South Africa's transition to Democracy viewed from the Just war perspective

by

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DECLARATION

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Acknowledgments

The motivation to undertake this study came from many conversations with my peers, family and acquaintances during my years of active social and political analysis on both local Radio and television. In my village, there was a culture of studying until Standard 10, now grade 12 and thereafter joining the employment world. At that time, there were several elders who were employed in the then Pretoria-Witwatersrand and Vereeniging region who were recruiting youngsters in the surrounding villages. They would recruit newly graduated grade 12s for employment mostly in January or after the Easter holidays. Most of my high school peers did not go beyond matric as a result of the practice. I must say it was a difficult mission because when those high school peers of mine visited home during holidays, those of us who remained students were isolated and overshadowed by their presence. In reaction to the isolation against the few of us, I committed myself to pursuing education to the distant ends. I only realise on hindsight that the culture actually perpetuated the goals colonial-apartheid capitalism of treating Africans as cheap labour.

At the University majored in Political Sciences, Philosophy and Sociology in my undergraduate studies. I was also active in student politics. A keen interest on national political issues developed. I closely followed major socio-political changes which were taking place in South Africa and abroad including the transition from colonial-apartheid to the constitutional democracy.

I got worried after observing that in a new dispensation, the majority of people who were disenfranchised during colonial apartheid were more and more depending on government for livelihood due to abject poverty. The 1994 changes have not provided them with opportunities which were supposedly brought about by liberation.

I would like to thank my aunt Mmachekge Martinah Ntsewa for laying my educational foundation, my mother Mokoele Ramasela Mokobane for her unrelenting encouragement and support for her children's education, my wife Dr Maria Mokobane who had also learned

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Abstract

This is a study of South Africa's new dispensation viewed from the just war point of view. The thesis of this study is that, the peace that was established after the formal and informal negotiations was not just and could not be durable because it did not eliminate the root cause of the conflict. The thesis is predicated on the recognition that: A debt or a feud is never extinguished till the equilibrium has been restored, even if several generations elapse … to the African there is nothing so incomprehensible or unjust in our system of law as the Statute of Limitations, and they always resent a refusal on our part to arbitrate in a suit on the grounds that it is too old. (Driberg, 1934:238).

Summary of the Study

The study starts off with an exposition of the armed struggle, the wars of resistance against the wars of colonisation based on the questionable right of conquest and the armed struggle against racial oppression and exploitation. It reminds readers that the armed struggle in South Africa's liberation process was actually launched by the African community leaders during the wars of colonial resistance. This is contrary to the popular view that armed struggle in South Africa started in the early 1960s after the banning of the African National Congress (ANC) and the Communist Party of South Africa, now the South African Communist (SACP).

It also explores challenges and lessons from negotiations for the so-called new South Africa. The negotiations were conducted in South Africa, a venue which by any standard could not be considered neutral. Some key members of the liberation movement particularly the ANC were given special indemnity in order to legally enter South Africa for the purpose of negotiations. It goes without saying that the conqueror was clearly in charge of the environment. The negotiations were, to a large extent, a reaction and part of the "Third World" democratisation and the globalisation of the American neo-liberal agenda after the collapse of the Union of the Soviet Socialist Republics. For that reason, the ANC negotiated with its back against the proverbial wall because the collapse of the Soviet Union, its all-time ally, meant it had no financial and military backing. It was therefore relatively easier to outmanoeuvre the ANC at the negotiation table. The adoption of a neo-liberal democracy by the ANC, despite the gross socio-economic inequalities among the populations of South Africa is a case in point.

Neo-liberal democracy presented some contradictions because democracy emphasises joint interests, equality and common loyalties whilst capitalism is based on self-seeking inequality and conflicting individual and group interest (Terreblanche, 2012: 59). The establishment of neo-liberal democracy means that big transnational and local business *are* the final winners leaving economic power vested in the posterity of *the* colonial conqueror. The structural inequalities accumulated through centuries of colonial–apartheid exploitation remain unaddressed. It stands to reason that, the sudden interest of both the NP and the corporate sector in South Africa to a transition to democracy needs to be understood against this background (Lephakga, 2015:167). If the structural inequalities accumulated through centuries of colonial–apartheid exploitation remain unaddressed, one then wonders how reconciliation would be possible.

The Truth and Reconciliation Commission (TRC) was an escape route from addressing the historical demand of socio-economic justice, equality and restoration of human dignity to the victims of centuries of exploitative and oppressive colonial–apartheid. It could be justifiably inferred that the new government had to find ways and means to impose national unity and reconciliation because it was impossible for unity and reconciliation in the face structural inequalities accumulated through centuries of colonial–apartheid exploitation. The law known as *The Promotion of National Unity and Reconciliation Act, No 34 of 1995* was promulgated to impose national unity and reconciliation. It is curious that the term reconciliation appears in the name Truth and Reconciliation Commission although it does not appear in the Act itself. It was deployed to dilute the demand for historical and social justice due to the indigenous conquered peoples. "It also cushioned the political accommodation between the struggle aristocrats and big business, foreign and local. Reconciliation was therefore, "apartheid regime's escape clause" (Pilger, 2006:300, and Sampie Terreblanche 2012).

The conception of the TRC is without saying the product of the negotiated settlement, and it owes its historical and ideological influence from "the global struggle of particularly Third-World countries which were resisting authoritarian regimes put in place by the West for the benefit of the West" (Lephakga, 2015:167). The elites of the struggle for liberation in South Africa were aware that poverty, unemployment and inequality were the "principal stumbling

block on the path to lasting reconciliation and peace" (Esterhuyse, 2012:165). In order to circumvent the 'stumbling block', the TRC became an effective instrument.

This study is a contribution to the African legal philosophical maxim that: *Molato ga o bole*. It means that the lapse of time does not erase injustice committed in the past. The root cause of the liberation conflict was not eliminated by the establishment of the "new" constitutional dispensation in South Africa.

Summary of Chapters

In chapter 1, this study presents the exposition of the research and also lays the framework and its parameters. It presents the problem statement which has led to this study, namely, that the descendants of the conquered peoples of South Africa continue to regard themselves as the rightful heirs to the land of their ancestors despite the 1994 transition to "a new" South Africa (constitutional democracy). This underlined the fundamental problem that was studied in this research, namely: may the conqueror in an unjust war of colonisation be permitted ethically to acquire "the right of conquest" over the vanquished and exercise it in perpetuity?

We argue that the 1994 dispensation did not vindicate the rights that were violated. Principal amongst which are: the entitlement to territory and sovereignty to the natives of South Africa. Instead, it co-opted the unjustly conquered into a democratic dispensation that is both politically and economically precarious as it is based exclusively on the epistemology of the colonial conqueror and, is in favour of its posterity. Furthermore, reflections on the legacy of structural inequalities transmitted from the centuries of colonial-apartheid leave no doubt that a new country is yet to be born; a country based on the unencumbered restoration of sovereign 'title to territory' to its rightful owners, namely, the indigenous peoples conquered in the unjust wars of colonisation.

Chapter 2 is the moral evaluation of the armed struggle from the just war perspective. The *jus ad bellum* and the *jus in bello* principles are used to analyse not only the decision to use violence in pursuit of the liberation struggle, but the conduct of the struggle itself. We argue that apartheid was declared a crime against humanity (Kader Asmal, Louise Asmal and Roberts, 1997:3). It stands to reason therefore that armed struggle was based on the just cause. We argue that the armed struggle based on the just cause did not yield the desired result, because it culminated into informal and formal negotiations that discounted consideration of the root cause of the struggle for liberation. None of the parties to the negotiations in the name of the indigenous people conquered in the unjust wars of colonisation ever consulted the people with regard to any aspect of the negotiations. By contrast, De Klerk found a way of legitimising his involvement in the negotiation process by calling a Whites-only referendum in 1992. "Although Whites were consulted as a group, Blacks, as a collective, had still to express their view on the negotiation process. If any consultation of Blacks took place at all, it was largely through opinion polls" (Maphai, 1994: 68). In the end, the negotiations turned out to be the

victory of the colonial conqueror on the one hand and international finance capital – particularly, Anglo-American – over the indigenous peoples conquered in the unjust wars of colonisation.

Chapter 3 is an analysis of the armed struggle through the principles of the Just war theory. Through analysis we lay bare circumstances which led the ANC to take a decision to wage the armed struggle. The armed struggle is subjected to jus ad bellum (reasons for fighting a war) and jus in bello (the manner in which the declared war was fought). A conclusion is reached that although the ANC failed to comply with principles of non-combatant immunity and the prospect for success, it was waging a just war with the right intention and the just cause.

Chapter 4 deals with the fact that the TRC was not mandated to address the ethical demand for socio-economic and historic title to sovereignty as issues of natural and fundamental justice. This undermined the quest for justice towards the resolution of the basic conflict in South Africa. The chapter points out a number of shortcomings of the TRC. National unity and reconciliation were imposed by the law. The Commission was led by Christian clergymen, one being its chairperson and another its deputy-chairperson. The former was a Black male and the latter a White male. South Africa has many religions. It is odd that only Christians were the leaders of the Commission. In some Christian denominations, women are accepted as pastors or priestesses. Yet, the topmost layer of the leadership of the TRC did not have a woman, even as deputy-chairperson.

In the concluding chapter, we underline the fact that the ANC had gained an overwhelming power particularly through an overwhelming election victory of 27 April 1994, however, it failed to take the liberation struggle to its logical conclusion. The democratic government abandoned the promised radical redistributive economic system in favour of a neo-liberal economic system led by transitional corporations in line with the Mineral Energy Complex of the Anglo-American system. However, the ANC government maintains the rhetoric, through its alliance partners, namely the South African Communist Party (the SACP), the South African Congress of Trade of Trade Unions (COSATU) and South African National Civic Organisations (SANCO), for the need to radically redistribute the economic benefits of the

country in favour of the poor and the working class. Furthermore, the ANC has also compromised its ability to transform the socio-economic country by deviating from South Africa's historical constitutionalism in the form of shifting from parliamentary supremacy to constitutional supremacy. The significance of the shift is that the ANC's parliamentary majority is counter-balance by the constitution. Another major point is that the rural residents do not enjoy the emancipation brought by national democracy in the sense that their being governed by a leadership that they neither elect nor hold accountable. The land that they occupy remain in the hands of traditional leaders.

It is our view that the underlying thread throughout the liberation struggle is the ANC's compromise. For instance, the ANC was in the 1940s influenced by Ethiopia's Atlantic Chapter which was advocating for African national, that is, African leadership in Africa for indigenous people. It was basically rejecting white colonial rule in Africa. But the ANC preferred to fight for accommodation within the political and economic structures created by whites. In the 1950s, the ANC adopted the Freedom Charter whose basic tenets signalled a compromise form pursuing the original objectives of the national liberation struggle, recoverability of land and title to territory. In post 1994 election and after gaining a land slight victory on the basis of a "redistributive developmental plan in the form of the Reconstruction and Development Programme" which was popularly known as the RDP, it abandoned it in favour of a neo-liberal capitalist economic to the dismay of the poor majority (Mckinley, 2017: 29). We argue that the reason for the compromise by the ANC is that during the struggle the ANC had accepted and accommodated many organisations into its fold for as long as they were opposing apartheid. For that reason, the ANC was known as the brought church. In the church one would find big business, workers, traditional leaders, urban residents and rural residents. All these forces were united by a common enemy – apartheid. During that period the ANC was able to balance the struggle pendulum, however, in a democracy the dominant class has swayed the pendulum in favour of big business.

Key words

Colonial-apartheid, Conqueror, Conquered, just war, Rwanda, parliamentary democracy, constitutional democracy Reconciliation, Reconfiliation.

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CHAPTER 1

1.1. Introduction

This study problematizes the popularly held view that equates the "new" South Africa with liberation of the conquered peoples of South Africa. According to this view, the liberation struggle has reached its conclusion with the abolition of apartheid – racial oppression. However, the argument we advance against this view is that the fundamental problem in South Africa historically preceded apartheid. It is colonialism. The indigenous peoples of South Africa were forcibly conquered in *unjust wars* long before apartheid. The conqueror occupied the land under the *questionable right of conquest*. Based on this history and memory, and guided by the Principle of Recoverability, "… the question of justiceable redress means in this context that the indigenous people of South Africa are entitled to the return of their motherland" (Mokoka, 1984:205).

