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## **Of Trials, Reparation, and Transformation in Post-Apartheid South Africa: The Making of A Common Purpose**

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ANDREA DURBACH

Of Trials, Reparation, and Transformation  
in Post-Apartheid South Africa:  
The Making of *A Common Purpose*

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ABOUT THE AUTHOR: Andrea Durbach is a Professor of Law and Director of the Australian Human Rights Centre, Faculty of Law, University of New South Wales, Australia. Born and educated in South Africa, she practiced as a political trial lawyer, representing victims and opponents of apartheid laws. In 1988 she was appointed solicitor to twenty-five black defendants in a notorious death penalty case in South Africa and later published an account of her experiences in *ANDREA DURBACH, UPINGTON: A STORY OF TRIALS AND RECONCILIATION* (1999) (for information on the other editions of this book see *infra* note 42), on which the documentary, *A COMMON PURPOSE* (Looking Glass Pictures 2011) is based. Some of the details described in this article are from Professor Durbach's personal notes and recollections of her experience representing these defendants.

## I. INTRODUCTION

In November 1985, twenty-six people were arrested in Paballelo, a black township on the outskirts of the Northern Cape town of Upington, for the murder of Lucas Sethwala, a local policeman.<sup>1</sup> The murder took place after almost 3,000 township residents met on the Eleven Experience soccer field early on the morning of November 13, 1985 to protest their daily living conditions and the brutal police conduct against the community.<sup>2</sup> Although the protest was peaceful, police arrived in armored trucks, declared the meeting unlawful, and fired tear gas cannisters to disperse the crowd.<sup>3</sup> As the crowd fled with police in pursuit, a small group gathered in front of Lucas Sethwala's home, throwing stones onto the roof and shouting chants.<sup>4</sup> Sethwala fired two shots from inside his house, seriously wounding a young boy playing nearby.<sup>5</sup> Fleeing his home, Sethwala was chased onto an open field, felled to the ground, beaten over the head with his own rifle, and set alight with petrol.<sup>6</sup> Two and a half years later, the Honorable Justice Jan Basson of the Upington Supreme Court in the Northern Cape province convicted twenty-five of the twenty-six accused of Lucas Sethwala's murder on the basis of the common purpose doctrine.<sup>7</sup> In May 1989, the Upington Supreme Court sentenced fourteen of the twenty-five to death.<sup>8</sup>

This article revisits the trial of the Upington 25 in the lead-up to South Africa's impending transition to democracy through the making of a documentary that explores the impact of apartheid's recent history on the lives of a small community as they seek, and in some cases gain, entry to the new South Africa. Moving between different segments of the trial, the documentary, *A Common Purpose*,<sup>9</sup> weaves together the details of Sethwala's death, the trial on conviction, the court's declaration of fourteen death sentences in 1989, the appeal hearing in 1991, and the testimony from the Upington community before the South African Truth and Reconciliation Commission (SATRC) hearings in 1996 and 1999.

The film traces these events through the frame of my return to South Africa in 2007 to reunite with many of the people I had represented almost twenty years earlier. This article explores how the documentary invites a review of a historical

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1. ANDREA DURBACH, UPINGTON: A STORY OF TRIALS AND RECONCILIATION 33 (1999).

2. *Id.* at 33–34.

3. *Id.* at 34–35.

4. *Id.* at 35.

5. *Id.*

6. *Id.* at 35–36.

7. See Christopher S. Wren, *Judge Condemns 14 South Africa Blacks*, N.Y. TIMES, (May 27, 1989), <http://www.nytimes.com/1989/05/27/world/judge-condemns-14-south-africa-blacks.html>; *14 to Hang For Slaying in S. Africa*, CHI. TRIB., May 27, 1989, § 1, at 7.

8. Wren, *supra* note 7; see also *S v. Kenneth Pinkie Khumalo and 25 others*, Supreme Court of South Africa (Orange Circuit Local Division at Upington), Case No 83/86, 18-27 April 1988, unreported.

9. A COMMON PURPOSE (Looking Glass Pictures 2011). The film was directed and produced by Australian documentary filmmaker, Mitzi Goldman. *A Common Purpose*, LOOKING GLASS PICTURES, <http://lookingglasspictures.com.au/films/a-common-purpose/> (last visited Apr. 9, 2016).

legacy easily downgraded or forgotten but still virulently evident in post-apartheid South Africa as the state continues to mediate its obligations to redress victims of apartheid and redevelop the nation in line with ambitious political and economic undertakings. More particularly, the article investigates the role of law as both an agent of stasis and of change, tracing an uneasy reconciliation between its insidious and ambivalent part in the entrenchment of apartheid and the transformation of state power as South Africa assumes a democratic transition.

## II. A CASE OF COMMON PURPOSE

*Justice and law . . . are . . . distant cousins, and here in South Africa, they are simply not on speaking terms.*<sup>10</sup>

There were times during my representation of victims and opponents of apartheid in legal trials during the mid- and late 1980s that my belief in the law and its capacity to balance or shift power, or to offer redress, was knocked about by the failure of its executioners to see the deep cruelty of the law's impact on ordinary lives. Perhaps more fundamentally, I loathed that apartheid laws and regulations sanctioned harm and essentially gave permission to manifest prejudice, to exclude, to diminish, and to eliminate life. But it was often my clients, and the extraordinary combination of events that brought me to them, that would reignite some inexplicable conviction and confidence in the law to push past the limitations imposed by a vicious state. The case of the Upington 25, which emerged during South Africa's "ungovernability period"<sup>11</sup> and concluded at the start of apartheid's inconceivable collapse, highlighted the paradox of practicing law in the hope of exacting justice under a system that mainly invoked the law's authority to validate oppressive state action rather than fortify individual freedom.<sup>12</sup>

Soon after the twenty-five accused were convicted in April 1988,<sup>13</sup> I was asked to act as their solicitor to prepare the case for extenuation and avoid the imposition of the

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10. A DRY WHITE SEASON (Metro Goldwyn Mayer 1989) (based on the novel ANDRÉ BRINK, A DRY WHITE SEASON (1979)). This line was spoken by Marlon Brando, who plays the role of a liberal white lawyer representing a black woman at the inquest of her husband, a victim of alleged suicide in a cell at the notorious John Vorster Square Police Station in Johannesburg in the late 1970s. *Id.*
  11. The "ungovernability period" refers to a period in South Africa's history from 1984 to 1990 during which the national and international struggle against apartheid intensified, with increased mobilization and resistance by anti-apartheid political, student, and trade union movements within the country and cultural and economic boycotts and disinvestment initiatives supported by international corporations, governments, and NGOs. See *The People Armed, 1984-1990*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/liberation-struggle-south-africa/people-armed-1984-1990> (last visited Apr. 9, 2016).
  12. See Andrea Durbach, *Conscientious Participation: Working the Law Back to its Bones*, in CHANGING LAW: RIGHTS, REGULATION AND RECONCILIATION 155 (Rosemary Hunter & Mary Keyes eds., 2005).
  13. See John D. Battersby, *Paballelo Journal; For One Moment of Mob Rage, Must 25 Now Die?*, N.Y. TIMES (Feb. 22, 1989), <http://www.nytimes.com/1989/02/22/world/paballelo-journal-for-one-moment-of-mob-rage-must-25-now-die.html>. We were instructed to represent twenty-five of the twenty-six people originally charged. "The twenty-sixth accused, Accused No 7, Enoch Nompondwana, was charged with murder and convicted of attempted murder. His conviction did not carry a potential sentence of

mandatory death penalty. South African criminal law at the time<sup>14</sup> required that the death penalty be imposed following a conviction of murder, unless extenuating circumstances could be demonstrated by the defense and accepted by the court.<sup>15</sup> Where the court might find the existence of extenuating circumstances (and so avoid application of the death sentence), my task also included the preparation of evidence and argument in mitigation of the sentences that could be imposed, potentially ranging from prison terms to orders of community service. Most of the twenty-five convicted were found neither to have physically participated in the killing of Lucas Sethwala, nor to have demonstrated the individual intention to execute the murder.<sup>16</sup> However, the Upington Supreme Court did find that all twenty-five accused threw stones at Sethwala's house.<sup>17</sup> Justice Basson concluded that the act of stoning Sethwala's house was sufficient conduct from which to infer that the crowd had a shared purpose to drive the policeman from his home so that he might be killed, thereby actively associating themselves with the act of murder.<sup>18</sup> Evidently applying the doctrine of common purpose,<sup>19</sup> the court

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death." DURBACH, *supra* note 1, at xii. Throughout the trial on conviction of the twenty-five, they had been represented by a single advocate, Andre Landman (initially with the assistance of an instructing attorney), on a *pro deo* basis (appointed by the state) for close to four years. *Id.* at 37. For the distinction in South Africa between an "advocate" and an "attorney," see *infra* note 26. Landman was unable to continue in this role. DURBACH, *supra* note 1, at 27.

