public policy are unenforceable.³² Public policy is a resourceful body of doctrine. In law it refers to the legal convictions of a particular community. The substantive question that arises in public policy issues - what constitutes good or else bad public policy - has been dealt with in a markedly similar fashion throughout the different jurisdictions. In the Roman-Dutch tradition, public policy demands the non-enforceability of any agreement that is “base or shameful, such as those that clash with good morals”³³ or one that tends to “do anything which is held dishonourable by law and morality”.³⁴ In South African contract law it refers to agreements that may fall into one of two possible categories - those that are “tainted with criminality or those that are per se immoral”.³⁵ In English contract law it means that the courts will not enforce agreements which “offend one’s sense of morality or justice”.³⁶ As stated by Zweigert and Kotz in their *An Introduction to Comparative Law* (2ed):

“Despite the prevalence in the Western world of the freedom of contract, every legal system must reserve the right to declare a contract void if it is legally or morally offensive, ‘contraire aux bonnes moeurs ou a’ l’ordre public’ or ‘contrary to public policy ...’ In all legal systems the principal task falls to the judge, who has to test the circumstances of the individual case in order to discover whether the contracting parties have gone beyond the bounds of the permissible.”³⁷

In most cases the courts are guided by codes or legislation. In fact, all the great European codes cover this issue with general clauses referring either to prohibitory rules or to the concept of good morals.³⁸ Many countries have more particular provisions in their codes and statutes dealing with particular types of contracts and the unfairness that may arise within them.

³² For the position in South African law, see *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Unibank Savings and Loans Ltd v ABSA Bank Ltd* 2000 4 SA 191 (W); and also Christie *The Law of Contract in South Africa* 3ed (1996) 377ff.

³³ Voet 2.14.16.

³⁴ Grotius 3.1.42.

³⁵ Kerr *The Principles of the Law of Contract* 4ed (1989) 152.

³⁶ Lloyd *The Idea of Law* (1964) 272.

³⁷ (1992) T Weir Tran. 407-408.

³⁸ Eg, Articles 1131 and 1146 of the French Civil Code; ss 134 and 138 of the German Civil Code; Article 7 of the Swiss Civil Code; and also Article 1324 of the Italian Codice Civile.

It is safe to conclude that there is a rule of law, common to most states in the civilized world, that a contract contrary to the community's sense of justice is legally unenforceable.³⁹ Bank loans are contracts in the true sense of the word. As such, any claim to enforce the repayment of a loan falls under the ambit of the rules embraced by the general principles of contract law. It is arguable that the successful enforcement of any loan made by a private organization to the "old" apartheid state would depend on whether or not that loan was made contrary to public policy.⁴⁰ If the loan was made contrary to the legal convictions of the community then repayment of that loan will not be enforceable.

It may be argued that at the time the debt was incurred the contract was not contrary to the legal convictions of the South African community. There is little question that such contracts were in line with the prevalent convictions of the reigning legal community. However, the reigning legal community in no way represented the legal convictions of the majority of South Africans who were forced to stand by while "their" government borrowed more and more money in order to bolster its security forces for the prime purpose of keeping black people in a position of subjugation. There can be little question that the "true" legal convictions of the (entire) community were overwhelmingly against any such aid, loans or support for the apartheid regime.

This argument in no way relies on equating the legal convictions of the community with what majority opinion is. The legal convictions of the community are based not on what the majority wants. It is not based on their volitions, but on their considered judgement about those acts or omission that we consider to be not only morally obligatory but also legally binding. Erasmus AJ in *Reis v Boland Bank Pks Ltd* restated the rule as follows:

"conduct is unlawful 'when the circumstances of the case are of such a nature that not only excites moral indignation but also that the legal convictions of

³⁹ Article 38(1) of the Statute of the International Court of Justice includes "the general principles of law recognized by civilized nations" as a source of international law.