Flowing from the above, a question arises, namely, whether or not the1994 constitutional dispensation has restored 'sovereignty' and 'title to territory' to its rightful owners. The question asks about both the 'sovereignty' and 'title to territory' at the same time because the link between 'sovereignty' and 'territory' is indispensable. 'Sovereignty' without 'territory' is empty, and 'territory' without 'sovereignty' is tantamount to squatting. For the purpose of brevity, whenever we address the land issue, 'sovereignty' and 'title to territory' will always be subsumed. Land is vital for various reasons. Key amongst them is that the basic human needs (viz., those biological and cultural) cannot be satisfied in outer space without access to land. On land and beneath it, there is water for vegetation, for grazing (livestock), for housing, for daily bread and dignity, and people even bury their dead-on land. There is therefore an organic vital link between human beings and land (Mokoka, 1984:205, Ramose, 1999:2). Land is the material resource for human subsistence.

The answer to the question whether or not the 1994 constitutional democracy has restored sovereignty to the indigenous conquered peoples and returned their land must be in the negative. The dispensation addressed the problem of racial discrimination in which the conquered people were oppressed and discriminated against on the basis of their skin pigmentation. Racial discrimination was the continuation of colonisation policy by other means. The fact that racial discrimination, or apartheid in brief, was associated with the

Afrikaner tribe of South Africa and they somewhat became its face, led people to misconstrue abolition of apartheid as the panacea to South Africa's politico-economic inequalities accumulated over centuries. "… the principles underlying apartheid are the same as those that inspired and guided previous conqueror regimes which have not proclaimed apartheid in the manner that the Afrikaner tribe did" (Ramose, 1999:4). Van Zyl Slabbert (1975) put it more succinctly that:

> the fundamental problem is essentially a Black-White problem. If Afrikaners lost control of decision-making to another White rule, it would not necessarily lead to a major reduction of racial stratification in South Africa. The structural constraints are such that in the long run it may make no difference which White group is in control … Afrikaner nationalist as a group control political decision-making. This control is perceived by them as a precondition for their existence as a national group.
>
> (Van Zyl Slabbert, 1975:4)

In contrast with Van Zyl Slabbert (1975:4), it is better to characterise the fundamental problem in South Africa in terms of conquered and conqueror rather than "Black-White." Notwithstanding the fact that the principles underlying apartheid are the same as those that inspired and guided previous conqueror regimes, the preferred characterisation has the twofold advantage of bringing to mind the historical reality of unjust conquest and its consequences and serves also as the ground for raising the pertinent moral, legal and political questions. As such, it helps us to avoid thinking in racial categories. This is, however, not to say that the characterisation, "Black-White", has no meaning and relevance at all in the history of South Africa since colonisation. On the contrary, thinking and acting in racial categories in South Africa is a way of life introduced and upheld by the conqueror in that country. There is no point denying that the race segregation laws before apartheid and those that were enacted in the heyday of apartheid are all the brainchild and the instruments of the conqueror in that country.

Conqueror South Africa ceased to be a British colony when it attained republican status in 1961. According to Kahn (1962):

> It is now accepted that the Statue of Westminister (*sic*), 1931, and the Status of the Union Act, 1934, resulted in the abdication of the powers of the United

> Kingdom parliament and cut the legal connection between Britain and South Africa. Confident that this was the position, the union parliament in passing the constitution Act, which had taken over as part of South African law the relevant sections of the statute of Westminster and section 2 had provided: 'the Parliament of the Union shall be the sovereign legislative power in and over the union, and notwithstanding anything in any other law contained, no Act of the parliament of the united Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the union unless extended thereto by an Act of the Parliament of the Union.' None of the provisions of the Statute of Westminster is repeated in the Constitution Act…. To this extent it can with justification be claimed that the old link with Britain has been cut.
>
> (Kahn, 1962:12)

Decolonisation had thus been embarked upon. The South African problem cannot be correctly understood apart from its colonial aspect. The correct solution cannot be found for this problem without decolonisation in the context of international law. Little or nothing has been written on this subject because it is erroneously assumed that South Africa is a 'sovereign' or 'independent' State in international law. This study is not in the field of Law but in Philosophy. As such, we therefore have to invoke the Principle of Recoverability. We adopt the Just War doctrine as our context to properly address this problem. The question is, what is just war theory?

1.2. Just war theory

In simple terms, just war theory is a set of principles which are used to morally regulate war in terms of conditions in which an authority can declare war and how war ought to be fought after its declaration.

St. Augustine is original thinker on just war theory and from a Christian perspective however, Saint Thomas Aquinas provided a systematic conception of just war theory in the 13th century. Aquinas' view laid a solid foundation for scholars and jurists of different intellectual temperaments. The theory received an intellectual impetus during in the twentieth century to a large extent in response to the invention of nuclear weaponry and American involvement in the Vietnam war (Internet Encyclopedia of Philosophy).

“Just war theory focusses on two questions: 1) the conditions that can justify recourse to war, in classic terminology, the ius ad bellum, and 2) the limitations on the methods that may justly be used in waging war, the ius in bello” (Coverdale, 2004:3). Based on the foregoing, wars must be fought without provocation, but with the right intention and for a just cause. But history is littered with records of wars which were fought for “natural resources, political hegemony, ethnic or religious dominance, etc. But, in its strict modern construction, *just* war may be undertaken primarily, it not solely, as a means of redressing wrongs inflicted on innocents, or to force an aggressor to cease and desist from inflicting harm, especially when negotiation and other means short of war have failed” (Kellogg, 2002:90). The concepts of ‘right intention’ and ‘just cause’ are important in meeting the criteria of a just war. Although the criteria for the just war is clear, it would seem that the very same criteria can be used to fight war in pursuit of selfish interests such territorial expansion, natural resources and ethnic or religious dominance. As Fiala has it, people know the requirements of a just war. “But it is false to assume that since we know what a just war would be, just war actually exist. In fact, there are no just wars. Nor is there any good reason to suppose that it is actually possible for there to be just wars” (Fiala,2008,3). Fiala became disillusioned about the existence of just wars after his observation that those who defended the US-led wars in Afghanistan and Iraq used “just war concepts to argue that the wars were necessary and good” (Fiala, 2008: vii). Similarly, architects and advocates of apartheid in South Africa used concepts of ‘just cause’, ‘right authority’ and ‘right intent’ to advance their cause its cause. Thus, Afrikaners believed that they were engaged in a just war for an ethnic survival. Johnstone as quoted in Baleng, wrote:

> “If we impartially and unemotionally examine the motivations for implementing Apartheid it meets all the requirements for a Just War of self-defence: it was a just cause to ensure Afrikaner demographic survival; it was a last resort; it was declared by proper authority; it possessed morally right intention; it had a reasonable chance of success; and the end was proportional to the means used”

On this basis, Johnstone’s view of Apartheid is a clear example of how Just war theory can be manipulated to justify any war. Her view basically reduces Just war theory to an instrument of the powerful against the weak. It is curious that Johnstone uses *jus ad bellum* and *jus in bello* to justify Afrikaners’ apartheid it was a just cause to ensure Afrikaner demographic. Johnstone’s argument ignores the fact that Afrikaners migrants in South Africa and therefore

bound to be a minority whereas indigenous conquered peoples of South Africa particularly Africans were bound to be a majority because they were indigenous to the territory. For example, in the 1870s white's population was 340 00 against an African population 2.2 million, yet they dominated Africans. Whites in South Africa waged war against the indigenous peoples for selfish interests such as greed. This comes out clearly in Grey's vision about the future of Africans then. "They were to become 'useful servants, consumers of our goods and contributions to our revenue" (Giliomee, 2003: 281). Grey's vision was followed in three ways: they used the power of the gun and the law to create political and economic structures in their own favour and to the disadvantage of the indigenous people, they deprived indigenous people of land, surface water and cattle, and lastly, they exploited the labour power of indigenous people (Terreblanche, 2002:6). The vision was successfully implemented because in post 1994 settlement, the structural inequalities are marked by a contrast of wealth and destitution in which white minority are socially and economically well-off on the one hand and the black majority who are poor on the other hand. So, the black majority particularly Africans remain 'useful servants, consumers of the goods whites and contributors to their revenue. Since 1994, many Shopping Malls were built in African townships and rural areas and Africans participate in such malls as employees or buyers and not never as owners. Logically, anyone who is driving a vision similar to the one of Afrikaners did against a people would feel vulnerable. It could not be followed without disturbing peace of the indigenous people.

Arguing that that apartheid was just cause against Afrikaner minority survival is a sign of a struggle for reason rearing its head in South Africa and at the same time a maintenance of the questionable of the so-called right of conquest. "By virtue of this ever questionable right, the victorious conqueror in the manifestly unjust wars of colonisation appropriated the sole, unilateral right to define and delimit the meaning of experience, knowledge and truth for the African…" Ramose, 2005: 3). "That which makes a war either just or unjust is, in essence, the immediate purpose and motive which determined it" (Horowitz, 1957:56). In the context of South Africa, apartheid was a systematisation of colonialism and segregation against indigenous peoples. It was an unjust war. Preservation of epistemological dominance by the conqueror continues un-relentlessly. It is for this reason that views seek to put Africa history and philosophy in its proper perspective are generally suppressed. Kunnie wrote:

> Analysis depicting South Africa as a "settler-colonialism" republic is not popular in the Western world, and understandably so, because it delegitimises the right of European colonial settlers to rightful occupation of the indigenous peoples' lands

> and challenges the fundamental right of such regimes and populations to determine the destiny of indigenous peoples. Patently, too, this kind of perspective asserts the primary right of self-determination of indigenous peoples based on their own histories, cultures, and experiences. In the South African context, this implies the refusal by the indigenous Black people to recognise the occupation of their country as legitimate, though the Western capitalist world demands such acceptance as bona fide and normative nation-state reality.
>
> (Kunnie, 2000:2)

We will adopt Just war theory as the framework in which we analyse South Africa's transition to Democracy because of its conceptual and or moral principles, namely legitimate authority, right intention, just cause, prospects for success, last resort, principle of discrimination or non-combatant and proportionality. The indigenous conquered peoples were subjected to colonialism, segregation and apartheid and through the force of arms they were dispossessed of the land. We subscribe to the view that just war may be undertaken primarily, it not solely, as a means of redressing wrongs inflicted on innocents, or to force an aggressor to cease and desist from inflicting harm, especially when negotiation and other means short of war have failed" (Kellogg, 2002:90). We adopt the Principle of Recoverability as our key analytical tool because it provides that, whoever is denied by force access to what is originally and rightfully his, has the inalienable right to self-defence. The Principle of Recoverability is, in this case, the necessary complement of self-defence or an appropriate means of redressing wrongs inflicted on the indigenous conquered peoples of South Africa. Both concepts of 'land' and the 'preservation of life' are intertwined. So, access to land or its ownership is the foundation of meaningful livelihood. "According to the theory of the just war, the forcibly deprived may invoke the principle of recoverability (*ad repetendas res*) if every other peaceful means to resolve the conflict fails" (Ramose, 2002:474).

As things stand, the colonised people of South Africa have not recovered their land and title to territory. As Terreblanche (2014) observed, the framework within which the democratic government operates will, in no way, enable it to fulfil the mandate it set for itself to achieve when it was fighting for the national liberation. The new dispensation is not conducive for job creation and poverty alleviation to the conquered majority of the indigenous peoples of South Africa because it is dominated by a tri-partite big business formation, namely "the successor of the white apartheid capitalist formation (mainly the MEC), the new BEE capitalist

formation, and the global capitalist formations with their joint embracing of financialism and the American ideologies of neoliberalism and the market fundamentalism" (Terreblanche, 2012:88).

Failure to recover land means a perpetuation of the Doctrine of Discovery; the international law of colonisation which condoned and encouraged conquest in the *unjust wars* of colonisation (Miller, 2011:80). It follows from this that even before the first British occupation of the Cape, the geographic designation called South Africa was already a conquered territory under the Dutch. In the beginning, the Dutch occupied only a small part of this designation.