14. Criminal Procedure Act 51 of 1977 § 277(1)(a) (repealed 1997).
15. DURBACH, *supra* note 1, at 25. In criminal law cases, extenuating circumstances, such as provocation, the young age of the offender, or a history of abuse, are unusual or extraordinary factors that may serve to lessen the moral blameworthiness of the accused and the seriousness of the crime. Their acceptance by a court may influence or reduce any consequent sentence or punishment. See Andrew Novak, *Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases*, 14 AFR. HUM. RTS. L.J. 24, 27 (2014); see also Andrew Novak, *The Death Penalty and the Right to Life in the Draft Constitutions of Zambia and Zimbabwe*, AFRICLAW (Apr. 18, 2013), <http://africlaw.com/2013/04/18/the-death-penalty-and-the-right-to-life-in-the-draft-constitutions-of-zambia-and-zimbabwe/>.
16. See DURBACH, *supra* note 1, at 39–41.
17. *Id.* at 39.
18. *Id.* at 40–41.
19. The common purpose doctrine, which originates from the English common law, imputes criminal liability to individual members of a group who, in pursuance of an unlawful joint (or common) enterprise, are sufficiently or actively associated with related unlawful acts that may be executed in implementing the joint enterprise. See *Thebus v. S* 2003 (6) SA 505 (CC) at para. 18; DURBACH, *supra* note 1, at 64. Thus, each member of the group assumes legal responsibility for the actions of the whole. In determining liability, however, the prosecution must prove, beyond a reasonable doubt, that each individual member of the group committed an unlawful act (or actively associated with such conduct) with the requisite intention, and reasonably foresaw its outcome when planning or executing the joint unlawful enterprise. *Thebus*, 2003 (6) SA 505 at para. 49. The doctrine, despite its notorious application in certain South African cases (discussed above) and its subsequent confirmation by the South African Constitutional Court in *Thebus v. S*, has utility when applied, for example, in a case where three people, one of whom will carry a gun, plan a bank robbery. During the execution of the robbery, the gun is fired, killing a bank teller, and all three may attract equal liability for the murder, given that in jointly planning the unlawful act (namely, the robbery), they should have foreseen the possibility of someone being harmed given the potential use of the gun. See DURBACH, *supra* note 1, at 64.

determined that this collective intention to kill could be “imputed to each individual accused.”<sup>20</sup>

The story of the Upington 25 is the story of a trial that has been replicated throughout South Africa’s legal history—the only difference perhaps being the scale of convictions (twenty-five) and sentences of death (fourteen). It did, however, present some unusual features. The stand-out element was that twenty-five people had been charged with the murder of one man. Applying the doctrine of common purpose, the state cast the net of criminal liability so wide as to bring together twenty-five people who had no apparent common enterprise or unmistakable individual intention to kill.<sup>21</sup> Of those charged, five accused were not initially arrested as suspects but were asked by the police to be fill-ins at the identity parade, “as extras, to make up the numbers.”<sup>22</sup> These five young men were pulled off the street, pointed out by state witnesses, and charged with and convicted of murder.<sup>23</sup> Since South Africa has no jury system,<sup>24</sup> the twenty-five were convicted of murder by one judge and one assessor (the second assessor died during the trial).<sup>25</sup>

Mostly unemployed and unable to afford legal representation, the twenty-five were represented throughout the major part of the two-and-a-half-year case on conviction—which featured close to 150 witnesses and nearly 11,000 pages of transcript—by one advocate and no attorney.<sup>26</sup> The advocate was appointed by the court to act *pro deo*.<sup>27</sup> In preparing for the trial on extenuation, we had to present evidence that would reduce the moral blameworthiness of the accused in relation to each conviction of murder, for example by demonstrating that the accused had been provoked or had been acting under duress. Given that the lower court had not

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20. DURBACH, *supra* note 1, at 41.

21. *Id.* at 36–37.

22. *Id.* at 36.

23. *Id.*

24. The jury system in South Africa was abolished in 1969. Abolition of Juries Act 34 of 1969; *see also* South African Law Commission Issue Paper 6 Simplification of Criminal Procedure (Access to the Criminal Justice System) (June 1997).

25. In criminal cases involving serious crimes, such as murder, the judge might be assisted by the appointment of two assessors who would generally advise on questions of fact but not questions of law. *See The Crucial Role of the Court Assessor*, ENCA (Mar. 30, 2014, 6:19 PM), <http://www.enca.com/south-africa/crucial-role-court-assessor>.

26. DURBACH, *supra* note 1, at 25–27, 39. In South Africa, and in many commonwealth countries, the legal profession is split between attorneys (broadly equivalent to “solicitors” in England and Australia) and advocates (broadly equivalent to “barristers” in England and Australia). *See South African Legal System*, GEN. COUNCIL B. S. AFR., <http://www.sabar.co.za/legal-system.html> (last visited Apr. 9, 2016). Although the demarcation is less marked, attorneys are generally engaged directly by clients to manage a transaction or litigation on the client’s behalf, while advocates tend to be briefed or instructed by attorneys to appear in court and argue complex legal cases and issues. *Id.*; *see also* L. Wildenboer, *The Origins of the Division of the Legal Profession in South Africa: A Brief Overview*, 16 *FUNDAMINA* 199, 199–200 (2010).

27. *Pro deo* refers to legal representation at the instruction of a court (often requested to assist indigent accused) paid for by the the state. DURBACH, *supra* note 1, at 26.

believed our clients at the trial on conviction, they refused to give evidence at the trial on extenuation, and accordingly, we had to rely on the meticulous profiles of each of the twenty-five compiled from interviews by various experts and presented to the court as proxies for direct testimony from our clients.<sup>28</sup>

A year and a half later, after mounting what was to become one of the most extensive trials on extenuation in African legal history—with evidence from clinical and behavioral psychologists, social anthropologists, forensic medical scientists, and criminologists—fourteen of our twenty-five clients, including a former mayor, a male nurse, and a young artist, were sentenced to death. Those sent to death row also included a couple in their late sixties with ten children: Gideon Madlongwane, a railway worker for forty years, and Evelina de Bruin, who had worked as a domestic worker for white families most of her life, illiterate, arthritic, and suffering ischemic heart disease.

Anton Lubowski, an advocate central to the case on extenuation and the first white member of SWAPO, the Namibian liberation movement, had initially sought my representation of the twenty-five accused.<sup>29</sup> On September 12, 1989, a few months after the sentences were handed down, Lubowski, who had been destined to step into a significant role in the new SWAPO-led government,<sup>30</sup> was assassinated outside his home.<sup>31</sup>

The extraordinary features of the trial on conviction and extenuation were evident until the very last stage. Justice Basson was so convinced of the unimpeachability of his own findings against the accused that he refused our application for leave to appeal, thus preventing, he said, “saddling the Appeal Court with appeals which have no grounds for success.”<sup>32</sup> After petitioning the Chief Justice, we were granted conditional leave to appeal, and in May 1991, the South African Appellate Division overturned twenty-one of the twenty-five murder convictions and set aside all fourteen death sentences.<sup>33</sup> In June 1995, just over a year

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28. *Id.* at 86–92.

29. *Id.* at 22, 25.

30. After the First World War, the League of Nations placed the German territory of South West Africa (later known as Namibia) under administration by South Africa. *Namibia Gains Independence*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/dated-event/namibia-gains-independence> (last visited Apr. 9, 2016). While South Africa’s attempts to formally incorporate South West Africa as one of its provinces were unsuccessful, South Africa extended the reach of its apartheid policies, and resistance to South Africa’s presence in Namibia led to the establishment of the South West African People’s Organisation (SWAPO), which advocated for Namibia’s independence from South Africa. *Id.*; see also *South West Africa People’s Organization (SWAPO)*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/topic/south-west-africa-peoples-organisation-swapo> (last visited Apr. 9, 2016). Following a UN-brokered peace initiative, the South African government agreed to relinquish control of Namibia in 1988, and on March 21, 1990, Namibia was granted independence. *Namibia Gains Independence*, *supra*.