⁴⁰ According to a report released by Jubilee 2000 South Africa, *Apartheid-Caused Debt* (part 1 ch 1), the IMF in 1976 and 1977 had granted South Africa a balance of payment loans totaling \$464 million, which helped to cover the increased expenses needed for the South African Defence Force and used to fuel the apartheid machine. Short-term loans from private foreign banks (most notably German and Swiss banks) were used to finance the final balance of payment deficits. We believe that because some of these loans are already repaid, the debt relief point may be rendered moot *vis-a-vis* that lender but this would not necessarily relieve the institution from liability incurred as a result of aiding and abetting the apartheid regime.

the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant”⁴¹

This legal conviction within the South African community is further bolstered by the legal convictions of the international community. It is clear from the literature and indeed the world’s response to apartheid, as detailed in earlier parts of this paper, that the legal convictions of the international community viewed apartheid as a serious breach of international law. The world’s response to apartheid (and the subsequent development of international law as a direct result) provides us with a reliable statement of what international public policy is. Even the (then) Minister of Foreign Affairs, Botha, confessed in 1977 “there is no state, no government in the world which is our friend. They are all our enemies”.⁴²

To the extent that apartheid statutory law, case law, and the convictions of the reigning legal community supported the view that such loans that were used for the primary purpose of propping up the apartheid regime were in conformity with the boni mores of the community, they were plainly wrong. Apartheid was a crime against humanity and anyone who gave financial or other support to the regime aided and abetted that crime. Thus, any contract that might have been concluded in furtherance of apartheid’s immoral and illegal purposes ought to be unenforceable. This is, we submit, a difficult argument to dispute.

The more complicated aspect of the enquiry involves determining exactly when it is that public policy evolved to the point that such loans became not only morally but also legally offensive. We have argued that it is probably sometime in the early 1970’s, but, without a doubt, the legal convictions of the international community solidified by 18 July 1976, the date on which the Apartheid Convention came into effect.⁴³ Article 1 of the Convention reads:

“The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of race segregation and discrimination, as defined in Article II of the Convention, are crimes violating the principles of the Charter of the United Nations, and constituting a serious threat to international peace and security. The States Parties to the present Convention declare criminal those organisations, institutions and

⁴¹ 2000 4 SA 955 (CPD) 968H quoting *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384D; and citing a string of cases beginning with *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597A.

⁴² Quoted by Asmal, Asmal and Roberts fn 1 151.

⁴³ It is probably true that international public policy was opposed to apartheid long before this - after all it was international public policy that moved the General Assembly to draft the Convention in the first place (and this was done in November 1973). There could well be other good reasons for setting the date even earlier.

individuals committing the crime of apartheid.”

While there may be very strong arguments that the legal convictions of the South African community solidified much earlier, the date at which the legal convictions of the international community solidified provides a good marker for putting states, international organizations, institutions as well as international corporations on notice that the aid that they were giving to the apartheid regime was contrary to public policy.

According to this, any credit institution or private money-lending corporation which may have financed the apartheid state ought to be targeted as a profiteer of an immoral and illegal system. It is also possible to argue that banks which gave financial support to the apartheid state were in fact accomplices to a criminal government that consistently violated international law. If the money was lent to the apartheid state and the financier subsequently wished to enforce repayment of the loan in terms of the contract, then such claim should fail in a court of law for the reasons that we have already given - such contracts of loan are contrary to public policy. If this were not so then the law would be self-contradictory. No law can treat a contract to commit (or assist in the commission of a crime) as enforceable because to do this it would be approbating and reprobating the same act - this is, of course, inconsistent with the rule of law.

A financier may foreseeably wish to respond to this argument in the following way: if the contract is illegal then surely we are entitled to restitution. This is so, the financier might say, because if the transaction is truly illegal then surely the South African state would have no right to retain the money already paid to it - lest it be unjustly enriched at the expense of the financier. This argument cannot be sustained. Most modern jurisdictions recognize the general rule that a party who has rendered performance in terms of a contract which is void for being contrary to public policy may not recover any performance already made. In South Africa, and indeed other states that have a Roman law foundation, this rule is given expression in the maxim *in pari delicto potior est conditio possidentis* (in equal guilt the position of the possessor is the stronger).⁴⁴ It is, however, commonly accepted that the maxim can be overcome in the interests of justice - usually where one party would, if the rule were not relaxed, suffer undue hardship. This exception would not apply here because any hardship suffered as a result of the “illegal” loans would surely be greater for the victims of apartheid than it would be for the perpetrators thereof.

⁴⁴ Christie 439-446.