1.3. Background of the Study

1.3.1 Conquest and the Loss of Sovereign Title to Territory

In 1994, the non-racial democratic dispensation was inaugurated in South Africa. The inauguration follows centuries of struggle by the indigenous peoples against the forcible expropriation of their land by the colonists. It was:

> through the violence of the unjust wars of colonisation that the vanquished indigenous peoples were colonised and Christianised. By virtue of the questionable right of conquest the colonizer acquired title to the territory of the conquered and assumed sovereignty over it.
>
> (Ramose, 2002:2)

However, the conquered never accepted "the right of conquest" as there was armed resistance. Sebidi (1986) divides the period of struggle against apartheid–colonialism into four periods or phases, namely: the Khoisan, the Tribalistic, the Nationalistic and Black Consciousness phases (Sebidi, 1986:3).

1. 3.2. The Khoisan Phase

The Khoisan lived in the Cape area, what is today known as the Western Cape. Their economy was based on farming. Thus, land, water and pastures were vital to their livelihood. The Dutch were also interested in the same land. When they invaded the land, conflict between the two nations ensued. The clashes started in 1659 and ended in 1677. The Khoisan were vanquished

and therefore forcibly incorporated into a "white society as farmhands, herders and kitchen servants" (Sebidi, 1986:3).

1.3.3. The Tribalistic Phase

The Tribalistic phase is characterised by the conflicts between the tribal groups of indigenous African peoples and the Dutch who later became known as Afrikaners. The indigenous African peoples, like the Khoisan, were pastoralists. So, land, water and grass or pastures were crucial to their livelihood. In contrast to the Khoisan, they tilled the soil much like Afrikaners. Common interests over land whilst the land was not expanding meant that skirmishes over competition for land was bound to erupt. Different tribes fought the conquerors fragmentally; each at their little corner. A total of approximately eight battles were recorded. The first clash took place in 1815. A century after the arrival of the three ships, namely, Dromedaries, Reiger and Goodehope at the Cape in 1652. The last war ended in 1893.

Through these wars, the British imperial government embarked on a policy of expansion in the whole of the southern African sub-continent. In two decades, a number of African kingdoms were subjugated. Those were, amongst others: the Hlubi in 1873, Gcaleka and Pedi in 1877; Ngqika, Thembu, Mpondo, Griqua and Rolong in 1878; Zulu in 1879; Sotho in 1880; and Ndebele in 1893 (Mothlabi, 1984:1; Mbeki, 1992:1; and Worden, 1994:19). After the indigenous peoples were defeated, they were subjected to South Africa which was divided into four territories: the British settler colonies of Natal and Cape Colony on the one hand; and the Afrikaner settler republics of the Transvaal and the Orange Free State on the other.

The tribes were subjected to varied experiences depending on the republics concerned. Fragmented tribal struggles enabled the conquerors to divide and rule them. In some clashes or conflicts of resistance, conquerors could enlist reinforcement from fellow conquered Africans. In the Cape and Natal republics, the African conquered peoples had a franchise albeit it was limited to those who owned some property or were educated. The conquered peoples in the Boer republics made it their goal to fight for the extension of the non-racial common Voters' Roll to all their republics. On the contrary, the right to vote for the conquered peoples was to be taken away country-wide. Idealisation of a common Voters' Roll, similar to the one which was practised in the British republics of Cape and Natal, was to become the basis for the conquered people's national struggle for liberation.

1.3.4. The Nationalistic Phase

This phase marked a vital shift in terms of the fighting strategy. The use of instruments (viz., arrows, spears, assegais and shields) and tactics used in the previous phase came to an end. Integration into the socio-economic and political institutions of the conqueror was the long-term objective.

Political organisations that were formed to advance the cause of the conquered peoples, such as the Transvaal Native Congress (TNC) founded in 1905, and the African People's Organisation (APO) founded in the Cape in 1903, were either for non-racial franchise where it was non-existent, or maintenance of it where it has once existed (Sebidi, 1986:9).

Gold was discovered in the Witwatersrand in the Transvaal. Transvaal was the Afrikaner republic and the fact that the British were not only interested in gold mining but also in gaining total control over the Republic meant that conflict between the Afrikaners and the English was looming. The Afrikaners, having fled from the British rule in the Cape (the Great Trek) tried to expel the British out of the land they themselves had acquired by conquest. "The outcome was the Anglo-Boer War of 1899-1902" (Mbeki, 1992:8).

In 1909, when the Anglo-Boer war ended, the conqueror-only National Convention gathered to consider a draft constitution for a new State. The constitution was later adopted and became the law of the Union of South Africa. Still under the British rule though, indigenous peoples also called their parallel African convention in the same year in Bloemfontein in order to develop a common position in the face of the conqueror-only draft constitution.

It should be noted that prior to the convention and the formation of the South African Native National Congress (SANNC) in January 1912, the conquered indigenous peoples of South Africa were both politically and militarily organised under the leadership of their respective "chiefs" during the wars of resistance against colonial invasions in the seventeenth, eighteenth and nineteenth centuries (Mokoka, 1983:246). The convention subsequently became an

organization named the South African Native National Congress, later, in 1923, renamed the African National Congress (ANC). "The ANC had its roots in the African nationalist organisation Imbumba Yama Afrika, which was formed in the Eastern Cape in 1882 and published the first African newspaper in 1884" (Kunnie, 2000:12). The participants of the convention were, amongst others, delegates from all local Native Congresses in the four Provinces, 'chiefs' and their followers including those from the then Protectorates of Bechuanaland, Basutoland and Swaziland. The main purpose and objective of the convention was, according to Seme:

> Chiefs of royal blood and gentlemen of our race, we have gathered here to consider and discuss a theme which my colleagues and I have decided to place before you. We have discovered that in the land of their birth, Africans are treated as hewers of wood and drawers of water. The white people of this country have formed what is known as the Union of South Africa – a union in which we have no voice in the making of laws and no part in their administration. We have called you therefore to this conference so that we can together devise ways and means of forming our national union for the purpose of creating national unity and defending our rights and privileges.
>
> (Walshe, 1970:34; Mokoka, 1984:247)

Given the problem of this study, we are obliged to underline the first preposition "of" in the statement: "The white people of this country have formed what is known as the Union of South Africa..." This is a manifestation of two underlying problems for Seme and his people. First, the preposition reflects the fact that senior organisers of the SANNC, particularly Seme, appeared to have admitted White people as legitimate citizens of South Africa. This would render the problem of colonial conquest in an *unjust war* to the remotest margin. This rendering opened the way to assimilation into the culture, values and ways of life of the colonial conqueror. The effect would be the dissolution of the ethical-political problem of sovereign title to territory.

Second, Seme was not of the royal blood. He was, however educated and somewhat as privileged as members of the traditional leadership. As Walshe (1970:34) wrote, the majority of delegates to the convention were educated professionals who perceived themselves as "culturally developed and fit" to live with or amongst the oppressor. Thus, they were basically mobilising for the establishment of the organisation that would fight for their civil rights.

The SANNC "was far from being a mass movement. It included some chiefs and rural leaders, but its members were still primarily middle-class men who feared" that the exclusion from the Union meant class demotion to lower classes and concordant lifestyle (Deegan, 1999:41). Since theirs was a "class struggle", it is no surprise that not any of them questioned their demotion from being kings to "chiefs of the royal blood." But it is a known fact that there are kings of Swaziland and Lesotho; and in South Africa, the king of the Zulus. Under the kings, there are various chiefs with delegated responsibilities from kings. As the majority of delegates were educated professionals, the reasonable explanation to the misappropriation of the concept chief is that colonial education had already taken its toll on their minds. This means, colonial education had already influenced the conceptual scheme to be in line with that of their colonial masters. The need for mental decolonisation was relevant already at that time. In other words, they were operating within the conqueror's epistemological paradigm though arguably not aware of it themselves.

A king is the holder of the sovereign title over his territory and it has been that way from the beginning of the African community. But, with colonisation, the African kings were converted into chiefs to act as representative and law enforcer of the conqueror upon the indigenous conquered peoples (Ramose, 2006:357). As holders of sovereign title to territory, it is only politically logical that the conqueror would not allow himself to co-exist with African kings because the two forms of political authority negate each other. On this basis, Jackson, as quoted in Ramose (2006), observed thus:

> The Europeans referred to them as chiefs in order to avoid equating them with European kings. They were kings in the truest sense of the word. Most of them could trace their lineage back to more than a thousand years. Those revolutionary nationalist African kings are mostly unknown because the white interpreters of Africa still want the world to think that the African waited in darkness for other people to bring light.
>
> (Ramose, 2006:359)

The fundamental goal and thrust of the ANC were to serve as an organisational tool for indigenous peoples across the tribe, i.e., they wanted to fight for the constitutional rights of the conquered as the united nation of indigenous peoples. That is, to fight for the right to:

> equality of opportunity within the economic life and political institutions of the wider society. They believed Western and Christian norms to be closely interrelated, and could not outgrow their everlasting desire for the Cape qualified franchise as their idea for which to struggle. From their people they would produce an African nation contributing its own genius, as Afrikaner and Briton would do, to the potentially rich texture of a multi-racial South African society. Legislation in this society was to be ideally on non-racial principles.
>
> (Walshe, 1970:34)

1.3.5 A Plea to the British Crown

The convention decided to send a delegation to Britain in order to register their displeasure at the constitution, since it excluded them. But the British ignored the delegation's case and the Union got established (Mbeki, 1992:13). It officially excluded the indigenous peoples of South Africa conquered in the unjust colonial wars. In Natal and Cape Colonies, indigenous Africans had a franchise though it was qualified by possession of property. The land held communally could not be regarded as a qualification for the franchise. By then, the indigenous Africans were still committed to peaceful and conciliatory methods of protest.

There are two issues to the problem here. First, that conquest in the *unjust war* conferred the questionable 'right of conquest' upon the colonial conqueror. Based on this right, laws were enacted primarily, on the premise of 'segregation'. And, second, this is the precursor of 'apartheid'.

1.3.6. The Problem of Racialisation in South Africa

The Union government embarked on a policy of racial segregation. Through a number of Acts, segregationist policies were implemented. Amongst the key policies were: the Mines and Workers Act of 1911, which imposed colour bar between workers, the Natives Land Act of 1913, which segregated land ownership, and the Natives (Urban Areas) Act of 1923, which provided for residential segregation in towns. The Native Affairs Act of 1920, which set up separate tribal councils for the administration of the reserves and advisory councils for the conquered indigenous peoples in urban areas. Through these Acts the Union government legally denied the conquered indigenous peoples political and economic rights (Worden, 1994:74). Subsequent to the enactment of these Acts, particularly the Land Act, the conquered

indigenous peoples sent delegations to Britain in the hope that the British government would persuade the Union government into accepting the peaceful demands of the conquered indigenous peoples (Walshe, 1987; and Karis & Carter, 1972). Like in 1909, the British government's response was indifferent. The indifference was a clear message to the conquered indigenous peoples that they were on their own.

The Union government continued to introduce segregationist policies, one after another. The conquered indigenous peoples kept on opposing such policies as they did with the Influx Control Act that was introduced in 1937. As usual the All-African Convention comprised of representatives of the indigenous conquered peoples organized to oppose the Bill, but all in vain. This was not the end of history as a more formal and systematic form of racial segregation was introduced. Accordingly, "apartheid inherited and perfected racial segregation through more and far-reaching racialist and expropriation legislation" (Worden, 1994:71). As we stated in the introduction of this chapter, it follows therefore that the abolition of apartheid cannot be the end of the struggle for authentic liberation. Thus, the systemic construction of racialism became the immediate and dominant reality in the relations between the indigenous peoples conquered in the *unjust wars* of colonisation and the conqueror. The immediacy and dominance of this reality therefore pushed the primary issue of the land question to the background. It consequently reorganised the order of priority in the struggle for liberation.

In 1948, the National Party (NP) won Parliamentary elections. In the subsequent years the party introduced apartheid – institutionalization of racial segregation. For instance, under the National Party government, two Acts were introduced. They are the Population Registration Act of 1950 and the Reservation of Separate Amenities Act.

In line with the Population Registration Act people were legally classified into four racial categories, namely: White, Coloured, Indian and Native; and thus, the Reservation of Separate Amenities Act, accordingly enforced social segregation in all public amenities such as transport, cinemas, restaurants, sports and education (Worden, 1994: 96).