31. See DURBACH, *supra* note 1, at 194–97; *A White Leader of Namibian Nationalists is Killed*, N.Y. TIMES (Sept. 13, 1989), <http://www.nytimes.com/1989/09/13/world/a-white-leader-of-namibian-nationalists-is-killed.html>.

32. DURBACH, *supra* note 1, at 182.

33. *S v. Khumalo* 1991 (4) SA 310 (AD); DURBACH, *supra* note 1, at 242.



after the inauguration of President Nelson Mandela and almost four years after the release of the Upington 14 from death row, the new South African Constitutional Court declared capital punishment inconsistent with the new Constitution and abolished the death penalty in the case of *S v. Makwanyane*.<sup>34</sup>

Aside from the legal complexities of the case, the day-to-day absurdity and cruelty of the Upington proceedings often made us question our real purpose as lawyers. The temptation to abandon legal procedure, etiquette, evidence, and argument was often overwhelming. There seemed little point to our task given the daily demeanor of the judge and the bully-boy men in blue who guarded the court each day. In addition to the overt displays of racism by the judge, the accused experienced cruel treatment throughout the trial on extenuation. Xoliswa Dube, whose daughter Innocentia was born soon after her mother's arrest, was transported in the back of a police van to a hospital suffering from acute appendicitis, and on visiting her the following morning before court, we found her post-surgery wound stitched and stretched as she lay manacled to her hospital bed, lest she attempt an escape while her guard stood smoking outside. Equally distressing were the revelations that emerged after accused Xolile Yona was sent to Cape Town, almost 900 kilometers south of Upington, to be investigated by a psychiatrist for neurological abnormalities that might have explained his conduct and constituted an extenuating factor, reducing the likelihood of the imposition of the death penalty.<sup>35</sup> En route to Cape Town and in the police cells, Xolile was tortured, administered electric shocks, and forced to eat feces.<sup>36</sup> And the night before the death sentences were proclaimed, friends and families of the accused were beaten and whipped by police and bitten by police dogs while walking home singing hymns after a vigil for the twenty-five.<sup>37</sup> We rushed the injured to the hospital, and in court the next morning, the accused entered the dock to hear their fate, their fear and horror amplified upon seeing their families, many with bandaged heads, dog bites, and welts.<sup>38</sup>

When I took on the Upington case, I had been in practice as a lawyer for seven years, working with trade unionists, students, journalists, and anti-apartheid activists. We had achieved some victories in the courts, and the application of harsh apartheid laws and state conduct may have been restrained as a result. Often, however, legal remedies remained symbolic, having little chance of enforcement. The overriding scale of hardship and harm and the enormity of damaged lives endured, barely dented. These were the times when fatigue set in and undid the optimism of triumph and I would doubt any ties at all between justice and the law. But as lawyers working with fragile communities diminished by the law's impact, we learned that we had to ride the waves of legal opportunity, to wait for the moment when the intimate facts and the exterior forces might effectively combine to undermine the loathsome intent

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34. 1995 (3) SA 391 (CC).

35. DURBACH, *supra* note 1, at 76.

36. *Id.*

37. *Id.* at 162–63.

38. *See id.* at 163, 166.



of a law or regulation—when we could use the courts as sites of struggle, and nudge, even inch, the law towards justice. The case of the Upington 25 is possibly a small example of that enterprise. And the making of the documentary, *A Common Purpose*, some twenty years later, became a crucial tribute to, and validation of, a community’s struggle to fight injustice against significant odds. Importantly, the documentary would stand as a record of the community’s role and a reminder of the cycles and teachings of South Africa’s history.

### III. RE-ENTERING THE PLACE OF OUR PAST

*The real horror and injustice of apartheid really took root in me; I really understood it when I went to cover the Upington trial for the first time. That was the moment when I really understood, in my head and in my heart, what apartheid was all about.*<sup>39</sup>

South Africa’s first non-racial democratic elections in April 1994 secured the transition of political power.<sup>40</sup> The establishment of the SATRC and South Africa’s Constitutional Court, and the adoption of a new Constitution and Bill of Rights, sought to implement the long-term objectives of political transition by addressing the destructive harm of apartheid and the gross imbalance of social and economic power that sustained a pernicious system. A critical component of South Africa’s transformation process was the reconciliation and reparations mandate of the SATRC, which was directed at acknowledging and compensating for the systematic and structural harm of apartheid and preventing its repetition.<sup>41</sup> Five years after the Upington 25 appellate judgment, Lucas Sethwala’s mother and some of the Upington accused testified before the SATRC. And in 2007, I returned to South Africa to meet my clients in Upington for the first time since late 1989, when I had left to live in Australia. I returned to South Africa for the Upington 25 case on appeal in 1991 and then again for the launch of my book, *Upington*,<sup>42</sup> in 1999, but I had not been to Upington or seen my clients and their families since their release from death row in

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39. John Carlin, *The Independent’s* South Africa bureau chief from 1989–1995, quoted in the documentary, *A COMMON PURPOSE*, *supra* note 9.

40. *Elections in Post Apartheid South Africa*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/elections-post-apartheid-south-africa> (last visited Apr. 9, 2016).

41. The SATRC, established pursuant to the Promotion of National Unity and Reconciliation Act 34 of 1995, was made up of three distinct committees: the Amnesty Committee considered applications for amnesty from perpetrators of gross violations of human rights between 1960 and 1994; the Committee on Human Rights Violations heard and compiled testimony on these violations and their consequent harm; and the Reparations and Rehabilitation Committee determined who would qualify for reparations and made recommendations to the President regarding awards and a reparations policy. *The Committees of the TRC*, TRUTH & RECONCILIATION COMMISSION, <http://www.justice.gov.za/trc/trccom.html> (last visited Apr. 9, 2015).

42. DURBACH, *supra* note 1. The book was first published in Sydney, Australia by Allen & Unwin (1999). It was subsequently published in Cape Town, South Africa by David Philip Publishers, ANDREA DURBACH, UPINGTON (1999), and in the United States by the Continuum International Publishing Group, ANDREA DURBACH, *A COMMON PURPOSE: THE STORY OF THE UPINGTON 25* (2002).

Pretoria Central Prison. The purpose of my return in 2007 was to explore my former clients' reactions to the making of the documentary and their key participation in its construction. I travelled with an Australian filmmaker and a South African cameraman and arrived in South Africa with anxious expectation. I was to meet my former clients—whom I had only ever known as accused and convicted murderers—as free, wrongly convicted individuals. Perhaps more remarkably, I was to meet them in the new South Africa, to witness their transformation into citizens now within reach of the promise of dignity, equality, and freedom heralded under the new South African Constitution.

While I had witnessed the impact of the horrors of apartheid on my clients and their families over many years, I was ill-prepared for the manifestations of that legacy on their day-to-day existence in the new South Africa. A few had transcended harsh histories, but the majority were caught by the enduring emotional and psychological damage of decades of cruel and inhuman treatment, trying hard to make new lives amidst the despair spawned by relentless poverty and unmet expectations.

We spent five days in forty-two-degree (107.6 degrees Fahrenheit) Upington heat on the edge of the Kalahari desert, close to the Namibian border. On our first day, we re-enacted my usual arrival during the trial, and en route from the airport to the town, we stopped at the Upington prison. At the entrance, which boasted the sign “With pride we serve,” were guards—now black and white—who welcomed us to the high-security prison, renamed a correctional center with the stated aim of rehabilitation for its inmates. The prison officials recalled the Upington 25, and with a strange mix of pride and commitment to change, they told us that two members of the Afrikaner Resistance Movement, the white right-wing militant group led by Eugene Terre'blanche, were currently serving terms of life imprisonment in the Upington jail for the murder of one of their own gang.