6 UNFAIR LABOUR PRACTICES UNDER THE APARTHEID STATE

“Under apartheid black people were things; not human individuals but a collective tool for various jobs. This attitude to black workers - that they constitute a natural resource - is still with us” (Asmal, Asmal and Roberts).⁴⁵

Some of the violations of rights that we have already discussed are connected with unfair labour practices in South Africa under Apartheid. South Africa was a founding member of the International Labour Organization and had in fact ratified 11 international conventions before withdrawing in 1964.⁴⁶

The racially discriminatory labour policies of the late 1950's and early 1960's caused considerable tension between the ILO and South Africa. South Africa's withdrawal in 1964 did little to ease the tension. Between 1964 and 1979 the ILO compiled 22 reports and made a number of resolutions regarding the unfair labour practices under apartheid.⁴⁷

During this period a number of internationally accepted norms were violated. They included the fact that black workers were excluded from the collective bargaining machinery of the Labour Relations Act 28 of 1956, and were instead subjected to a committee system under the Bantu Labour (Settlement of Disputes) Act 48 of 1953. Further, although black workers were not legally prohibited from forming unions, the unions were not legally recognized, and thus were not afforded the same legal protection and benefits that white unions were given. Employers were not required to recognize the black unions and as a result they were able to harass and victimize those who attempted to exercise their rights to association (such harassment often being assisted by the police). Strikes were not legally permitted under the Bantu Labour (Settlement of Disputes) Act.⁴⁸ Many jobs, especially skilled and semi-skilled jobs, were reserved for whites - for example those under the Mines and Works Act 12 of 1911 and also the Conciliation Act 28 of 1956.⁴⁹ The systematic racial discrimination in the workplace was further entrenched by the absence of legislation providing for fair discipline and dismissal of workers. The plight of black employees was

⁴⁵ 210.

⁴⁶ Woolfrey “The Application of International Labour Norms to South African Law” 1986-1987 12 *South African Yearbook of International Law* 135 139; see also Brassey *Employment and Labour Law* Vol I (1998) A1:36-42 for a concise history of South African labour law from 1948-1977.

⁴⁷ Woolfrey 140. The contents of these reports, we submit, may contain further grounds for legal action.

⁴⁸ Brassey A1:38.

⁴⁹ Woolfrey 141; and Brassey A1:38.

worsened since no reason whatsoever was required for the dismissal of an employee under the common law. Finally, the influx control and residential segregation laws placed black workers at an even further disadvantage in the labour market.

The consequences of a system like this are predictable. The denial of access to legally recognized trade unions and their bargaining power mixed with an extremely liberal regime for discipline and dismissal resulted in a labour regime that systematically discriminated against black workers, leading to the possibility and often actualization of an exploitative work environment falling outside the bounds of internationally accepted labour standards. It should be noted that the exploitation of the labour of a member of a specific racial group is listed as a crime in Article II(e) of the Apartheid Convention as:

“legislative and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of a country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying ... basic human rights and freedoms, including the *right to work*, *the right to form recognized trade unions* ...” (our emphasis).

Dissatisfied workers had to either live with their dissatisfaction or else participate in illegal strikes which often resulted in arrest and detention coupled with mass dismissals.⁵⁰ The damages suffered by apartheid’s victims as a result of the system includes not only those resultant from an injury to dignity but also quantifiable economic loss. Economic loss can range from the cost of travel (since segregationist apartheid laws often made it impossible for black people to live and work in the same area) to the actual loss in earnings or earning capacity. For the purposes of compensatory justice, one easy (although undervalued) method of establishing the loss for a black worker would be to measure the difference in pay between the average salary of a white and black worker performing exactly the same job function.⁵¹

⁵⁰ After 1979 the situation began to change. In 1977 South Africa appointed a Commission of Inquiry into Labour Legislation which in its 1979 report recommended that labour relations in South Africa should be based on international labour standards. This, according to Woolfrey 141-143 resulted in drastic changes in the practice of the Industrial Court, particularly with regard to unfair labour practices. For an example of this, see *Metal and Allied Workers Union v Stobar Reinforcing Pty Ltd* 4 (1983) ILJ 84 IC. For more on this, see also Brassey A1:42-54.

⁵¹ For instance, in 1967 the average monthly wage for a white mine-employee was R282 while it was only R17 for a black employee (A Survey of Race Relations in South Africa, 1968) 104 cited in Dugard “The Legal Framework of Apartheid” in Rhoodie (ed) *South African Dialogue* (1972) fn 89 46.