The Youth of the ANC got impatient with the elitist and indecisive character of the mother body towards the racial oppression and exploitation. The Youth formulated a policy that subsequently guided their programme of action adopted in 1949. For the purpose of this chapter, we limit our focus to the Basic Policy Document (BPD). The policy was based on historical evidence of conquest, forcible expropriation and dispossession of indigenous peoples conquered in the *unjust wars* of colonisation. The policy presented African Nationalism as:

> the dynamic National liberatory creed of the oppressed African people with its basic aim as: the creation of a united nation out of the heterogeneous tribes; the freeing of Africa from foreign domination and foreign leadership and the creation of conditions which can enable Africa to make her own contribution to human progress and happiness.
>
> *(Basic Policy Document*, 1948:1)

According to the policy, the struggle against colonisation should be led by Africans themselves. Hence the argument that "in their struggle for freedom the Africans will be wasting their time and deflecting their forces if they look up to the Europeans either for inspiration or for help in their political struggle. They have vested interests in the exploitative caste society of South Africa" *(Basic Policy Document*, 1948:5). The idea of conquered peoples fighting for their own cause on their own terms is taken to a higher level in the next phase.

1.3.7. The Black Consciousness Phase

This phase had a common key element with the previous phase, namely, unity of certain forces for a common goal. The Nationalistic phase united all the conquered tribes in South Africa. The Black Consciousness phase was oriented towards the conquered peoples together with all the other human beings legally excluded and exploited economically by the political order established by the conqueror. The concept "black" was invoked to designate these peoples who, in terms of the conqueror's classification, were the Bantu, the Coloured and the Indian.

Black Consciousness represented a complete break from the multi-racial and **integrationist* approach of the African National Congress. They advocated for Black solutions by Blacks. The ideology and philosophy of the Black Consciousness was advanced through organisations

such as the South African Students Organisation (SASO) and the Black Peoples Convention (BPC). The BPC opened its membership to exclusively Black people.

1.4 Statement of the Problem

The memory of injustice committed against the colonised through the *unjust wars* of colonisation, and the subsequent unjustifiable exercise of the *right of conquest* over the territory of the conquered refuses to fade despite the generation gaps since the victorious coloniser subjugated the colonised. The descendants of the conquered peoples of South Africa continue to regard themselves as the rightful heirs of the land of their ancestors despite the 1994 transition to a new South Africa (constitutional democracy). This underlines the fundamental problem to be studied in this research, namely: may the conqueror in an *unjust war* of colonisation be permitted ethically to acquire "the right of conquest" over the vanquished and exercise it in perpetuity?

1. 5. The Aim and Objectives of the Study

1. 5.1. Aim

The aim of this study is to make a contribution to the justice as an ethical imperative for the attainment of peaceful co-existence in the human family with particular reference to South Africa. The Just War doctrine is examined in the light of the Doctrine of Discovery from the perspective of the philosophy of the indigenous peoples conquered in the *unjust wars* of colonisation. In particular, the legal principle of ***Molato Ga O Bole*** – a direct counter to the Western legal philosophical doctrine of prescription – will be invoked in the argument for the restoration of unencumbered sovereign title to the indigenous peoples conquered in the *unjust wars* of colonisation.

1.5.2. Objectives

- To argue that the ethical imperative for the decolonisation of South Africa is yet to be realised;
- To highlight the three faced injustice in the epistemological, political-social and economic spheres that prevail in the "new" South Africa; and

- To argue that in the context of the Just War tradition, the current dispensation contains the seed of future conflict.

1.6. The Thesis

1.6.1. Thesis

The thesis defended in this study is that the "new" South Africa had missed the opportunity to resolve the basic ethical cause of the conflict between the conquered and the conqueror.

1.6.2. Research Questions

- Why was the decolonisation paradigm set aside and the democratisation paradigm adopted in the "negotiations" for the new South Africa?
- What is the ethical and political significance of the transition from Parliamentary to Constitutional Supremacy?
- What are the moral and political grounds for maintaining the constitutional dispensation introduced in South Africa under the 1993 and 1996 constitutions?
- What is the strategy for justice still due to the indigenous peoples conquered in the *unjust wars* of colonisation?
- Is it possible to go beyond the bounds set by the "triple capitalist formations: the White apartheid capitalist formation (mainly the MEC) the new BEE capitalist formation, and the global capitalist formations" (Terreblache, 2012:88); by cultivating and upholding a genuinely home-grown constitution of South Africa?

1.7. Research Method

The study uses the historical-comparative method of research. As Neuman (1997) observed, this method enables the researcher to handle broad questions such as: How did a major societal change take place, and why did current social arrangements take a certain form in some societies but not in others? Historical-comparative research enables us to trace the socio-political factors that influenced 1994 changes in South Africa. A comparison between how power and property relations were under colonialism and what they ought to in the yet-to-be born post-conquest country fit well in this method. The method is "appropriate when asking big questions about macro-level change or understanding social processes that operate across

time…" (Neuman, 1997:413). Historical-comparative research strengthens conceptualization without necessarily restricting concepts to a single historical time or to a single culture. As such, concepts can be grounded in the experiences of people living in specific cultural and historical contexts. In accordance with this method, I spent more time "searching for sources in libraries, travel to several different specialized research libraries and read… books and articles" (Neuman, 1997:393).

On the other hand, the approach is primarily philosophical, because the knowledge and insights derived from various sources will be subjected to rigorous criticism in terms of their fundamental assumptions and argumentation.

1.8. Approach of the Study

The current problem is considered philosophically legitimate. It calls for the questioning of the ethical basis of the constitutional settlement that gave birth to the "new" South Africa. It questions the validity and the tenability of the presuppositions as well as the arguments on the historical origin of political dispute in South Africa.

The failure of the "new" South Africa to reverse the historical injustice established through *unjust wars* of colonisation cannot be adequately conceptualized without the moral dimension of 'restoration', 'restitution' and 'redistribution'. The study evaluates the moral and political grounds for maintaining the constitutional dispensation established. It is, therefore, a study in ethics. At the same time, it is a study in political and legal philosophy since the constitution belongs to these scientific disciplines respectively.

1.9. The Significance of the Study

The study is significant at both theoretical and practical levels. At the theoretical level, it will contribute to the existing social and politico-philosophical knowledge with particular reference to the relationship between ethics and politics on the one hand and, politics and law on the other. At the practical level, it will provide insights to be considered for implementation in

pursuit of the common good. It will also provide insights for rethinking "reconciliation" amongst the peoples of South Africa.

1.10. Limitations to the Study

The limitation to the study is that the conceptual level of this study is the domain of comparatively few experts. As such, it inadvertently excludes the majority of the people.

The study is also limited by excluding the aspect of comparative decolonisation. Doing so would show, especially in the light of Miller's (2011) exposition of the Doctrine of Discovery, that proper decolonisation is an enduring ethical problem of our time. The "independence" of Latin America (Bethell, 1987), for example, and that of the conqueror, i.e., the United States of America, stand as important adumbrations – perhaps inadvertently – of Miller's (2011) exposition. It is crucial to recognise that for decolonisation to take effect unencumbered reversion to sovereign title to territory ought to take place and, the economies and natural resources ought to be freed from "the domination and control of the colonialists" (Turack, 2013:305).

1.11. African Nationalism

African Nationalism has played an important role in the development of the political and economic consciousness of the indigenous peoples conquered in the *unjust wars* of colonisation in South Africa. It gave expression to the historical framework of their liberation struggle.

> More than 150 years ago, our forefathers were called upon to defend their fatherland against the foreign attacks of European Settlers. In spite of bravery and unparalleled heroism, they were forced to surrender to white domination. Two main factors contributed to their defeat. Firstly, the superior weapons of the white man, and secondly the fact that the Africans fought as isolated tribes, instead of pooling their resources and attacking as a united force.
>
> (Bopela & Luthuli, 2005:36)

According to the BPD, the historical basis of African nationalism is:

> The starting point of African Nationalism is the historical or even pre-historical position. Africa was, has been and still is the Black man's Continent. The Europeans, who have carved up and divided Africa among themselves, dispossessed, by force of arms, the rightful owners of the land – the children of the soil. Today they occupy large tracts of Africa. They have exploited and still are exploiting the labour power of Africans and natural resources of Africa, not for the benefit of the African People but for the benefit of the dominant white race and other white People across the sea. Although conquered and subjugated, the Africans have not given up, and they will never give up their claim and title to Africa. The fact that their land has been taken and their rights whittled down does not take away or remove their right to the land of their forefathers. They will suffer white oppression, and tolerate European domination, only as long as they have not got the material force to overthrow it. There is, however, a possibility of compromise, by which the Africans could admit the Europeans to a share of the fruits of Africa, and this is inter alia: (a) that the Europeans completely abandon their domination of Africa; (b) that they agree to an equitable and proportionate re-division of land; (c) that they assist in establishing a free people's democracy in South Africa in particular and Africa in general.
>
> (Mokoka, 1984:253)

Let us reflect a little on the word 'compromise' as used above. In our view, 'compromise' in the above context means that Europeans are welcome to stay in South Africa, however, on the terms set out by Africans as the rightful owners of the land. Of importance to this issue is point (b) which clearly stipulates that Europeans could only be accommodated provided they agreed to an equitable and proportionate re-division of land. It stands to reason that by "equitable and proportionate re-division of land" the large proportion of land would be transferred into the hands of Africans (reversal of dispossession) since they are the original owners and are the majority. This concession does not abrogate the conquered indigenous peoples' claim to Sovereignty over their land. However, it does remove it from the centre of any 'compromise' that might be contemplated. As such, it is virtually the renunciation of the right to sovereignty and title to territory of South Africa. The 'new' South Africa, inaugurated since 1994, is in fact a living reflection of this 'renunciation'; a 'compromise' in breach of justice because it is a concession to the ethically unsustainable 'right of conquest'.

In the light of the above,

> The settlement should secure those basic rights whose violation triggered the justified war. The relevant rights include human rights to life and liberty and community entitlements to territory and sovereignty. This is the main substantive goal of any decent settlement, ensuring that the war will actually have an improving effect. Respect for right, after all is a foundation of civilization, whether national or international. Vindicating rights, not vindictive revenge, is the order of the day.
>
> (Oriend, 2007:580)

On the contrary, the 1994 dispensation did not vindicate the rights that were violated. Principal amongst which are: the entitlement to territory and sovereignty to the natives of South Africa. Instead, it co-opted the unjustly conquered into a democratic dispensation that is both politically and economically feeble. For this reason, we agree with Terreblanche (2012:66) that:

> Granted, the socio-economical legacy bequeathed by the apartheid regime to the ANC was in many aspects a bankrupt one. But one can see with the wisdom of hindsight that without doubt the opportunity to create a politico-economic system that could have addressed the deeply ingrained and deep-seated poverty problem was squandered when a neoliberal politico-economic system was institutionalised to serve the narrow interests of the old white elite and the emerging black elite, and when the enabling conditions of the new system were moulded in such a way that the imperial aspirations of the American-led neoliberal empire would be satisfied. While the capitalist/corporatist side of the new politico-economic sector has been extraordinarily powerful since 1994, the political side contained several constraints that deprived the ANC government of the capacity to execute governance with efficiency, effectiveness and compassion towards the impoverished majority.

The preceding reflections leave no doubt that a new country is yet to be born; a country based on the unencumbered restoration of sovereign 'title to territory' to its rightful owners, namely, the indigenous peoples conquered in the *unjust war*s of colonisation.

CHAPTER 2

THE JUST WAR THEORY AND THE ARMED STRUGGLE IN SOUTH AFRICA

2.1 Introduction

This chapter evaluates the armed struggle against colonial-apartheid in South Africa within the context of a Just War tradition. The African National Congress (ANC) and other liberation movements waged armed struggle in order to recover the dispossessed land and title to its sovereignty. In dealing with this issue, we are posing a question with Mokoka (1981:204) "whether force used in that manner (to dispossess or disseize land from its native owners) legitimises the claim to ownership on the part of the conquerors or does it finally and absolutely abrogate and annul the right of the conquered their claim of title to their motherland?"

In an attempt to answer the question, we apply the principles of the Just War Theory to the South African liberation struggle. According to the Just War Theory, reasons for resorting to war must be morally legitimate and the means used in pursuing the war must be morally justified. Still, after war, there must be a just peace. The Just War Theory is divided into three phases, although the third phase is not fully developed. The first phase is known as the *Jus ad Bellum*, which deals with conditions that justify starting a war or when is it, just, to declare war. Second, is the *Jus in Bello*, which deals with how to justly conduct war after it had started. The third one is known as the *just post bellum* (Orend, 2007:571). It means that peace that results from the conflict should be just by, amongst others, upholding human rights, punishing those who have violated the rights of the aggrieved, restoring the sovereignty of the aggrieved and rebuilding the economy, for example. If, for example, the cause of the Just War is not eliminated by the peace settlement, then there is not just peace. The key objective of a just war therefore, is to restore the equilibrium which was disturbed prior to the initiation of war.