Despite the appropriate punishment of those once seen as foot-soldiers and heroes of the apartheid regime, other signs of transformation to the new South Africa—acutely evident upon our arrival in Johannesburg—were hard to detect as we drove into Upington. Over the next few days, we discovered that apartheid had left deep imprints on the map of this receptive town, with old divisions framing access to housing, education, employment, and health care. The town and its neighborhoods, always prosperous and now a haven for international tourists keen to explore the desert and the dramatic Augrabies Waterfalls nearby, bustled with white residents and visitors and four-wheel drives. The black population, as in 1989, lived in Blikkies and Paballelo, two townships some kilometers away. The blunt racism and ruthless police surveillance, which kept the townships cowering in the shadow of Upington and then finally exploding in the late 1980s, were distinctly absent. However, benign discrimination and the horrors of extreme poverty, widespread unemployment, HIV/AIDS, and a chilling increase in the levels of sexual violence, relegated the majority of township communities to the extreme margins of effective social and economic participation.<sup>43</sup>

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43. In February 2015, Statistics South Africa reported that 21.7% of South Africans live in extreme poverty, unable to afford sufficient food to sustain basic nutritional needs; 53.8% fall within the broad definition of poverty in South Africa, surviving on under ZAR779 (U.S. \$50.50) per month. STATISTICS SOUTH

The new South Africa had undoubtedly brought opportunity for those previously denied rights. Even some of the Uppington trialists were able to surmount political and personal barriers and create new lives and possibilities. Justice Bekebeke, accused number ten, a male nurse at the time of his arrest who was found by the court to have delivered a fatal blow to Sethwala's head, told us that he had begun to study for a law degree on death row to continue the work of Anton Lubowski. After graduating, he became an expert on electoral law while serving as a senior official of the Northern Cape office of the South African Independent Electoral Commission. Justice Bekebeke had been an official observer at the 2004 American presidential elections and had travelled throughout Africa, advising governments on electoral laws and procedures.<sup>44</sup> His brother Barry Bekebeke, accused number fourteen, had become a social worker and used memory as a tool to heal trauma. Accused number five, Myner Bovu, had studied anthropology and social administration and had been appointed the Director of Social Services for the Kharahais Municipality, which served the Uppington community. Accused number nine, Elisha Matshoba, who drew and painted intricate courtroom scenes, had moved to Cape Town, where he worked as a master wood craftsman.

Other trialists found re-entering a viable life daunting and unattainable after almost two years on death row. Wellington Masiza, accused number thirteen, returned to his old job at the Uppington abattoirs, where he worked long hours for little pay, slaughtering 1,300 sheep and 150 cows each day. He lived in a shack on the outskirts of Paballelo township, a single father to a nine-year-old son who required medical and learning assistance that Wellington could not afford. "I'm striving," Wellington told us, "but I can't get to the point where I should be, where I want to be." Zonga Moghatle, accused number eleven, had been unable to secure work for many years. "I often think of committing crime again so that I can be

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AFRICA, REPORT NO. 03-10-11, METHODOLOGICAL REPORT ON REBASING OF NATIONAL POVERTY LINES AND DEVELOPMENT OF PILOT PROVINCIAL POVERTY LINES: TECHNICAL REPORT 13 (2015). In the last decade, South Africa's unemployment levels have remained between twenty-two and twenty-five per cent, INT'L LABOUR ORG., WORLD EMPLOYMENT AND SOCIAL OUTLOOK: TRENDS 2015, at 19 (2015), positioning the country as having the eighth highest unemployment rate in the world in 2015, *SA Ranks 8th on Worst Unemployment Rate List*, NEWS24 (Jan. 20, 2015, 7:05 AM), <http://www.news24.com/Archives/City-Press/SA-ranks-8th-on-worst-unemployment-rate-list-20150429>. Poverty and unemployment are frequently cited as core reasons for the high levels of sexual violence against women in South Africa. See Helen Moffett, *The Political Economy of Sexual Violence in Post-apartheid South Africa*, Paper Presented at the Harold Wolpe Memorial Trust's Tenth Anniversary Colloquium, "Engaging Silences and Unresolved Issues in the Political Economy of South Africa" (Sept. 21–23, 2006), <http://www.wolpetrust.org.za/conferences/colloquium/moffett.pdf>. The extent of sexual violence, combined with social inequality, unequal access to medical care, and a transient or migrant labor force has had a direct impact on the number of South Africans living with HIV, currently estimated at 5.9 million people (over ten per cent of the country's population). See *HIV and AIDS in Sub-Saharan Africa Regional Overview*, AVERT, <http://www.avert.org/hiv-aids-sub-saharan-africa.htm#sthash.5Fz5sYRR.dpuf> (last updated May 1, 2015).

44. See FAIR ELECTION INT'L, 2004 U.S. ELECTION: AN INTERNATIONAL PERSPECTIVE ii (2004). Justice Bekebeke is currently Director-General for the Northern Cape Provincial Government. *Director-General for the Northern Cape Provincial Government*, PUB. SECTOR MANAGER, <http://www.gcis.gov.za/sms/nc.html> (last visited Apr. 9, 2016).

arrested and sent to jail. It was a better life inside than out. I have suffered more since my release,” he told us.

While we were aware of the disquieting level of violent crime in South Africa prior to our arrival in Johannesburg, the degree to which the violence occupied conversations and media coverage and was evident in everyday life—the alarms and security fences, the signs and remote controls, the high walls and gates and guards—lent an uncomfortable credence to the enormity of the crisis. That apartheid was a brutal system and the country was regrettably destined to wrestle with its deep-seated manifestations was perhaps a routine explanation for the disturbing levels of crime that struck a blow at the triumph of South Africa’s velvet revolution. Although violence can be explained as an inevitable response to the mass atrocities committed in the name of apartheid, I also saw a country keen to embrace the imperatives of an emerging, non-racial democracy, refusing to allow, in the words of a poster we saw affixed to an Upington lamp-post, “the future to be destroyed by the evils of the past.” Undoubtedly, the brutality endemic to the maintenance of oppression had continued in pockets and unleashed a spiral of violence that presented a real risk to the fragile process of South Africa’s reconstruction and development. While the need to address the causes of the violence seemed to be underplayed, we were acutely aware of how many South Africans argued that the abolition of the death penalty had resulted in the high rate of violent crime. Calls for its reinstatement were accompanied by arguments in support of its value as an effective deterrent.<sup>45</sup>

Our final meeting was with Justice Albie Sachs of the South African Constitutional Court. “The history of the nation,” said Justice Sachs during our interview, “is a history of humiliation, racism, authoritarianism.” He continued:

There was a sense (on the part of the state) that somehow you can’t be a real state unless you kill your own citizens. That became the ultimate symbol of the sovereignty of the power of the state—that it assumed to itself the right to kill its own, not in warfare, not in self-defence, but as a symbolic gesture to show that certain human beings don’t deserve to exist. The state’s deliberate and cold-blooded taking of life, the whipping of juveniles which was done through the courts, the absence of fair trials, detention without trial, torture and murder, the exclusion from society and denial of dignity, were part and parcel of the state’s rule, sometimes legally supported, sometimes done clandestinely, but with the support of the highest in authority and often, the backing of the law.<sup>46</sup>

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45. See Moyiga Nduru, *DEATH PENALTY: Calls for the Return of Capital Punishment in South Africa*, INTER PRESS SERV. (June 7, 2006), <http://www.ipsnews.net/2006/06/death-penalty-calls-for-the-return-of-capital-punishment-in-south-africa/>.

46. Interview with Justice Albie Sachs, Constitutional Court, in Johannesburg, S. Afr. (Jan. 2007) (on file with author). Prior to his appointment by Mandela as one of the first eleven judges on South Africa’s new Constitutional Court, Albie Sachs had spent twenty-four years in exile as a writer and academic, after being granted an exit permit by the apartheid government (with no right of return) following years of harassment and surveillance, arrests, detention in solitary confinement, interrogation, and torture. As a young lawyer in South Africa, he challenged repressive laws, racism and the denial of civil liberties, representing political dissidents and those who sought to undermine the South African state, many facing the death penalty as a result. After returning to South Africa from his period of exile, during

“Where the law,” said Justice Sachs as we ended our interview, “became a major instrument of executing injustice . . . [i]t was a terrible perversion of a system of justice.”<sup>47</sup> Almost ten years earlier, Justice Sachs addressed that “terrible perversion” as one of the judges in the case of *S v. Makwanyane*,<sup>48</sup> the first case to be heard after the Constitutional Court’s inauguration in 1995. *Makwanyane* considered the constitutionality of the death penalty prescribed by section 277(1) of the Criminal Procedure Act of 1977.<sup>49</sup> The Constitutional Court held that the death penalty offended the prohibition on cruel, inhuman, or degrading punishment under section 11(2) of the Interim Constitution of 1993.<sup>50</sup> The Court also declared that the right to human dignity<sup>51</sup> and the right to life<sup>52</sup> were “the most important of all human rights, and the source of all other personal rights in Chapter Three” of the Interim Constitution.<sup>53</sup>

In the *Makwanyane* judgment, the late Justice Ismail Mahomed declared that “[t]he death penalty sanctions the deliberate annihilation of life,”<sup>54</sup> and quoted from the 1994 decision of *S v. Mhlongo*:

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which he survived an assassination attempt by South African security agents, Sachs played a significant role in drafting South Africa’s post-apartheid Constitution. In 2009, as his term on the Constitutional Court expired, Albie Sachs stood down after fifteen years as a jurist who shaped many of the Court’s significant judgments, from abolishing the death penalty to legalizing same-sex marriage. See *A Triumph of Humanity and Social Justice*, ACAD. ACHIEVEMENT, <http://www.achievement.org/autodoc/page/sac0bio-1> (last visited Apr. 9, 2016).