The above discussion establishes the wrongfulness of the practice and also the harm suffered by black South Africans as a result of the failure of the apartheid government to meet the minimum labour standards required under its international law obligations.⁵² Other foreign governments, their parastatals, and private alien companies that invested in apartheid South Africa (and in so doing exploited the unjust racist laws) may also have been in violation of their international law obligations. The same could be said of local employers, local parastatals and local corporations. Thus, we turn to examine the unjust enrichment by these profiteers at the expense of black South Africans.⁵³

7 UNJUST ENRICHMENT: PRIVATE COMPANIES THAT INVESTED IN THE APARTHEID STATE

“Reconciliation requires a readiness to accept responsibility for past human rights violations and a commitment, especially by those who have benefited and continue to benefit from past discrimination, to the transformation of unjust inequalities and de-humanising poverty” - (TRC Report).⁵⁴

We have argued that apartheid was immoral, unjust, and illegal. It follows logically from this argument that any private company (local or foreign) that benefited financially by exploiting these injustices has been unfairly or unjustly enriched at the expense of the victims who were exploited.

⁵² The post-apartheid South African laws and programs aimed at affirmative action in education and the workplace are positive measures taken by the state to redress these wrongs. These programmes along with others designed to improve services in previously disadvantaged areas as well as legislation aimed at socio-economic rights and land restitution should not be underestimated (whatever their shortcomings) when evaluating the current government’s efforts. We deal with this in later parts of the paper.

⁵³ It is very tempting to want to associate the apartheid labour practices and human exploitation with the practice of slave labour and forced servitude under the Nazi regime. There have been a flurry of cases over the past 5-10 years in which Nazi victims have found considerable success in their claims against the German state. The same success has been achieved in claims against corporations who used and benefited from slave labour. But, one should be very careful in making analogies to the claims by victims of slave labour and forced servitude in Nazi Germany. Not only are the facts (as a general rule) vastly different, but so are the international law rules regarding slavery as opposed to exploitation on the basis of race. There is clearly a spectrum between slavery and ‘fair’ competitive exploitation in the market. Most would probably agree that the labour practices which resulted in the average black worker earning only 6% of the average white worker’s wage clearly tends to the forced slave labour end of the spectrum. Nonetheless, the international law rules on slavery solidified long before those on racial discrimination. Slavery is a clear case while exploitative labour practices on the basis of race are less so. As mentioned, the Nazi slave labour conditions were markedly different from those in South Africa. Black workers under apartheid could, although with great hardship, quit their jobs and walk away. Under the Nazi regime, workers had no such option; their compliance was in no sense optional. Their compliance was ensured by the very real threat of torture and death.

⁵⁴ TRC Report vol 5 435.

Private companies investing in South Africa during the apartheid years were able to enrich themselves primarily because the conditions detailed in earlier parts of this paper made it easy for them to amass wealth by exploiting the black people that provided them with cheap and disposable labour. South Africa's (then) constitutional system of parliamentary sovereignty effectively enabled the state legislature to enact a plethora of statutory provisions, which, when read as a whole, created a repressive regime that systematically deprived black people of their basic civil liberties. This legislation was aimed at consolidating social, cultural, residential, economic and political apartheid. The result of these laws was the creation of an unequal society marked by a massive disparity of wealth and access to basic resources. Conditions under apartheid did not allow them to achieve any meaningful economic potential. At their expense ruthless opportunist local and foreign investors continued to grow richer.⁵⁵

There can be little scope to dispute that under apartheid private companies (both local and foreign) profited by investing in South Africa - because of the country's grossly unjust racist laws. The difficult part of the argument is to convert the obvious moral obligation (to give back) that rests on these exploitative profiteers into a legally binding duty to do so.

Unjustified enrichment is a source of legal obligation. It has its origins in the Roman law maxim *iure naturae aequum est neminem cum alterius detriment fieri locupletioem* (it is fair according to natural law that nobody be enriched at the expense of another). Actions based on unjustified enrichment are common to most modern legal systems.⁵⁶ These kinds of claims give rise to an obligation in terms of which the enriched party incurs a duty to restore the extent of his/her enrichment to the impoverished party. Put differently, the impoverished party acquires a legal right to claim that the extent of the other's enrichment be restored to him/her if it was acquired at his/her expense. Unjust enrichment is a useful remedy where the claimant has not directly suffered a loss (as would need to be the case in a delictual claim), but where somebody else has nonetheless benefited at the claimant's expense.

The problem, from a legal perspective, is that unjustified enrichment is not a general source of obligations in South African law. In other words, an obligation to compensate an impoverished party will not always arise simply because the general features of enrichment are present. This is because South

⁵⁵ For a somewhat outdated yet very insightful discussion on the oppressive nature of apartheid, see Dugard (1972) 80-99.