> [The] attempted answer will thus focus on the two-fold question, whether or not force may be used in order to repel force (*vim vi repellere*) and whether or not

> there is justification to retrieve, by means of armed force ultimately the thing that is lost (*ad repetendas res*).
>
> (Mokoka, 1981:204)

The liberation struggle culminated in a relatively peaceful, the democratic dispensation in which the constitution is supreme law (constitutional supremacy) as opposed to the previous dispensation in which parliament was supreme (parliamentary supremacy). Our observation is that the 1994 democratic dispensation is fraught with challenges. Key among the challenges was that, the government inherited a society in which the distribution of income between different racial and ethnic groups was so skewed against the indigenous conquered majority that it was near impossible to address. "These inequalities are indeed so large that they introduce almost unbearable tensions into the viability of our democratic system" (Terreblanche, 2012:80). Compounding to the challenge of inequalities is that despite the just liberation war, land was not recovered yet it was the *raison d'être* of the liberation struggle, the 'pre-mature' adoption of the principle of Constitutional Supremacy. A shift from the principle of Parliamentary Supremacy that has since 1806 characterised constitutionalism in South Africa signified a clip on the potency of the numerical strength of the conquered majority of South Africa. The critical in this regard is that the ANC may have the parliamentary numbers to drive socio-economic transformation, but the courts are ready to test the constitutionality of whatever legislation and policy which it proposes. So, the intellectual power of the erstwhile rulers of South Africa remains capable of vetoing ANC's transformational efforts regardless of its majority in parliament.

Lastly, the rural populations are not completely free because, their day-to-day lives are subjected to the ascriptive form of leadership, namely, traditional leaders yet during elections they vote for political representation like any other citizen in South Africa. The rural dwellers do not vote for traditional leaders. We conclude the chapter by arguing that under the constitutional democracy, just, durable people is not guaranteed because the sovereignty of the democratic government is limping. The business alliance which is constituted by the old Afrikaner business, the British–American business and the new Black business elite who are in essence (the struggle aristocrats) because members of this group largely come from the liberation struggle, have too much power that they would not allow implementation of

redistributive economic policies. As a result, the poor majority of the indigenous conquered peoples of South Africa will remain marginalised, this time by class and not race. "This reality has been framed by a growing socio-economic divide between the few 'haves' (represented by established, mostly white, corporate elites as well as a political and bureaucratic state elite and an expanding black bourgeoisie) and the many 'have-nots' (represented by an overwhelming black majority of workers and the poor), …who have historically provided the ANC and its alliance partners with their support base" (Mckinley, 2017:4). Flowing from the above, we therefore argue that what triggered the liberation conflict has not yet been eliminated.

2.2 Just War Theory

It is difficult to define Just War Theory because this tradition spans back into many years and has been evolving with pressure on academics, ethicists of war, religious and secular thinkers of various strands and direct participants in wars. As a result, there is no standard definition. Orend (2007) defines the Just War theory as "a coherent set of concepts and values designed to enable systematic and principled moral judgement in wartime" (Orend, 2007:571). The phrase "in wartime" in the definition above is less extensive and therefore problematic. It covers only the second part of the theory, the *jus in Bello* which focuses on the moral conduct of war. In terms of the Just War Theory, war is judged twice. First is the moral evaluation of reasons to starting a war and second is the assessment on whether waging that same war is compliant with the moral principles of war, key amongst them being the Principles of Proportionality and Discrimination (Walzer, 1977:21). The theory, however, seeks not to create wars, but to regulate their declaration and limit their scale of damage whenever they are created in order to reduce the amount of human suffering in the process, and ultimately, ensuring the possibility of peace and resumption of pre-war activities or 'the *tranquillitasordinis* of Augustine.'

> Just war theory is not just about war: It is an account of politics that aims to be non-utopian yet to place the political within a set of moral concerns and considerations, within an ethically shaped framework. It is important to see just war thinking in its full elaboration as a theory of international and domestic politics.
>
> (Elshtain, 1992:3)

The overall objective of the Just War Theory is to answer the question: under what justifying conditions is war legitimate, and by whom may it be declared and waged? (Ramose, unpublished paper). The term 'just' in the Just War Theory means licit or permissible. This gives rise to the question, who permitted the war, regardless of whether the war satisfied particular conditions. As a possible answer, one may declare war as just only if it complies with self-evident and eternal principles of natural law. What makes the issue more difficult is that there are times when parties involved in war similarly claim to be pursuing justice. The afore-mentioned answer is abstract and universal to be actionable by a decision maker. It is on this basis that Ramose asserts that the original question: under what justifying conditions is war licit, "is itself meaningless outside the context of specific concrete conditions" (Ramose,2010:2, unpublished paper). For Ramose,

> [I]t is the concrete conditions themselves which constitute the basis for the conclusion that war is permitted. We hold, therefore, that the moral or natural law lies in the ability to discriminate between right and wrong, justice and injustice in given concrete conditions. Thus, we come to discover and to know the moral law only when the determination of right and wrong is objectively ascertainable in specific concrete conditions. From concrete conditions tradition has distilled certain principles. The principles in turn pertain to the initiation of war – ius ad bellum – and the regulation of its conduct – ius in bello.
>
> (Ramose, 2010, unpublished paper)

Although Just war theory is theoretical, it is used in concrete situations to evaluate practical wars conducted in space and time. Hence, the study under review uses Just war theory to evaluate the liberation conflict of South Africa. The liberation conflict came into being as an attempt recover sovereignty and title to territory which were usurped during wars of conquest on the basis the questionable rights of conquest.

The reversibility of sovereignty and territorial integrity falls within the domain of domestic politics. Although the struggle for liberation was between the indigenous conquered peoples of South Africa and the conqueror, the bone of contention is located in the domestic domain. We therefore use Just War Theory to analyse a domestic problem, namely: the recoverability of territorial integrity and its sovereignty.

The following principles constitute the structure of the Just War tradition.

2.2.1.1 Legitimate Authority

In terms of the principle of Legitimate Authority, only the sovereign power can declare war because only the kings have the exclusive right to declare war. In Ancient period, the power to declare war rested with kings as kings were assumed to be vested with divine rights to rule (Fiala, 2008:12). It is; thus, individuals get involved in war in their capacity as State agents only (Howard, 1992:30).

> [t]the principle that only the sovereign power possesses the exclusive right to war lends credence to the assertion that war is the game of kings. For Aquinas, this needs to be so, since it is the sovereign power alone who is divinely entrusted with the protection of the community as a whole. At the same time this is a reflection of Aquinas' adherence to the hierocratic ideology of rulership in the respublica Christiana." We will maintain, on the contrary, that the basic flaw of this principle is that the fate of the entire community is placed in the hands of the sovereign alone who is by no means incapable of plunging the community into war for reasons extraneous to the preservation of the common good.
>
> (Ramose, 2010:3)

Aquinas's view that only sovereign power possesses has exclusive right to war is problematic in the sense that it excludes wars of decolonisation because they are fighting against sovereign powers which happen to be illegitimate by virtue of their colonial status. We agree with Miller (2011) that the exclusive right of the sovereign power to declare war means that liberation war against the colonial State is automatically ruled out, and further that the assertion "ought not to be part of a general theory of just war" (Miller, 1990:81).

> But historically many just war theorists allowed for the possibility of a just war to remove a tyrant. And of course, political theory in general, including liberalism, admits of the moral possibility of a just internal war, and this because there are limits to the obligation to obey the state, and because the state itself has obligations the discharging of which is part of the ground of its legitimacy.
>
> (Miller, 1990:81)

Aquinas wrote during Middle Ages and at the time the "concept of state in the modern sense – state sovereignty" was not common (Ullman, 1969:43). The historic Treaty of Westphalia, which was concluded in 1648, had arguably ushered in the rise of the modern State in Western Europe on the one hand, while on the other marked the disappearance and dissolution of the ancient State (Parkinson, 1977:44).

The condition that only a head of State is authorised to wage war against another had disadvantaged freedom fighters or non-State actors for a long period of time. It is only in 1968 that a resolution was taken by the United Nations General Assembly although implemented in 1977 that "persons struggling against 'racist or colonial regimes' should be protected against 'inhuman or brutal treatment and treated as prisoners of war: that freedom fighters, in fact, should be afforded the protection of international law" (Howard, 1992:33). "So it is that Aquinas appears not to have foreseen nor did he accommodate wars of national liberation in his theory of the just war" (Ramose, 2010:3).

The Just War Theory and the traditional international law then did not cover internal wars of anti-colonial or anti-apartheid nature "within the framework of an existing constitutional system against an established administration" (Verwey, 1977:124). However, there was an element of delay between the United Nations General assembly and the international law in recognising the right to self-determination because the UN General Assembly resolved in 1960 to grant independence to Colonial Countries and Peoples, and the resolution was strengthened by a number of treaties taken at different conferences since then until 1970s. The right to self-

determination and liberation was expressly stated, for example, in Resolution 2787 (XXVI) of 1971 by the General Assembly that:

> …the people's struggle for self-determination and liberation from colonial and foreign domination and alien subjugation, notably in Southern Africa and in particular that of the peoples of Zimbabwe, Namibia, Angola, Mozambique and Guinea (Bissau), as well as the Palestinian people, by all available means consistent with the Charter of the of the United Nations.
>
> (Abi-Saab, 1977:148)

Resolutions such as the one mentioned above gave an impetus to regional organisations such the Organisation of the African Unity to pass specific resolutions, as well as establishing an organ known as the Liberation Committee through which it provided aid to the liberation movements on the African continent. However, the General Assembly's declarations and resolutions did not automatically give effect to recognition of liberation movements as such by other governments. Recognition was again a struggle because international law put hurdles through which one had to overcome before earning a belligerent status. For example, there were four requirements which any organisation claiming to be fighting for liberation had to fulfil in order to earn a status or recognition a movement fighting for self-determination and liberation (Verwey, 1977:126):

(a) the armed conflict is of a sustained and general character;
(b) the insurgents effectively occupy and administer a substantial part of the territory;
(c) they conduct their hostilities in accordance with the rules of warfare; and
(d) circumstances require that the foreign State determines its attitude towards the armed conflict in question.

The requirements above are extremely difficult to meet, particularly with reference to the African National Congress military wing, the uMkhonto weSizwe (MK). The MK could not sustain a conflict against the mighty all South African Defence Force (SADF), given the regional hegemony of South Africa's racist regime then. The neighbouring States to South Africa were so poor and militarily weak that the SADF was able to attack MK soldiers on their

soil, thus violating their territorial integrity and without any international political consequences against it. Mozambique is one of the victims of South Africa's military might (Simpson, 2016: 276). As a result, the nearest country in which MK could establish camps were Zambia and Angola. Flowing from the above, there was no way in which the MK could meet requirements (a) – (c) above.

The rules of recognition for liberation fighters and protection by international law are clearly spelt out as indicated above. But such rules were loaded against those in pursuit of self-determination and liberation because, at initial stages, liberation movements do not start with resources sufficient to shake the established administration to the conviction of the international regimes for possible recognition, aid and assistance. It should be taken into cognisance, however, that many declarations in recognition of liberation movements were made, yet action or implementation was often lacking. In 1973, the General Assembly had, for example, declared through Resolution 3103 (XXVIII), that "the armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions" (Verwey, 1977:128).

On the basis of the above, liberation forces are in a paradoxical situation in the sense that to be recognised they needed to fight sustainably so, but sustaining a fight needed resources such as recognition, lest they are declared rebels and therefore assuming criminal status. For more than three decades the ANC and its military wing were in terms of colonial law, a bunch of communist terrorists and criminals. It was only on 12 February 1991 that the MK got recognised by the colonial-apartheid government as the armed wing of the ANC and membership of MK was subsequently no longer a criminal offense (Ngculu, 2009:214). So, recognition as a legitimate authority is more of a political issue than legal.