47. Interview with Justice Albie Sachs, *supra* note 46.

48. 1995 (3) SA 391 (CC). The two accused were convicted “on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts.” *Id.* at para. 1. Although the appeal against the convictions was dismissed by the Appellate Division of the Supreme Court, the appeal hearing against the death sentence was postponed pending a determination by the Constitutional Court as to whether section 277(1)(a) of the Criminal Procedure Act No. 51 of 1977, which prescribed that the death penalty was a competent sentence for murder, “was consistent with the Republic of South Africa Constitution, 1993, which had come into force subsequent to the conviction and sentence by the trial court.” *Id.* at paras. 2–3. Dennis Davis and Michelle le Roux wrote:

The case of *Makwanyane* is not about the way brutal murderers succeeded in their argument that the death penalty was unconstitutional. . . . Rather, in their judgments, the newly appointed judges of the court not only reflected on the history of the death penalty as a metaphor for a brutal history of government in which life and dignity, particularly of South Africans, was not respected, but asserted the importance of constitutional democracy and the vision the constitutional text held for the future of the country.

DENNIS DAVIS & MICHELLE LE ROUX, PRECEDENT AND POSSIBILITY: THE ABUSE OF LAW IN SOUTH AFRICA 14 (2009).

49. *Makwanyane*, 1995 (3) SA 391 at para. 2.

50. *Id.* at paras. 146–48.

51. S. AFR. (INTERIM) CONST., 1993, § 10.

52. *Id.* § 9.

53. *Makwanyane*, 1995 (3) SA 391 at para. 144.

54. *Id.* at para. 265.

[It] is the ultimate and the most incomparably extreme form of punishment . . . It is the last, the most devastating and the most irreversible recourse of the criminal law, involving as it necessarily does, the planned and calculated termination of life itself; the destruction of the greatest and most precious gift which is bestowed on all humankind.<sup>55</sup>

The right to life, guaranteed under the Interim Constitution, Justice Mahomed continued, includes “the right of every person, not to be deliberately killed by the State, through a systematically planned act of execution sanctioned by the State as a mode of punishment and performed by an executioner remunerated for this purpose from public funds[.]”<sup>56</sup> One of the reasons for the prohibition of capital punishment advanced by Justice Arthur Chaskalson, President of the Constitutional Court at the time, was “that allowing the State to kill will cheapen the value of human life . . . .”<sup>57</sup> Rather than condemn violence, the death penalty allows the state to repeat it.<sup>58</sup> Removing the state’s right to take human life was a critical starting point for the creation of a new order in which all South African lives were equally valued.

On our last day in South Africa, we were driven to the Apartheid Museum just outside Johannesburg by a white Afrikaner tour guide. Upon seeing all of our equipment, he was curious to know our purpose in South Africa. I told him we were reviewing people’s attitudes to the death penalty. Our driver confided in us that he drove around with a thirteen-inch knife inside his jacket. “A gun,” he said in a quiet, almost gentle voice, was “too dangerous. At least with a knife, I can protect myself and do damage to my attacker. A gun is too immediate. You can kill people quickly.” While his considered strategy disturbed me, he was plainly frightened. After arriving at the museum, where we were to film an installation consisting of nooses hanging from a ceiling and a neighboring replica death row cell, our driver helped us with our luggage and equipment. As we said goodbye, he took my hand and said, almost imploringly, with no clue as to the true subject of my film: “Lady, whatever you do, *please* bring back the death penalty.”

#### IV. AN UNEXPECTED FORM OF REPARATION

*[T]he majority of us in the case were not criminals. . . . [A]s a comrade . . . I expected [things] in my life when I joined the struggle [against apartheid]. Firstly jail, secondly death and freedom is last. But Judge Basson . . . sentenced me to death for a hearsay story. . . . The death sentence does not only hurt the person who is to hang. Firstly it hurts your family. And it kills you twice. It kills you psychologically. By the time they*

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55. *Id.* (quoting *S v. Mhlongo* 1994 (1) SACR 584 (A)).

56. *Id.* at para. 269.

57. *Id.* at para. 124 (quoting *Rodriguez v. British Columbia*, [1993] S.C.R. 519, 608 (Can.)).

58. MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 15 (2002).



*hang you, you are no longer the same person you once were. It's just your heart that beats.*<sup>59</sup>

The combination of fourteen of my clients being sentenced to death and the assassination less than four months later of their advocate and my friend and colleague, Anton Lubowski, sent me into a downward spiral of fear and dread. My responsibility to the fourteen and their families seemed overwhelming, and I was struggling to comprehend the enormity of Anton's death. With the Upington 25 appeal hearing postponed for at least a year, I left South Africa to spend time with close family in Australia, perhaps to find space to grieve and allow some distance from the pain of the previous months. The letters I received from many of my clients, especially those on death row, spoke of their confusion, their sense of abandonment, their hopes dashed as the implements of death—the measuring stick, the neck measure, the scales—surrounded them as imminent indications of their own. Although I maintained contact with the Upington 25 and the rest of the legal team after the appeal, and spent time with the fourteen before my return to Australia, I was anxious about their reception when I arrived in Paballelo almost two decades later. But the making of the documentary—listening to my clients look back on their lives without the pressures of a court case dictating our time; uncovering archival material, especially from the SATRC hearings at which Beatrice Sethwala, mother of Lucas, and some of the Upington 25 testified; and watching their response to pre-release screenings in crowded Paballelo kitchens and living rooms as families and neighbors squeezed around small television screens—became a remarkable journey of truth, reconciliation, and perhaps reparation.

One aspect of the trial that never diminished in my mind was that Lucas Sethwala had been brutally killed. Forcefully hit over the head with his own rifle, Sethwala was felled, soaked with petrol, and set alight.<sup>60</sup> A crowd of over 100 people had gathered around him, and irrefutably, members of that crowd were responsible for his death.<sup>61</sup> During the trial on conviction, the actual cause of Sethwala's death was in dispute. Were the blows to his head or the burns to his body and the asphyxiation from inhalation of smoke the primary cause of death? The court found that Justice Bekebeke, accused number ten, had grabbed Sethwala's rifle and struck him twice over the upper part of his body, and that in all probability, Lucas Sethwala had died from the blows to his head.<sup>62</sup> Justice Bekebeke was held liable for the act of murder beyond a reasonable doubt.

Our research for the documentary took us back to the SATRC hearings, where we uncovered testimony from people key to the Upington trial. We discovered that Justice Bekebeke had made an application for amnesty and appeared before the

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59. This statement was made by Xolile Yona, accused number 20, in an interview. SABC, *TRC Episode 22, Part 02*, YouTube (Apr. 19, 2011), <https://www.youtube.com/watch?v=IPvtQy5-ZoE&index=2&list=P L88F2FFA619A24CE3>.

60. DURBACH, *supra* note 1, at 35.

61. *Id.*

62. *Id.* at 99.



SATRC's Amnesty Committee in Bloemfontein in May 1999 to admit that he had struck Sethwala twice over the head with the butt of his gun and to argue, in support of amnesty, that his deed was politically motivated.<sup>63</sup> Present at the hearings was Beatrice Sethwala.<sup>64</sup> Through her legal counsel, Mrs. Sethwala indicated that she did not oppose Justice Bekebeke's amnesty application but asked him "why it was necessary at all to kill the deceased [her son]" and whether the attack against Lucas Sethwala "was a revenge attack propelled against the police."<sup>65</sup> On the day of Sethwala's death, "[w]e were driven by our anger" fueled by the actions of the police, said Bekebeke.<sup>66</sup> However, he continued:

[T]here was no overt antagonistic action from members of my organisation against the police. . . .