⁵⁶ In Anglo-American legal systems enrichment actions are referred to as restitution actions.

African law does not presently recognize a general enrichment action. A claim for unjustified enrichment arises only in certain and very specific circumstances. South African law recognizes only three enrichment actions: one for the return of something delivered in terms of a contract where the other party does not counter-perform; a second where something is delivered under a contract that is void; and a third where a bona fide possessor of something does improvements to it and in so doing increases its value to the benefit of the owner.⁵⁷ It is apparent that the current body of South African common law governing unjustified enrichment makes no specific provision for a claim against apartheid-profiteers enriched at the expense of apartheid's victims. The existing body of common law principles do not in fact seem to make provision for any type of unjustified enrichment that falls outside of the three specified actions identified above.

There is thus no judicial precedent to support our proposed "extended" action. Judicial precedent is always a useful guide in the legal process. In law, as in all human affairs, there is a natural tendency to regard the decisions of the past as a useful guide to the future. But with law there are other considerations too, the most obvious of which is the maintenance of certainty in the law. This certainty creates a legitimate expectation amongst the subjects of a legal system that judges will follow previous rulings - that they will stand by precedents and not disturb settled points. Nonetheless, the common law is a living creature whose growth and development is incremental. It occurs on a case-by-case basis. As noted by Burchell in his preface to *Principles of Delict* "the law of delict is dynamic - it can, and does, develop to meet the needs of a changing society".⁵⁸ The question is whether the common law should evolve so as to accommodate a new action of this kind.⁵⁹

We are of the view that the common law is capable of developing in this way and that a new type of unjustified enrichment action can be competently argued for under the 1996 Constitution. This is because the Constitution specifically charges our courts with the task of achieving constitutional compliance. This means two things: first, they must interpret the common law in such a way as to ensure that the decisions which they hand down are not in conflict with the values provided for in the Bill of Rights; and secondly, if the common law does not give effect to the values that underlie

⁵⁷ Hosten, Edwards, Nathan and Bosman, *Introduction to South African Law and Legal Theory* (1983) 506-512.

⁵⁸ Burchell *Principles of Delict* (1992) v.

⁵⁹ For a note on the issue in point, see Hopkins "The Common Law is Indeed a Living Creature: A Noteworthy Decision Handed Down in the Cape Court" 2001 *South African Law Journal* 149.

the Bill of Rights then it must be developed so that it does.⁶⁰ This raises two very important questions. The first question is whether the common law governing unjustified enrichment is actually deficient and in need of development. The second question is whether there are any values in the Bill of Rights that support our argument that unjustified enrichment should be developed so as to include an action for apartheid's profiteers enriched at the expense of apartheid's victims.

In reply to the first question: The law of unjust enrichment is substantially as it was in Holland and Rome. It has not changed much over the past 500 years. The reality seems to be that the South African common law does not recognize a general enrichment action only because Roman law did not. But law is an institution and institutions are designed to serve both people and society. The needs of people and of society change over time and in this way the institutions that serve them must also change to accommodate these changing needs. For this reason, there have been numerous academics (and judges) who have argued persuasively for the need to develop our common law of enrichment: some argue for a general enrichment action whilst others argue for one that is more specific to particular needs not catered for under the current common law. It is, however, clear that there is considerable support for the notion that there is a need to develop the action on account of the fact that our modern South African society has needs which are substantially different to those of the olden societies in Rome and Holland around which the current action was formulated.⁶¹

In reply to the second question: The values that animate the Bill of Rights, namely those that "underlie an open and democratic society based on human dignity, equality and freedom" should, in our opinion, facilitate developing the common law of unjust enrichment so that it can include the kind of claim that we have written about in this paper. This is largely, as De Waal, Currie and Erasmus put it, because:

"The Bill of Rights can only be properly understood as a part of the Constitution as a whole and as a significant element of the Constitution's

⁶⁰ This is confirmed by s 39(2), which provides "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". It also accords with the inherent power of the courts, as set forth in s 173, "to develop the common law, taking into account the interests of justice".