It should be pointed out, however, that there is no guarantee that sovereign powers will exercise the exclusive rights to waging war justly. The sovereign is not infallible, it is often inclined to abusing the exclusive powers (Fiala, 2008:12). A president, for example, can unilaterally commit his or her nation to war, aggressively. Investing the power to declaring war in the

hands of legitimate authority could inadvertently preserve a totalitarian or colonial system often at the expense of people who are supposed to be protected by the very same authority. For example, indigenous peoples conquered in the *unjust wars* of colonisation who fought under the title of wars of liberation "against European colonial authorities or, as in Southern Africa, regimes asserting a racial hegemony" were labelled as rebels against legitimate sovereign governments (Howard, 1992:32). The groups had no recognition in international law, yet they were fighting for a 'just cause'. For instance, MK and other liberation armies were viewed as rebels bent on destabilising 'White' South Africa even after after the 1970s.

> Of particular importance to us is the fact that finally in 1970 the General Assembly unanimously adopted Resolution 2625 (xxv) recognising self-determination as a right of all peoples. In the context of decolonisation, the right to self-determination was recognised as *iusta causa*; a veritable causa *portandi gladium* for purposes of *ius as bellum*. The right to (national) self-determination is not an end in itself but a means to an end, namely, upholding and exercising the right to life. This latter means in the first, though not necessarily paramount, place the preservation of life of the individual human being. However, such preservation is meaningless without access to the resources that nurture and sustain life. The most fundamental of these resources is land.
>
> (Ramose, 2010:6)

It should be taken into cognisance that the South African situation was not as clear cut as it is contemplated by the principles of the Just war theory because it had the elements or characteristics of both inter-state and intra-state conflict at the same time. This confusion is reflected in the interpretation of the Atlantic Charter for the liberation of Ethiopia by the

Congress Youth League of the African National Congress. The key quest of the principles of the Atlantic Charter was "to replace the alien regimes established by European aggression, for no matter how beneficent in intention, such administrations were 'not accountable to the indigenous inhabitants" (Walshe, 1987:334). The colonial-apartheid government fitted the description of the alien regime. From this point of view, liberation struggle was an inter-state conflict. However, the Youth League decided not to reject colonial domination, instead they opted to demand "full citizenship and direct representation" in the political and economic administration of South Africa (Walshe, 1987:334). Moving from this premise, liberation conflict was an intra-state conflict. Despite the ANC's opting to demand full citizenship and direct representation, the colonial-apartheid regimes continued to behave as an alien regime through legislation and its promotion of white supremacy. Tlhagale (1986) elucidates the behaviour of the regime vividly thus:

> Historically, white South Africa could be viewed as unjust aggressors for the indigenous black people were never really seen as forming one single nation with the European people as they began to settle in South Africa. Nonetheless, white South Africans proceeded to distance themselves from the indigenous people and even maintained the division by law.
>
> (Tlhagale, 1986:144)

Moving from this premise, liberation conflict was an inter-state conflict. The oscillation of the ANC between its policy options and its rhetoric seems to have been persistent in the organisation to this date. On the basis of the above, South Africa was a two nations State forced by historical circumstances to share a territory. There was a European nation on the one hand and the indigenous 'nations' derogatively called non-European people on the other. It was no coincidence, therefore, that in 1925, the then Governor-General, Lord Athlone when expressing his disappointment at the fact that the visit of the Prince of Wales to South Africa failed to reconcile the English speaking and the Afrikaans speaking South Africans referred to the two groups as the Dutch and the British. Thus… "no one with any sense of reality would claim for one moment that large numbers of the Dutch have suddenly been converted into staunch upholders of the British Empire" (Lambert, 2009:218). From this point of view, we can conclude that the struggle for liberation was therefore an inter-state conflict in which the application of the principle of legitimate authority was relevant.

However, practical actions of 'the European regime' point to a violation of its own law of recognising two nations because at the same time they failed to recognise leaders of the indigenous peoples conquered in the *unjust wars* of colonisation. The European authorities in South Africa used instruments such as imprisonment and banishment, to deny recognition of the leadership of the indigenous people. The leaders of the African National Congress, the Pan Africanist Congress, the Black Consciousness Organisations, the Christian Institute and many other organisations involved in the struggle for liberation of the indigenous conquered peoples of South Africa were, for example, imprisoned or exiled while their organisations were banned (Tlhagale, 1986:144). Furthermore, the colonial-apartheid regime continued to promulgate laws which directly impacted on the lives of the indigenous conquered peoples such as "the pass laws, stock limitation, the Group Areas Act, the Separate Representation of Voters Act, the Suppression of Communism Act and the Bantu Authorities Act" (Walshe, 1987:402). The fact that the colonial-apartheid parliament was able to deliberate on the affairs of the people who were to be affected by the above-mentioned laws means they recognised them as citizens of South Africa because no country is allowed to make laws for another country. In this case, it is an intra-state a situation. It means therefore that non-recognition was used expediently as a political weapon against people fighting a legitimate cause as it was demonstrated above.

A reading of Tlhagale (1986) gives an impression that armed struggle in South Africa started with the formation of the MK and the Azanian People's Liberation Army (AZANLA) of the Pan Africanist Congress initially known as POQO. The launch of the MK and AZANLA during the years between 1961 and 1963 often creates an impression to most readers that armed resistance against colonial-apartheid started only then (Tlhagale, 1986:144). On the contrary, it started in the 1600 when the KhoiKhoi resisted the Dutch in defence of the sovereignty of their land under the leadership of Gounema.

Our analysis of the struggle for national liberation takes two phases. The first phase is the armed national resistance against land invasion by conquest and the second one is the armed struggle against racial oppression commonly referred to as apartheid. In 1818, for example, Kings Ndlambe and Makhanda fought with the British in the *unjust wars* of colonisation and they were defeated. Upon defeat, the Ndlambes crossed the Fish River, thus making way for

the establishment of Grahamstown. When Makhanda was defeated, the conquerors seized land lying between the Fish and the Keiskama rivers.

In 1834, the Xhosas under the leadership of King Hintsa again waged war in an attempt to recover their land. But the conquerors' soldiers under Colonel Harry Smith defeated them. A further large portion of land was seized by the conqueror and that piece of land was named Queen Adelaide (Pheko, 1990:6).

In 1846, the British conqueror won the war of the Axe in which Sandile, Maqoma and Phalo were involved. The defeat of the Africans in this area led to the dispossession of the land between the Keiskamahoek and Kei. That land was turned into British Kaffraria and King Williamstown where today's East London is built.

Persistent to recovering their land, the indigenous peoples conquered in the *unjust wars* of colonisation mounted another war of recoverability in 1850 under the leadership of Mlanjeni. The war that was named after Mlanjeni raged from 1850 to 1853. The above-mentioned conflicts are some of the many wars which were fought in the Cape area alone. About 12 wars of resistance were fought in this part of the country.

Other "provinces" were no exceptions to the wars of national resistance. In Natal, for instance, the Zulu Kingdom under King Dingane was overthrown after he was defeated at the Battle of Blood River on 16 December 1838. In 1879, another major war broke out in Natal and the battle is popularly known as the Battle of Isandlwana. The Zulu army under the command of King Cetshwayo killed about 1 400 British soldiers while they lost about 2 000 men. The battle was recorded as "one of the worst defeats suffered by the British army during the Victoria era" (www.southafricaholiday.org.uk/history/ hist_ isandlwana.htm). Other significant battles in Natal were, namely, Ulundi, Rookies Drift and Hlobane; and yet another popular war, namely, the war of Bambatha that took place 1906.

In the Transvaal area, the Bapedi under Sekhukhune fought the Boer encroachment in the Labu Mountains in 1879 whereas the VhaVenda fought under King Makhado and his son Mphepu. The Bapedi and the VhaVenda lost the wars and they subsequently conquered as well. In the Orange Free State, King Moshoeshoe inadvertently gave away land by peacefully accommodating the settlers (Pheko, 1990:90).

Even though the conqueror emerged victorious in colonial wars, the numerical strength of the conquered remained vulnerable, hence they found it necessary to unite amongst the four provinces. The aim was to pool their resources together against the indigenous conquered majority. The insecurity that was felt by the conqueror in view of the defeated indigenous majority is reflected in the correspondence between the then Governor of the Cape Colony, Sir George Grey and the Secretary of States and Colonies, E. Bulwer Lytton thus:

> The Kaffir tribes upon our borders are already becoming disturbed. If the Basutos are conquerors in the war it will greatly encourage the Coloured races against the whites, and they will be dissatisfied with our assumed neutrality, under the guise of which we have continued to supply the Orange Free State with arms and ammunition, whilst we have acted as police to prevent the Basutos from obtaining such supplies.... I still believe that nothing but a strong Federal Government which unites within itself all the European races in South Africa can permanently maintain peace in this country, and free Great Britain from constant anxiety for the peace of her possessions here.
>
> (Pheko, 1990:19)

The data on wars of national resistance are vital for this study in two respects. Such refutes the tendency to claim that the Bantu speaking peoples do not have a legitimate claim to a territory in South Africa. The *tẽrra nullius* (land that belongs to nobody), therefore *res nullius* (property that belongs to no one and nor anyone has rights over the territory) theory is refuted therefore. The theorists assert that the first inhabitants in South Africa were the Khoisan residing at the Cape and they confined themselves in that region. Furthermore, that the remainder of the South African territory was an empty and unknown space. It was a territory without rights or alternatively the Europeans moved into the territory at about the same period as the Bantu speaking peoples coming from the North of the continent (Worden, 1994:5).

The adherents of the supra-mentioned theory pursue the argument further that in fact there are many colonisers in South Africa, citing King Shaka as one the colonisers. Colonisation is a process in which a group of settlers migrate to a territory other than theirs and take control economically, politically and culturally. Shaka embarked on a mission to establish a mighty Zulu Kingdom. He thus in the process forcibly assimilated smaller ethnic groups into the Zulu empire. During that period, the British were conducting slave trade into the interior. So, territorial and national expansions were common political ends. Hence, the claim that Shaka's expansion policy was arguably in response to the slave trade conducted by the British slave raiders. Shaka was a native South African. Unlike colonialists, he did not prohibit intermarriages between ethnic groups. This implies that communities evolved naturally under Shaka.

There is further evidence that South Africa was populated long before the British and the Dutch conquerors first came to the continent.

> In a repudiation of Eurocentric versions of Zulu national history that attempt to associate Shaka's monarchical emergence with reaction to European colonization of the area, it is important to consider ecological, climatic, and social factors in the rising of the Zulu kingdom.... However, the reality is that the British did conduct slave raids into the interior, because England had outlawed the slave trade in 1807. The British needed to conceal their own slaving operations and thus construed the Zulu expansion as a decoy. In 1828, for instance, British colonial leader Henry Somerset penetrated the Transkei and conducted massive slave raids, claiming to defend the Xhosa ruling establishments against Shaka's onslaught.
>
> (Kunnie, 2000:5)

The archaeological sites such as Mapunkubje and Thulamela in the Limpopo Valley, do display evidence of sophisticated indigenous political and material cultures that reflect contact with the East African trading economy. The material cultures predate the European encroachment by centuries. (Http://www.info.gov.za/aboutsa/history.htm).

It is no coincidence that the conqueror remained unease with the fact that the existence of indigenous conquered peoples of South Africa was a reality that could not be wished away. Subjugating them was not a solution because their aspiration for freedom in their country would never die. Indeed, the conqueror's fears that the conquered would overtime regroup and

demand the restoration of their land strongly motivated the conqueror to unite and form a 'federation' of the four colonies. The unity of the colonies gave birth to the Union of South Africa of 1910.

2.2.1.2 Just Cause

The Just Cause Principle demands that the overall aim of declaring war should be a creation or restoration of justice, righting the wrong committed in the past and perhaps still continuing.

> The principle of the just cause means that war may be initiated in order to: repel an injury (ad repellendas injurias); (b) gain vindication against an offence (ad vindicandas offensiones); (c) redress an injury or regain the thing lost (ad repetendas res). …We suggest that any of these three principles must be extended to and applied in the determination of the question whether or not wars of national liberation should receive legal recognition and attain the same status in international law as accorded to sovereign states. However, it must be stated albeit parenthetically, that none of these principles is available to any future belligerent if the latter demonstrates the will and the capacity to wage nuclear war.
>
> (Ramose, 2010:3)

Wars of aggression and imperial wars, such as wars of colonisation, are theoretically excluded from this principle because they inherently fall in the category of *unjust wars*. In practice, however, wars are often fought for different intentions although disguised as legitimate cause. The war in Iraq, which was led by the United States of America against the so-called Iraq's possession of Weapons of Mass Destruction (WMD), and the war against terrorism or the war to spread democracy, are good examples. In our view, it is possible for both sides of the conflict to equally claim fighting for a 'just cause'.