. . . [but] certain individuals . . . were definitely trying to thwart our aspirations to get us out of the morass of poverty in Paballelo. We have friends in the police services. I was playing soccer with a number of police in my soccer team, Paballelo Chiefs. My father's best friend is a policeman. . . . So it was not to say that we are anti the police. We have to have policemen. But those who are against our aspirations as black people, those were definitely our enemies.<sup>67</sup>

The inclusion of Justice Bekebeke's testimony for amnesty in the documentary spoke to an acknowledgment of the "history of humiliation, racism, authoritarianism"<sup>68</sup> of which Justice Sachs had spoken; of the enduring systemic and systematic harm generated by the institutions and agents of apartheid and the simmering and explosive responses to the layers of oppression. Of equal or perhaps greater importance was the inclusion of the testimony of Mrs. Sethwala, whose suffering at the loss of her son was compounded by her feeling that she had been "ostracized from the community . . . rejected by the people."<sup>69</sup> While I was lawyer to the twenty-five, admitting

63. *S. African Truth & Reconciliation Comm'n: Amnesty Hearing on the Application of Justice Bekebeke Before the Amnesty Comm.*, Case No. AM6370/97 (1999) [hereinafter *Application for Amnesty by Justice Bekebeke*]. Section 20 of the Promotion of National Unity and Reconciliation Act provided that the SATRC Committee on Amnesty could grant amnesty where the applicant "has made a full disclosure of all relevant facts" in relation to an "act, omission or offence . . . associated with a political objective committed in the course of the conflicts of the past," for example, an act committed by "any member or supporter of a publicly known political organisation or liberation movement . . . in furtherance of a political struggle waged by such organisation or movement against the State . . . in the course of or as part of a political uprising, disturbance or event . . ." Promotion of National Unity and Reconciliation Act 34 of 1995 § 20(1)–(3). The Act granted applicants civil and criminal immunity where amnesty was awarded. *Id.* § 20(7).

64. *Application for Amnesty by Justice Bekebeke*, *supra* note 63.

65. *Id.* (quoting Advocate Steenkamp, legal representative of Mrs. Beatrice Sethwala and her daughter, Miss Magdalene Sethwala).

66. *Id.*

67. *Id.*

68. Interview with Justice Albie Sachs, *supra* note 46.

69. *S. African Truth & Reconciliation Comm'n: Upington Hearings Before the Human Rights Violations Comm.*, Case No. CT/01418/UPI (1996) [hereinafter *Testimony of Beatrice Sethwala*] (testimony of Beatrice Sethwala).

images of the violent death of twenty-four-year-old Lucas Sethwala, a former friend of some of the Upington accused, would have risked a response that might have been detrimental to my task to secure an appropriate and just outcome for my clients. The documentary, however, showing strong images of the grotesque practice of a “necklace” murder,<sup>70</sup> gave voice to the horror that I banished during the trial and enabled a parallel exposure and recognition of Mrs. Sethwala’s experience and anguish. “It is now ten years and ten months and 43 days ago that [Lucas Sethwala] died but the pain is still with me,” Mrs. Sethwala told the SATRC.<sup>71</sup> And then she spoke of her isolation:

[T]he community [of Paballelo] killed my child and they burnt him to death. That is the truth . . . .

Something which contributed to me coming to tell my story here is the fact that I would like to know why the one who suffered the loss cannot be attended to. Why it is that only the members of the ‘Upington 26’ group received all the attention, not even my local social workers in Upington gave any attention to me. I saw them around me in the Court room but not even the social workers or the ministers [clergy] paid any attention to me.<sup>72</sup>

In April 1996, six months before Mrs. Sethwala testified before the SATRC, Anton Lubowski’s parents and his sister, Annalize, appeared before the Human Rights Violations Committee of the SATRC to plead that those who had assassinated Anton on September 12, 1989 be brought to justice and that the SATRC “consider the possibility of assistance for the family of Anton who has lost a breadwinner, husband and father.”<sup>73</sup> In an attempt to cloud state complicity in the murder, General Magnus Malan, the Defense Minister at the time, publicly declared that Lubowski was a covert military intelligence operative while working for SWAPO,<sup>74</sup> a slur rejected and dismissed by the SATRC.<sup>75</sup> Despite an inquest into his death in 1994, led by Justice

70. Necklacing was a form of summary execution and torture, often directed against people perceived as political informers. The practice, which originated in the mid-1980s, is described in journalist Lynda Schuster’s book, *A Burning Hunger: One Family’s Struggle Against Apartheid*:

‘Necklacing’ represented the worst of the excesses committed in the name of the uprising. This was a particularly gruesome form of mob justice, reserved for those thought to be government collaborators, informers and black policemen. The executioners would force a car tyre over the head and around the arms of the suspect, drench it in petrol, then set it alight. Immobilized, the victim burned to death.

LYNDA SCHUSTER, *A BURNING HUNGER: ONE FAMILY’S STRUGGLE AGAINST APARTHEID* 304 (2004).

71. *Testimony of Beatrice Sethwala*, *supra* note 69.

72. *Id.*

73. *S. African Truth & Reconciliation Comm’n: Upington Hearings Before the Human Rights Violations Comm.*, Case No. CT/00001 (1996) [hereinafter *Testimony of Wilfried Lubowski, Molly Lubowski, and Annalize Lubowski*] (testimony of Wilfried Lubowski, Mrs. Lubowski, and Annalize Lubowski).

74. John F. Burns, *Pretoria Foes Press Death-Squad Attack*, N.Y. TIMES (Feb. 28, 1990), <http://www.nytimes.com/1990/02/28/world/pretoria-foes-press-death-squad-attack.html>.

75. *See Lubowski Never a Military Spy: Du Preez*, S. AFR. PRESS ASS’N (Sept. 17, 1997), <http://www.justice.gov.za/trc/media%5C1997%5C9709/s970917i.htm>.

Harold Levy of the Supreme Court of Namibia, that revealed evidence of “*prima facie* involvement” of an Irish mercenary, Donald Acheson, and nine members of the clandestine Civil Cooperation Bureau (CCB) in the planning and realization of Anton Lubowski’s killing,<sup>76</sup> no criminal proceedings against the named CCB operatives had been confirmed almost seven years after his assassination. Ironically, Justice Levy was asked to find that the named members of the CCB, some of whom had tracked Anton’s movements and devised his murder, had actively associated themselves with the assassination, exhibiting a common purpose with the act.<sup>77</sup>

With the permission of Anton’s close family, *A Common Purpose* includes archival footage of his life and death, to pay tribute to the former and unmask the subterfuge behind the latter. Two stark images in the documentary indicate a ruthless state-sponsored execution: footage of Anton Lubowski’s mother holding up an outline photograph “depicting his head full of bullet wounds [which] were received in the post”<sup>78</sup> and a photograph of Anton’s bullet-ridden and bloodied body slumped at the gate to his home, sourced from police files.<sup>79</sup> The film’s depiction of a township necklacing, of a legal system that invoked a common law doctrine to criminalize legitimate political protest and convict twenty-five people of murder,<sup>80</sup> of the assassination of a lawyer to the twenty-five, and of the state apparatus employed to

76. See Chandre Gould, *Niemoller Named in Lubowski Inquest*, MAIL & GUARDIAN (June 17, 1994), <http://mg.co.za/article/1994-06-17-niemoller-named-in-lubowski-inquest>. The Civil Cooperation Bureau (CCB) was a ‘hit-squad,’ a division of the Special Forces, which operated from within and under the command of the South African Defence Force. In pursuit of its “major objective . . . to disrupt the enemies of the Republic of South Africa to the maximum possible extent” both within and outside the country, the CCB committed “acts of arson, intimidation, sabotage and murder.” *Covert Operations*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/article/covert-operations> (last visited Apr. 9, 2016). “The acknowledged policy of the CCB was to destabilise Namibia and to disrupt the elections in Namibia and even to assassinate leading figures.” *Testimony of Wilfried Lubowski, Molly Lubowski, and Annalize Lubowski*, *supra* note 73.

77. See Gould, *supra* note 76; INDEP. BD. OF INQUIRY, REPORT FOR MAY–AUGUST 1994, at 18–20 (1994).

78. *Testimony of Wilfried Lubowski, Molly Lubowski, and Annalize Lubowski*, *supra* note 73.