⁶¹ Van Zyl "Enrichment and Wrongs in South Africa" in Visser (ed) *The Limits of the Law of Obligations* (1997) 273; and Visser, "The Role of Judicial Policy in Setting the Limits of a General Enrichment Action" in Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa* (1995) 342-365.

project of transforming South African society and its political and legal systems.”⁶²

The legislation that has given birth to the TRC stands as a massive testimony to this constitutional commitment and we do not believe that the common law of unjustified enrichment can stand aloof of these developments. Development of the common law is necessary to achieve constitutional compliance - this is the constitutional imperative given to the judiciary. The unjust enrichment that occurred also constituted a perpetual assault on the core values underlying the Constitution. It was the enrichment of some at the expense of others’ freedom, dignity, and equality. This is what makes the extension of the action into this area so compelling under the final Constitution.⁶³

8 THE QUESTION OF REPARATIONS: COMPENSATORY VERSUS DISTRIBUTIVE JUSTICE

“I have no doubt that you can not separate the amnesty process from the reparation process, because people make those connections, and I think that if reparation was dealt with better, there would have been a greater acceptance, not in total, but a greater acceptance” (Kollapen, Lawyers for Human Rights).⁶⁴

Kollapen suggests that the amnesty process failed to make a positive impact on reconciliation in South Africa partly because of a perception that all sides have not benefited equally from it. Jenkins quotes Kollapen to the effect that “if anything, there is more of a sense that perpetrators who worked in the apartheid regime benefited (more than victims)”.⁶⁵

We have spoken in this paper about the need to consider holding accountable those profiteers of apartheid who do not fall within the scope of the TRC’s mandate. But we have not attempted the massive task of trying to decide what form the compensation or reparations ought to take, and how they ought to be made to the victims. We are nevertheless of the view that whatever form these reparations may take, they should definitely not take the same form as those adopted by the TRC for cases that do fall within its mandate. We do not believe that an amount of R4 000,00 or R5 000,00 can make a significant impact on the lives of apartheid’s victims. Any redress

⁶² De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4ed (2001) 1.

⁶³ Issues of (i) who the unjust profiteers are; and (ii) to what extent compensation ought to be made, are factual in nature and accordingly fall beyond the scope of this paper - our proximate concern is to do no more than simply establish the legal basis of an argument in favour of extending the existing common law rules.

⁶⁴ Interview with Jenkins, as quoted in Jenkins 384.

⁶⁵ *Ibid.*

should try to at least make a meaningful difference to the lives of those people adversely effected. It should go some way to putting them where they would have been had their rights not been violated.

The issue of reparations is a fairly open one in international law. What is clear, however, is that international law does not necessarily consider the payment of a sum of money as the best form of reparation. In the *Chorzow Factory* case the Permanent Court of International Justice had the following to say:

The object of reparations should be to wipe out, as far as is possible, all the consequences of the illegal act and re-establish the situation which would in all probability have existed if the act had not been committed.⁶⁶

Wallace is of the view that reparations are designed primarily to restore previous conditions and only when this is not possible should they seek to compensate.⁶⁷ But the rules of reparations are seemingly flexible enough to allow for virtually any appropriate kind of justice - the appropriateness of the remedy would foreseeably differ from case to case. In at least one reported case that we are aware of, the tribunal concerned awarded what it called "restitution in kind".⁶⁸

It is our view that this line of thinking could be extended so that where Wallace speaks of reparations restoring previous conditions, they might, where previous conditions were always appalling, rather try to place the victims in a position as close as possible to the one that they would have been in had their human rights not been violated in the first place. The rationale that we offer here is one of distributive justice rather than merely compensatory justice.

Compensatory justice is the claim that victims have to be compensated for discreet and 'finished' harm done to them. In other words, compensatory justice requires an award for harm already suffered. Distributive justice, on the other hand, tries to address the general harm suffered by a group of people with a view to addressing their current plight by seeking to achieve the positions, benefits, and advantages that they might have enjoyed under fair conditions - fair conditions in the context of this paper refer to the absence of discriminatory laws and practices.

The two concepts of justice are quite distinct. Distributive justice is a claim for justice in the present; compensatory justice is a claim for retroactive

⁶⁶ *Chorzow Factory Case (Indemnity) (Merits)* PCIJ Rep, ser. A, No 17 47 (1928).

⁶⁷ Wallace 179.

⁶⁸ *Martini Case (Italy v Venezuela)* 2 RIAA 975 1002 (1930).

justice, for a past wrong committed and for a past harm suffered. The effects of the apartheid legacy are by no means a thing of the past. For many black South Africans, quality of life now is not much different to what it was under apartheid. This is because the injustice of apartheid has continuing effects for black people. Similarly, white South Africans continue to enjoy the privileges and benefits bestowed upon the white community by apartheid.