In South Africa, for instance, the ANC argued that fighting for liberation against colonial-apartheid regimes was the 'just cause'. The declaration of apartheid as a crime against humanity by the United Nations gave more credence to the argument. The seriousness of prohibition of colonial oppression and the denial of the right to Self-determination was backed by the Chapter VII of the UN charter. In this regard, we may think of for examples Resolutions 2022 (XX) and 2262 (XXII) with respect to Southern Rhodesia, 2074 (XX) with respect to Namibia, 2184 (XXI) with respect to Portuguese Territories…2307 (XXII) with respect to

South Africa (Verwey, 9177:134). The fact that "the policies of apartheid government of South Africa are a negation of the Charter of the United Nations and constitute a crime against humanity" strengthen the ANC's moralistic argument that their struggle was just (Doxtader & Salazar, 2007: xii). On the other hand, the Nationalist Party has equally asserted that theirs was a 'just cause' in defence against the communist imperialism. "The National Party stood by its historical evaluation, presented on several occasions and by President de Klerk in particular: apartheid had a purpose, was perhaps (in de Klerk's words) "wrong", even as its initial objective was practical if not generous" (Doxtader & Salazar, 2007: xii). Conflicting claims outlined above demonstrate that the justness of a cause can be political and debatable. It is often difficult to discern the 'just cause' between belligerent parties to the conflict. In our attempt to resolve the above-mentioned difficulty, we adopt the US Catholic bishop's concept of comparative justice (US Catholic Bishops, 1992:98). Comparative justice means that "no state (or party to the conflict) should act on the basis that it has 'absolute justice' on its side. This means that every party to a conflict should acknowledge the limits of its 'just cause' and the consequent requirement to use only limited means in pursuit of its objectives. Comparative justice is designed to relativize absolute claims and to restrain the use of force even in a justified' conflict," it is not meant to legitimize a crusade mentality (US Catholic Bishops, 1992:98).

Let us remember that the indigenous conquered peoples were fighting for recoverability of sovereignty and the lost land that was dispossessed the wars of colonial conquest based on the questionable right of conquest. The Khoisan people, for example, were disposed of their land by the Dutch because both nations had livestock whose numbers needed more land for grazing. Instead of negotiating ways and means on how best to accommodate one another, the Dutch under Van Riebeeck kept on encroaching on the best land in the Liesbeeck Valley. At the end war broke out between the two nations and the Khoisan people were defeated. Van Riebeeck then declared that since the Khoisan people were vanquished during war over land, then the land belonged to the Dutch. More and more portions of land were invaded and the indigenous peoples were subjugated, hence the objective of the liberation struggle was to recover land that was forcibly taken from its original owners through the unjust wars of colonial conquest (Kunnie, 2000:4).

It is morally imperative that the Khoisan and other people with similar experience have the just cause of waging war in order to recover their land which was dispossessed as highlighted above. Related to the Just Cause Principle is the principle of Right Intention.

2.2.1.3 Right Intention

The principle requires that wars be fought purely on moral intentions. It does not cater for avenges or private and selfish ends. Challenges that are often encountered with the principle, for example, are that it is difficult to access the private intentions of those vested with the authority to declare war. Private intentions do at times interfere with intentions to wage war for the common good. One could even ask a question: what would happen in the event that personal inclination to declare war coincides with the 'right intention' to declare war? The kings waged wars with the intention to stop an invasion of their territory and forcible removal from their land of birth through the *unjust wars* of colonisation. Intentions of people are difficult to read, it is only by observing human behaviour that we are able to guess the person's intention. However, it is improbable for a particular cause to be just when the intention is wrong.

The kings and subsequently the ANC engaged in armed struggle against colonial conquest, the exclusion from the Union of South Africa which was perfected into apartheid, all motivated by a just and Right Intention. They were all geared towards liberating the indigenous conquered peoples of South Africa. As explicated in the preceding paragraphs, the kings embarked in armed struggle in reaction to colonial conquest and the ANC embarked on armed struggle because in Walshe's words "it was thwarted, buffeted and eventually banned by government order in 1960" (Walshe, 1987: 405). The channels for peaceful engagement were closed.

We cite the Principles of Recoverability and Self–Determination in order to give the principle of the Right Intention a historical context. Without context the principle remains abstract and will therefore not aid elucidation to our exposition of *jus ad bellum* as it applies in the South African situation. The principle cannot be fulfilled in the abstract since declaration is time-bound and therefore linked to the objective conditions prevailing at a given point in time (Mokoka, 1981:229). "Intention at formal level is an empty concept as it is devoid of concrete objective content: interconnection between the objective content of the political history of South Africa and the intentional declarative requirement ensuing from that objective reality"

will assist in understanding the condition of the conquered (Mokoka, 1981:229). Our interpretation of Mokoka (1981) here is that, declaring one's intention as right is necessary, but not sufficient. The rightness of the intention has to be seen in real life conduct as well. That the intention is right does not settle the issue with this principle, because a question arises, namely, are there reasonable prospect of success? In the context of the Just war theory, it is a requirement to weigh the prospects for success against those of failure even if the intension is right. It means that should the prospects of success be less than the prospects for failure, then the war should not be declared regardless of the right intention. It would have been difficult to provide a reliable answer to the question in advance. In the *Just War* tradition, the Right Intention means the actor or agent is bound always to aim only at the promotion of the common good and avoidance of evil.

When addressing the first conference of the MK at the University of Venda in South Africa on 9–11 August 1991, Joe Modise said:

> Umkhoto we Sizwe was born out of historical necessity to further our struggle for freedom and social justice. The formation of the military wing of the African National Congress was a logical response to the regime's increasing violent suppression of popular activity, harassment, banishment and banning of our activities.
>
> (Ngculu,2009:254)

As highlighted above, the formation of MK did not precede the liberation struggle, but came in the process in which the colonial-apartheid regime was tightening the oppressive grip against the indigenous peoples and closing all avenues for peaceful and civil engagement. Moving from this premise, the formation of the MK and subsequent armed struggle was therefore a last resort. We will now consider the principle of the Last resort.

2.2.2 Last Resort

The point of departure as far as Just war theory is concerned is that a decision to wage war should be taken as the last resort, if and only if all available peaceful means have been exhausted. All other possible means available must be given a chance to succeed or fail before a decision to wage war is taken.

It is however, known that, many wars were declared as a first resort as it happened with the United States-led war in Iraq purportedly against Iraq's possession of Weapons of Mass Destruction (WMD). The team of inspectors of the weapons in Iraq were not given sufficient time to test evidence to the allegation that there were WMD in Iraq. While the process of inspection was on course, the war was declared to punish for possession of WMD (Fiala, 2008:13).

Coming to the African continent and South Africa in particular, the conversation between the Dutch (represented by Jan van Riebeeck) and the indigenous people (represented by the Khoisan) illustrates' wars were unjust and further that the conquered peoples waged wars of resistance to conquest (Kunnie, 2000:4). The above-mentioned examples demonstrate that there are wars which are declared without exploring all other option before the last one which declaring war. Now declaring war as first resort already puts the ability to adhere to other principles on shaking foundation.

In South Africa many anti-colonial wars were fought by the indigenous conquered peoples in a fragmented approach because they fought as different tribes in different regions and times, until after 1909 when the conqueror peoples formed the Union of South Africa. With the establishment of the Union of South Africa came a new way of resistance to colonialism such as deputations and letters of petitions to the British government. The peaceful means of protest continued until 1960. The South African National Native Congress (SANNC) which later became the African National Congress, preferred non-violence for a variety of reasons. Amongst the reasons cited are, (a) there were no independent African States to support the liberation of the conquered Africans, (b) there was no Organisation of the African Unity (OAU) African liberation efforts by Africans and (c) the SANNC was constituted by intellectuals, traditional leaders and clergymen whose majority were brought up in the culture of conducting politics within the framework of the law while at the same time, clergymen have by training and conviction, the propensity to oppose war. Intellectuals are inclined to solving problems by argument, debate and reason.

But in 1944, the peaceful approach to colonial oppression was to change for good as a result of the launch of the Congress Youth League. The league brought energy into the ANC and young members wanted action. The youthful members of the ANC influenced the organisation to draw up a Program of Action and it was done in 1949. Subsequent to the Program of Action, the Defiance Campaign was planned and was to be launched on 06 April 1952 in order to coincide with the tercentenary of Jan van Riebeek's arrival at the Cape (Hirson, 1988: 78). But the launch was poorly prepared and as result it failed to materialise. After it was launched, the ANC began to work closely with other organisations such as the Communist Party of South Africa, the South African Indian Congress and Congress of Democrats. But the Youth league, under the leadership of Anton Lembede, was not in support of cooperation with those organisations. It was particularly "bitterly anti-communist for the first seven years of its existence" (Walshe,1987: 328). Their main contention was that communists and other organisations did not have the interests of the Africans at heart. They were also not comfortable with the class analysis approach to the South African societal problems by the communists. The Africanist oriented group within the Youth league, were of the view that Africans were oppressed as a people and not as a class. The adoption of the Freedom Charter at Kliptown in 1955 sharpened the divide between the Africanists and the rest of the ANC members. Africanists were opposed of the Freedom Charter for two main reasons. First, that its preamble and basic point of departure that South Africa belongs to all who live in it. Secondly, that the charter was a deviation from the ANC Youth League's principles of African Nationalism and self-reliance (Mathabatha, 2004: 299). We will consider the Freedom Charter in more detail at a later stage.

The Defiance Campaign

The defiance campaign marked a departure from decades of liberation struggle which was characterised by "petitions, delegations, a short-lived attempt at passive resistance, resolutions and unofficial and official channels of consultation to check racial discrimination and so to move Native policy towards equality of opportunity for all citizens" (Walshe, 1987: 349). "Rural resistance, which flickered in the 1940s, flared in the 1950s and culminated in major uprisings in Zeerust, Sekhukhuniland and Mpondoland" (Magubane, et al 2004:56). Rural inhabitants viewed government actions as disruptive of livelihood in traditional communities

particularly dethroning of traditional leaders who were not complying with the laws of colonial-apartheid such as the law that obliged stock farmers to cull their livestock purportedly because there was not enough land for grazing.

In this regard, the Pedi regiments and militant activists in the Sekhukhune region embarked on a campaign of killing representatives of the Bantu authorities while in Pondoland, activists were burning down houses of local government representatives and in the process murdering others. There are claims that some rural activists at that time were inspired by the Mau Mau revolt in the East Africa (Magubane, et al 2004:56). The Natal province was no exception to rural uprising because there were wide spread protests in the rural areas which lasted for two years, 1959 – 1960. The protests were in resistance to "new forestry regulations, the extension of passes and taxes to women and wives, the threat of forced removal from so-called black spots, control and culling of livestock and compulsory cattle dipping" (Magubane, et al 2004:60).

The fierce protests in rural areas caught the ANC off guard more especially when rural activists started to demand military assistance from the organisation. For example, some Mpondos in the Transkei "were clear and loud that they want the National Executive (of the ANC) to assist them to obtain guns so that they can defend themselves when the army comes to hunt them in the mountains" (Magubane, et al 2004:56). The ANC was still inclined to a peaceful liberation struggle and therefore had no guns to meet the demands by rural activists. Nevertheless, the ANC facilitated a link between leaders of the Mpondoland activists and leaders of the Sekhukhune activists. The regiments in rural areas later served as useful recruitment pools for the Umkhonto we Sizwe when it was established. For Magubane, "once MK was formed, some of the areas still smarting from the rural uprisings of the late 1950s and with strong links to the ANC and the Communist Party, provided a rich source of recruits" (Magubane, et al 2004: 60).