79. A COMMON PURPOSE, *supra* note 9.

80. The common purpose doctrine was employed by the South African state in a number of high-profile political trials, including the Sharpeville Six, *S v. Safatsa* 1988 (1) SA 868 (A), and Delmas treason trials, *S v. Baleka* 1988 (4) SA 689 (T), “in such a way that it could implicate a crowd of thousands in a murder and expose them to the death sentence,” John D. Battersby, *Sharpeville Journal; Black and Poor, Her Daughter Faces the Gallows*, N.Y. TIMES (July 13, 1988) (quoting human rights lawyer, Edwin Cameron), <http://www.nytimes.com/1988/07/13/world/sharpeville-journal-black-and-poor-her-daughter-faces-the-gallows.html>. Professor Gail Gerhart wrote:

State prosecutors in the Delmas trial, besides trying to attribute the violence of the revolt to the United Democratic Front, hoped to prove that the front was actually the internal wing of the revolutionary African National Congress. The congress and its ally, the South African Communist Party, had at that time been outlawed for over two decades. Establishing the existence of links between them and the front could have enabled the state to criminalize virtually any protest activity, no matter how nonviolent, carried out under the United Democratic Front banner. Thus the stakes at Delmas were high, both for the front and for the individual defendants, all of whom faced charges carrying a possible death penalty.

kill fourteen of the Upington 25 by hanging—the latter an exhibit in the Apartheid Museum—are all chilling manifestations of a country and its people “brutalized”<sup>81</sup> by the system of apartheid. While the truth behind each of these acts may be impossible to uncover, their exploration and linking via the making of the film might offer some way of seeing the enormous reach of a system and its stacked players at work. This slow revelation of an entrenched and complex history and the immense expectation imposed upon an emerging democracy acutely demonstrated the limitations of reconciliation and the critical need for reparation.

On appeal, four of the twenty-five convictions of murder were upheld and all of the death sentences were overturned or commuted to prison terms ranging from eight to twelve years.<sup>82</sup> At the SATRC hearings ten years later, the prospect of extending acknowledgment and compassion to Mrs. Sethwala by those who testified as part of the Upington 25 was overtaken by their legitimate anger at wrongful arrests, the court’s refusal of bail, police torture, erroneous murder convictions, and sentences of death by hanging. While attempts at reconciliation between Mrs. Sethwala and the Upington 25 were voiced at the SATRC hearing but were paid little heed, the SATRC’s Amnesty Committee did find that the killing of Lucas Sethwala was politically motivated and Justice Bekebeke was granted full amnesty, having complied with the requirements of full disclosure in accordance with the Promotion of National Unity and Reconciliation Act 34 of 1995.<sup>83</sup> The SATRC also declared that Mrs. Sethwala and those who testified from the Upington 25 were victims of gross human rights violations<sup>84</sup> and therefore eligible for consideration for individual reparation grants by the SATRC’s Reparations and Rehabilitation

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Gail M. Gerhart, *Trial by Color*, N.Y. TIMES (Dec. 30, 1990), <http://www.nytimes.com/1990/12/30/books/trial-by-color.html> (reviewing ROSE MOSS, *SHOUTING AT THE CROCODILE: POPO MOLEFE, PATRICK LEKOTA, AND THE FREEING OF SOUTH AFRICA* (1st ed. 1990)).

81. See Graça Machel, Address at the Second Annual Desmond Tutu International Peace Lecture (Oct. 2, 2012).

82. *S v. Khumalo* 1991 (4) SA 310 (AD).

83. *Application for Amnesty by Justice Bekebeke*, *supra* note 63.

84. These names are included on the list of “Victims of Gross Violations of Human Rights” in volume 5, chapter 2 of the final report of the SATRC. 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 26–107 (Oct. 29, 1998) [hereinafter SATRC REPORT]. The introduction to the list notes that:

[While] [i]t contains the names of all those people who, by [the cut-off date of August 30, 1998], had been found by the Commission to have suffered a gross violation of human rights. . . .

. . . There are thousands more names to come, because the process of making finding and of dealing with queries, reviews and appeals has continued beyond that date. In addition, there will be further victims of human rights violations who will be identified through applications for amnesty.

It is the intention of the Commission to publish a complete list at a later date, as an addendum to this report. At that stage, the list will include not only names, but a brief summary of the finding made in every case.

*Id.* at 26.

Committee.<sup>85</sup> During our meetings with members of the Uppington 25 and their families, however, it became apparent that many of them had only learned about the SATRC's receipt of victim statements and testimony after the expiration of the Human Rights Violations Committee's two-year term and had missed the opportunity not only to testify, but also to be listed as potential recipients of reparations. Those who had testified and had been identified by the SATRC for possible grants of reparation were still waiting for some indication from the President's Fund, established in 2003 by Thabo Mbeki for this purpose.<sup>86</sup>

The mandate of the Reparations and Rehabilitation Committee included making awards of urgent interim and individual payments of compensation and extended to making recommendations for reparations that were aimed at addressing community rehabilitation, institutional reform, and symbolic reparation.<sup>87</sup> Financial compensation would have been of considerable assistance to the Uppington 25 and their families, but in its absence there was acknowledgment that making and screening *A Common Purpose* held reparative qualities for the participants and observers. When we screened the documentary in Paballelo to participant members of the Uppington 25, their families, and their friends a few weeks prior to its public release in Australia, at South African university law schools and film festivals<sup>88</sup> and on national television, the community response signaled a number of important outcomes: a realization of the complex layers of the case, a concern that the events of the trial had not been widely known, a stark reminder of "apartheid brutality,"<sup>89</sup> and a recognition of its impact on fractured lives. Moving between disparate events and time frames, the film sought to invite a witnessing of these events and to weave together and reframe a composite narrative of a community torn apart by a system that for "decades and decades" had been "structured, engineered, crafted and systematically implemented . . . precisely to

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85. The Committee recommended two forms of individual grants: (i) urgent interim payments for those requiring immediate medical, psychological, educational, or material assistance, such as access to relevant services and facilities, due to the nature of the harm, *id.* at 175; and (ii) one-off financial payments (compensation) of gross violations of human rights to identified victims (or their relatives or dependents) paid out over six years, *id.*, "to acknowledge the suffering caused by the gross violation that took place, an amount to enable access to services and facilities and an amount to subsidise daily living costs, based on socio-economic circumstances," *id.* at 184.

86. Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES (Apr. 16, 2003), <http://www.nytimes.com/2003/04/16/world/south-africa-to-pay-3900-to-each-family-of-apartheid-victims.html>.

87. SATRC REPORT, *supra* note 84, at 175–76. Symbolic reparations: are aimed at restoring the dignity of victims and survivors of gross human rights violations. These include measures to facilitate the communal process of commemorating the pain and celebrating the victories of the past. Deponents to the Commission have indicated that these types of interventions are an important part of coming to terms with the past.

*Id.* at 188.

88. *A Common Purpose* premiered at the 2011 Sydney Film Festival.

89. *The Historical Case for an Independent Judiciary*, MAIL & GUARDIAN (June 21, 2012), <http://mg.co.za/article/2012-06-21-ical-case-for-an-independent-judiciary>.

break the social fabric of [the] nation.”<sup>90</sup> In so doing, the documentary offered the possibility of resisting an absolute interpretation of the facts and transmitting “the painful process of traumatising and its historical legacy, while promoting symbolic reparation.”<sup>91</sup> Transitional justice and cultural studies scholars Olivera Simic and Zala Volcic argue that “[t]his painful process is as necessary for film viewers as for the witnesses themselves. There is a need to actively engage and confront the horrors of these many historical settings in order to move on.”<sup>92</sup>

The fora in which criminal trials are determined, the narrow legal constructions of guilt and innocence, and the statutory constraints and time limitations that often define transitional justice mechanisms can risk obscuring and excluding the “everyday experience of those . . . who live in conflicted societies”<sup>93</sup> and the “deep social and emotional impact of trauma and pain that prevent people from living normal lives.”<sup>94</sup> In a small way, *A Common Purpose* became an unexpected form of reparation beyond individual compensation, “serv[ing] as a vehicle for [public acknowledgment of] past violations and state responsibility for harms” and communicating an intention “to respond to their enduring impact.”<sup>95</sup> Through the making of the documentary, we began to envisage the transformation of negative and destructive narratives into constructive forms of recognition, acknowledgment, and potential contribution to the creation of South Africa’s revised moral framework. Importantly, given its examination of the far-reaching consequences of an event over a twenty-year period that saw the excesses of apartheid, its ultimate collapse, and South Africa’s transition to “the rainbow nation,” *A Common Purpose* was able to resurrect and “regenerate historical consciousness”<sup>96</sup> in the hope that the past may usefully instruct the present and that measures might be devised to prevent a recurrence of the times.

#### V. THERE IS NO ‘POST’ (APARTHEID) HERE: THE TRAGEDY OF MARIKANA

*Two weeks after the police opened fire on a crowd of 3,000 workers . . . at a platinum mine near Johannesburg, killing 34 people in the bloodiest labor unrest since the end of apartheid, prosecutors are bringing murder charges against a surprising set of suspects: the miners themselves.*

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90. Machel, *supra* note 81.

91. Olivera Simic & Zala Volcic, *In the Land of Wartime Rape: Bosnia, Cinema and Reparation*, 2 GRIFFITH J.L. & HUM. DIGNITY 377, 396 (2014).