It is our view that there is a very strong objection that can be made to any argument seeking to promote the idea of compensatory justice at the expense of promoting distributive justice. Compensatory justice is premised on two principles: compensation should be paid to the one harmed and it must be paid by the one who caused the harm. In cases where this can be established then there is little question that victims should be compensated by those who violated their rights. However, in cases where the primary victim has passed away or even where the primary wrongdoers are either deceased or too diffuse to identify by name, it does not follow that the question of justice is now moot.

The unjust benefits and wrongful burdens imposed and facilitated by apartheid pass on from generation to generation (through the laws of succession and contract). The law itself has facilitated these inequalities. The descendants of apartheid's victims continue to suffer a grave disadvantage. Further, it is not only the actual perpetrators of the abuses that have benefited from apartheid but also later generations of whites and corporate successors who now have unequal advantage to springboard themselves ahead of black competitors who are still, for the most part, shackled by the disadvantage of apartheid.⁶⁹

9 CONCLUSION

In some ways we are already witnessing a kind of distributive justice unfolding in South Africa today - initiated by the state in the form of affirmative action, black economic empowerment, government programmes aimed at land reform and wealth redistribution, and policy aimed at improving housing, education and social services. But the purpose of our paper is to point out that there are other parties - the apartheid profiteers of which we have spoken - who should also front up and account for their ill-

⁶⁹ Black South Africans, *eg*, were deprived of the same educational opportunities that whites had and in the process their future career options were limited and with that their prospect of economic success. Even after apartheid, whites continued to enjoy a privileged education in a superior educational system, while blacks (restricted for the most part to townships) continue to suffer an inferior education with inadequate infrastructure, overcrowded classrooms, under-qualified teachers, and minimal textbooks.

gotten gains. This must be done not “as a favour to black people” or because of “moral conscience” but rather because there is a legal duty to do so. By making it obligatory, one effectively removes the obligation to “give back” from the discretion of those that are not bothered by a moral conscience. We have tried to demonstrate that there is in fact a legal basis for their accountability; the question of how they ought to account nevertheless remains open to debate although we suggest that it would work best if done in accordance with a distributive justice model, rather than relying solely on compensatory justice.

A distributive justice model could look something like this: Let us suppose that under segregationist apartheid laws, spearheaded by the most notorious of all, the Group Areas Act 41 of 1950, community X are destined to live in township Y - an impoverished ghetto in which fresh water and electricity are inadequate or non-existent; living conditions poor; roads, sanitary, and health-care facilities primitive; and recreational amenities scarce. The residents of Y were employed largely by the mining industry. A massive gold mine Z made use of this cheap source of labour and exploited every possible latitude under the apartheid laws to generate more profit for themselves at the expense of their black labour force - and with complete disregard to their basic human rights. The black men who worked for Z earned precious little. They could not afford to commute regularly and so they left their families behind and lived in hostels on the mine. Community X suffers tremendously as a result of this migrant labour practice. On our argument, Z should be legally accountable since they are unjust profiteers. But who should they be accountable to? Our brand of distributive justice would require that the profitable gold mine give something back to the community that it systematically robbed of so much during the apartheid years - not because it is being punished for the evils of the apartheid state and legislature, but because it profited from the exploitation of the injustice. Company Z could make reparation by contributing to the upliftment of community X by, for example, building a school or a library in township Y, or improving the roads, and basic services. In this way future generations that live in township Y, who would still be adversely effected by the continuing impact of apartheid are also addressed in the reckoning.

This is only one example of how distributive justice may be implemented. It may be argued that the community should have a legal claim against such companies that profited at the community's expense. While the exact extent of the harm is very difficult to determine, economists could make estimations based on levels of prosperity in similar sized communities that operated under at least minimal human rights standards, for example, in Australia, the UK or the US. In such communities where workers make

reasonable wages, one finds decent housing, shops, infrastructure and services that are all made possible through those wages, taxes on wages, and on property, goods and services purchased through those wages. Thus, it is not only the state's fault that black communities lack the infrastructure and services of (previously) white communities but it is also the fault of companies and other private actors that exploited the apartheid legal framework - the blame can be apportioned. Therein lies the rationale for holding them liable, notwithstanding that their liability falls beyond the scope of the TRC's mandate.