92. *Id.*

93. Colm Campbell & Catherine Turner, *Utopia and the Doubters: Truth, Transition and the Law*, 28 LEGAL STUD. 374, 377 (2008).

94. Simic & Volcic, *supra* note 91, at 384.

95. LISA MAGARRELL, REPARATIONS IN THEORY AND PRACTICE 2 (2007).

96. Simic & Volcic, *supra* note 91, at 385.



*Using an obscure legal doctrine frequently relied upon by the apartheid government in its dying days, prosecutors did not accuse the police officers who shot and killed the strikers as they surged forward, machetes in hand.*<sup>97</sup>

Twenty years into the making of a new democracy, as the multiple challenges of post-apartheid transformation manifest, the grip on the values and principles underlying South Africa's ambitious transition is inevitably and increasingly tenuous. Caught in between the resolution of the legacies of a repressive past and the aspirations of a democratic future is the mammoth task of guaranteeing the interruption, and ultimately the cessation, of apartheid practices. Of parallel and perhaps even greater difficulty is the reconstruction and development of the social conditions that enable the emergence of a viable society, particularly for "those who have worked to build and develop [the] country."<sup>98</sup>

Towards the end of August 2012, I received a number of emails and calls from South African lawyers and journalists in the wake of the Marikana massacre. How is it possible, they asked, that the National Prosecuting Authority (NPA) could use the common purpose doctrine to charge over 270 miners with the murder of thirty-four of their colleagues who were shot dead by police during a strike? The legal principle at the center of the turmoil—the same principle invoked in the case of the Upington 25—"is, in itself, arguably sound."<sup>99</sup> In the Marikana case, however, the NPA maintained that the striking workers demonstrated a common purpose with the shooting of their co-workers by South African security forces—the latter not being similarly charged<sup>100</sup> despite injuring scores of miners and killing thirty-four, some of whom had gun-shot wounds in their backs.<sup>101</sup> While the application of the doctrine

97. Lydia Polgreen, *In Police Shooting of Miners, South Africa Charges Miners*, N.Y. TIMES (Aug. 30, 2012), [http://www.nytimes.com/2012/08/31/world/africa/south-africa-to-charge-marikana-miners-in-deadly-unrest.html?\\_r=2](http://www.nytimes.com/2012/08/31/world/africa/south-africa-to-charge-marikana-miners-in-deadly-unrest.html?_r=2).

98. S. AFR. CONST., 1996, at pmbl.

99. Andrea Durbach, *Grotesque Irony in Post-apartheid South Africa*, THE DRUM (Sept. 5, 2012), <http://www.abc.net.au/news/2012-09-05/durbach-grotesque-irony/4244446>.

100. South African constitutional lawyer Pierre de Vos, among others, has argued that the application of the common purpose doctrine to the striking miners was erroneous in law. See Pierre de Vos, *Why South African Miners Will Not be Convicted of Murder in Marikana Dispute*, CNN (Sept. 3, 2012), <http://edition.cnn.com/2012/09/02/opinion/south-africa-miners-opinion/>. See further the South African Constitutional Court decision, *Thebus v. S* on the application of the doctrine:

[It is] the duty of every trial court, when applying the doctrine of common purpose, to exercise the utmost circumspection in evaluating the evidence against each accused person. A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other pre-requisites of guilt.

2003 (6) SA 505 (CC) at para. 45.

101. See Transcript of the Marikana Commission of Inquiry at 183–201 (Oct. 22, 2012) (Dumisa Ntsebeza, Senior Counsel, on behalf of the families of twenty-one of the striking miners killed on Aug. 16, 2012).



was clearly specious and distorted, the more pressing concerns were that conditions for miners in democratic South Africa still resembled the dire inequities endemic to the migrant labor system<sup>102</sup> and that legitimate resistance and calls for improved work and living conditions were met with an intervention that relied on and resurrected the tools of apartheid brutality.

*Miners Shot Down*,<sup>103</sup> the documentary of the Marikana strike and shootings, reveals the negligence underlying the inaction by the mining company and the South African government. Stark footage shows miners being mowed down by heavily armed police, clearly ill-equipped or ill-advised to effect a sophisticated resolution. Despite the manipulation of a common law principle to portray the miners as the perpetrators of the shootings and the initial diversion of attention away from the conduct of the police, the documentary evidence and the visibility of unlawful police conduct seems incontestable, and the documentary might trigger or enable prosecutions against the police and the government and stand as an obstacle to their impunity. Three years after the strikes and the killings, the tragedy of Marikana points to minimal change as the mining industry's dependence on cheap migrant labor continues "with much the same jarring inequality" and "new and novel sources of [embedded] inequality reinforcing the old."<sup>104</sup> More recently, *Mama Marikana*,<sup>105</sup> a documentary on the women of Marikana, has provided a forum for these women, some of them widows of miners shot down during the strike, to speak about their ongoing suffering, to build their community, and to become agents of change, moving "away from the narrative of victimhood to one of leadership and empowerment."<sup>106</sup> Perhaps through the making of this documentary and the unleashing of women's voices, the women of Marikana, once forgotten, can now constitute a vital dimension of pressure for change.

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102. With the discovery of South Africa's mineral resources in the late nineteenth century, the migrant labor system was devised as both a source of cheap and plentiful black labor to white-owned mines, farms and industry and as a mechanism to control the movement of workers and enforce the foundations of apartheid. With employment and urban settlement reserved primarily for "whites only," thousands of black male migrant workers, their wives and children prohibited from accompanying them for long periods of time, would travel from rural areas and outlying black townships to urban areas and live in crowded single-sex hostels near their place of work, subjected to wholly inadequate wages and living conditions, and often dangerous working environments (in the mines). *Migrant Labor*, S. AFR.: OVERCOMING APARTHEID, BUILDING DEMOCRACY, <http://overcomingapartheid.msu.edu/multimedia.php?id=65-259-5> (last visited Apr. 9, 2016). Industrial sociologist Gavin Hartford has argued that South Africa's migrant labor system, which has "remained unaltered post apartheid," was at the core of similar mining strikes. See GAVIN HARTFORD, *THE MINING INDUSTRY STRIKE WAVE: WHAT ARE THE CAUSES AND WHAT ARE THE SOLUTIONS?* 1 (2012).

103. *MINERS SHOT DOWN* (Uhuru Productions 2014). The film was directed by Rehad Desai.

104. Rex A. McKenzie, *Financialisation and Labor: What Does Marikana Tell Us About Inequality in South Africa?* 1, 21 (The New Sch. for Soc. Research, Working Paper 05/2013, 2013), <https://www.newschool.edu/WorkArea/DownloadAsset.aspx?id=98127>.

105. Directed by Aliko Saragas, the film is "still in production and will be released in 2016." *The Film, MAMA MARIKANA*, <http://www.mamamarikanafilm.com/the-film/> (last visited Apr. 9, 2016).

106. Natalie Simon, *Mama Marikana: Forgotten Voices*, U. CAPE TOWN DAILY NEWS (Feb. 26, 2015), <http://www.uct.ac.za/dailynews/?id=8997>.

The making of a documentary has the potential to transform participants through the process of recognition and acknowledgment, clarification, reflection, empowerment, and possibly healing. But its capacity to transform unequal social conditions is limited. However, documentary can offer to put those who hold power on notice that their failure to effect the requisite social and economic change will in all probability give rise to the consequences of retaining and facilitating the status quo. A powerful tool for bringing history back into the present, documentary can expose the invisible, give voice to the silenced, and sharpen written and one-sided accounts. In a chapter entitled “Political Mimesis,” which considers the question whether documentary films ever produce social change, Jane M. Gaines observes that “[t]he whole rationale behind documenting political battles on film, as opposed to producing written records, is to make struggle visceral, to go beyond the abstractly intellectual . . . .”<sup>107</sup> The “abstractly intellectual” world of the law had sought to reduce the Uprising of 1936 to numbers on a charge sheet and exiled inmates on death row. *A Common Purpose* facilitated a translation of their struggle, enabling the rebuilding of identity, the reclaiming of a narrative, and the re-entry of banished men and women into an altered community. The making of the documentary was, in effect, a restoration of lives and an exploration of personal transformation amidst extraordinary political change. Ultimately, it was an invitation for the viewer to respond to the flaws of our common humanity.

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107. Jane M. Gaines, *Political Mimesis*, in *COLLECTING VISIBLE EVIDENCE* 84, 91 (Jane M. Gaines & Michael Renov eds., 1999).