The defiance campaign was, however, not as effective as its advocates would have liked due to the ANC's organisational and leadership weaknesses. The organisation did not have the capacity to effectively drive the defiance campaign. It was ill-prepared to embark on a militant national campaign. Some of the limitations which were faced by the ANC were the general

inertia of majority of people who were staying in rural areas as traditional leaders were legally restricted from participating in politics, membership of the organisation in urban areas was sparse and its leaders, who had grown in a relatively open political system, were even less prepared for a defiance action, but above all, they were paralysed by fear of possible reprisals from government (Walshe, 1987:404, Karis, 1987: 191). Walshe describes the leadership style of Xuma in particular as one which was constraint by amongst others “his own temperament, his past experience of constitutional politics, and perhaps his understanding of the ruthless nature of Afrikaner nationalism, meant that he lacked the determination of a Gandhi to risk all in challenging the power of the State” (Walshe, 1987:404).

Meanwhile, the ANC continued to sufferer tensions between the leftists and the Africanists. In 1958, for instance, the Africanists refused to participate in the strike which was organised by the ANC against the Union government’s general elections. In April 1959, the Africanists attendance of Kwame Nkrumah’s All African People’s Conference (AAPC) in Accra, served as an impetus to breaking away from the ANC and subsequently launching their own political organisation, the Pan Africanist Congress (PAC) (The 1959 PAN AFRICANIST MANIFESTO, page 47, Mathabatha, 2004: 300). One of the ultimate goals of the PAC was stated as follows:

> We aim, politically, at government of the Africans by the Africans for Africans, with everybody who owes his only loyalty to Africa and who is prepared to accept the democratic rule of an African majority being regarded as an African. We guarantee no minority rights, because we think in terms of individuals, not groups.”
>
> PAC Inaugural Address, page 20

The ANC and the PAC existed side by side, but in competition to one another and not cooperation. For instance, in December 1959 at its Durban national conference, the ANC announce an anti-pass campaign to be launched on 31 March 1960 to coincide with the 41st anniversary of the Johannesburg anti-pass campaign of 31 March 1919. A week after the ANC’s conference, the PAC held its National Executive Committee meeting in Bloemfontein

where they proposed an anti-pass campaign and further that the proposal would be ratified at its first annual conference. The PAC was seemingly on a rush because prior to the conference, its head office announced that plans for positive action were underway and at the conference the leadership, particularly its president, Robert Sobukwe a mandate to operationalise the plan in the form of an anti-pass campaign. He was supported by the delegates and he subsequently set the date of the launch of the campaign as 21 March1960, just 10 days prior the launch of the ANC's campaign. It was only announced 18 March. The PAC invited the ANC to join the anti-pass campaign, but the ANC declined to take part in the anti-pass protest action (Mandela, 1994: 343, Magubane, 2004:68). But Mandela's elaborate interpretation of the PAC's invitation is contemptuous of the organisation and its campaign:

> "The PAC at that time appeared lost; they were a leadership in search of followers, and they had yet to initiate any action that put them on the political map. They knew of the ANC's anti-pass campaign and had been invited to join, but instead of linking arms with the Congress movement, they sought to sabotage us. The PAC announced that it was launching its own anti-pass campaign on 21 March, ten days before ours was to begin. No conference had been held by them to discuss the date, no organisational work of any significance had been undertaken. It was a blatant case opportunism. Their actions were motivated more by a desire to eclipse the ANC than to defeat the enemy" (Mandela, 1994:343).

Nevertheless, the PAC went ahead with the anti-pass protest action which resulted in arrests of many protesters while a lot more got killed by the police. At Sharpeville, police fired on an angry crowd outside the location police station without warning, killing 67 people and wounding another 186, including children and women (Magubane,2004:69). And since that date protest actions within the anti-pass campaign mushroomed across many urban centres until 30 March 1960 when the government responded by declaring a state of emergency. But more protests continued to flare up including burning of passes. The colonial-apartheid government responded by banning the ANC and the PAC under the hastily enacted Unlawful Organisations Act in the same year of 1960 (Kotzẽ, 1975:16, Magubane, 2004:69). The banning of the ANC and the PAC meant that suddenly the majority of the conquered peoples of South Africa were silenced. Was this a mark of another victory by the conqueror similar to those which were

scored against tribal chiefs in the 1800s? if the answer is in the affirmative, the it means dispossession of land through the questionable rights of conquest is justified. Put differently, a wrong is turning into right through the force of arms. Flowing from the above, we therefore have to ask with Mokoka (1981:204) the question, whether or not force used in dispossessing a people of their land and sovereignty legitimises the claim to ownership on the part of the conquerors or does it finally and absolutely abrogate and annul the right of the conquered to the claim and title to their motherland?

In 1891, Henry Sidgwick (1977:56), as quoted in Walzer, responded to a similar question that rights over a territory do not endure permanently. From that premise, the conquered may not have the legitimate claim to the territory was forcibly taken from them through wars of colonisation based on questionable rights of conquest. The right to claim could have expired over time. Moving from this premise, it means the lapse of time can turn wrong into right. If that view were to be accepted by the conquered peoples of South Africa, then reasons for continuing the liberation struggle become invalidated. He wrote thus:

> We must…recognise that by this temporary submission of the vanquished ... a new political order is initiated, which, though originally without a moral basis, may in time acquire such a basis, from a change in the sentiments of the inhabitants of the territory transferred; since it is always possible that through the effects of time and habit and mild government – and perhaps through the voluntary exile of those who feel the old patriotism most keenly – the majority of the transferred population may cease to desire reunion ...When this change has taken place, the moral effect of the unjust war transfer must be regarded as obliterated; so that any attempt to recover the transferred territory becomes itself an aggression....
>
> (Walzer, 1977: 56)

Sidgwick's (1977) assertion is a classical statement on the Statute of Limitations. According to this statute, an injury or injustice may through the passage of time alter and assume the new status of justice. One may take the argument further that between 26 and 29 April 1994, about 20 million people patiently voted for the new dispensation. Twenty million out of 45 million is significant when it comes to voter turnout. The huge turnout means the majority of the indigenous conquered people had accepted the new dispensation.

How Sidgwick's (1977) legal philosophical paradigm is distinctively and contrarily opposed to the indigenous conquered peoples of South Africa's legal philosophical principle that the lapse of time does not change wrong into right (Drieberg, 1934:238; and M'Baye, 1974:147). Accepting the line of reasoning by Sidgwick (1977) would undermine the moral question we asked at the beginning of this study that is based on the Just War Principle of Recoverability (i.e., *Ad repedendus res).*

Worth noting is the fact that this principle is central to the African conception of justice. It is found, for instance, in several African philosophical dialects of the Sothos, Shonas and the Hereros. The principle holds that the lapse of time, however long, may not alter injustice into justice. A Sotho expression is *Molato ga o bole*. It follows therefore that Sidgwick's (1977) statement does not hold for all the epistemologies to be found among the peoples of planet Earth. There is therefore no justification to regard it as binding upon the indigenous conquered peoples of South Africa. It underlies the special value that this research contributes to the Just War doctrine by inserting into it the principle of *Molato ga o bole*. To this end, Article 17 of the Vienna Convention explicitly provides that "a new state is under no obligation to succeed to a multilateral treaty if it does not want to do so" (Akehurst, 1970:161). A new State is guided by its national interest and history as such. The indigenous conquered people of South Africa are entitled to the return of their land.

A question is, how the conquered peoples of South Africa recover their land when peaceful protests were banned? On the one hand, "History has taught that a group in power has never voluntarily relinquished its position. It has always been forced to do so. And we do not expect miracles to happen in Africa" (Mokoka, 1984:252). On the other hand, there was no way in which peaceful protests could yield the desired results; since the overriding aim and conviction of the successive governments during that period was the preservation of a White-controlled State (Barber and Barratt,1990:2). The comments made by successive Prime Ministers were consistent in one thing, that there was no intention to heed the demands by the indigenous conquered peoples of South Africa. The quotation below is one example indicating the commitment to resisting any group claiming a space or territory on what was incorrectly perceived as White South Africa. Jan Smuts said:

> We have developed a white community here, and I can visualize no future government will ever dare to touch the basis on which South Africa has been developed.' In 1955 Johannes Strijdom stated: 'Our task in South Africa is to maintain the identity of white man: in that task we will die fighting.' Ten years later his successor, Hendrik Verwoerd, was telling the world: 'Our motto is to maintain white supremacy for all time to come over our own people and our own country, by force if necessary.' John Vorster who followed, assured the white electorate that the world should know that in defending itself white South Africa 'will fight to the end with all that we have got.
>
> (Barber & Barratt, 1990:2)

It was a stalemate considering the fact the Afrikaner leaders expressly stated, one after the other, that their task in South Africa was to maintain the identity of the White man and, for that, they were prepared to die fighting. The other one indicated that their task is to maintain White supremacy for all time; to cover over their own people and their country, by force if necessary; and lastly, to assure the White electorate that the world should know that, in defending itself, White South Africa would fight to the end with all that they have got,' how else can they communicate their perceived threat from the indigenous conquered peoples against their ill-gotten being in South Africa. In essence, the liberation struggle about the reversal of forcible dispossession of land and the recoverability of sovereignty and title to territory. This alone put the indigenous conquered peoples of South Africa on a collision course with Jan Smuts, Johannes Strijdom, Hendrik Verwoerd, John Vorster and their constituencies. "…the choice of violence is, in fact, antecedently made by the oppressor not the oppressed" (Wiredu, 1586:374). No number of deputations and letters, therefore, was going to change the conqueror's sense of entitlement to the dispossessed land acquired through the questionable right of conquest. As part of defending the White South Africa, the liberation movements were outlawed.

The indigenous conquered peoples had run out of option except declaration of war. The manifesto of the Umkhonto We Sizwe clearly elaborates this point thus:

> Refusal to resort to force has been interpreted by the government as an invitation to use armed force against the people without any fear of reprisals. The methods of Umkhonto We Sizwe [the Spear of the Nation] mark a break with the past… The Government policy of force, repression and violence will no longer be met with non-violent resistance only! The choice is not ours; it has been made by the

> Nationalist Government which has rejected every peaceable demand by the people for rights and freedom and answered every such demand with force and yet more force!
>
> (Wiredu, 1586:374)

The outlawing of the liberation organisations, the arrest of some leaders, the death of others in the custody of security police agents and the escape into exile of yet other leaders created a period of political silence, fear and doubt. For Mokoka (1984:174), the life of Black people was characterised by fear and doubt,

> [Which] prevented them from venting, on a national plane, their political aspirations and goals against the mounting tide of oppression and repression. The grip of fear on the Blacks was intensified by a wave of arrest that followed by the bannings. The "subsequent political trials which stretched into 1966 and ended with nearly all the leaders imprisoned on the Robben Island" and the systematic deaths of political detainees in the custody of the security police agents, added more to the already existing fear and doubt. Notwithstanding the reign of fear and doubt in their life, the indigenous communities soon spontaneously formed, on the local level, isolated cultural and even secret political groups.... These groups functioned as outlets of the communities' growing fear and depression. To the extent that they grew countrywide and became the common feature in the black communities, these spontaneous groups can be said to have prefigured the rise of Black Consciousness in South Africa.
>
> (Mokoka, 1984:174)

From a principle of last resort of the Just war theory perspective, the indigenous conquered people had exhausted all means of protest. Resort to the armed force was the only option open to the conquered peoples of South Africa (Makhetha, 1996: 95). This point was affirmed during the Rivonia Treason Trial in 1964 when Mandela addressed the court.

Mandela outlined the history of the ANC's peaceful conduct of the struggle and the tyrannical and oppressive response in return by the successive colonial-apartheid regimes. In this regard, the delegations to London and to the local regimes and many other forms of peaceful protests; and the peaceful defiance campaign of 1952 were, for example, met with brutal force from security forces. Mandela's letter to the then State President PW Botha in 1989 illustrated the ANC's commitment to the pursuit of peaceful resolution of the liberation conflict vividly:

> The position of the ANC on the question of violence is very simple. The organisation has no vested interest in violence. It abhors any action which may cause loss of life, destruction of property and misery to the people. It has worked long and patiently for a South Africa of common values and for an undivided and peaceful non-racial state. But we consider the armed struggle a legitimate form of self-defence against a morally repugnant system of government which will not allow even peaceful forms of protest…. Right from the early days of its history, the organisation diligently sought peaceful solutions and, to that extent, it talked patiently to successive South African governments, a policy we tried to follow in dealing with the present government.
>
> (Doxtader & Salazar, 2007:58)

A moment arrived at which the conquered were faced with one option: to accept permanent subjugation or defy the system. They chose the latter (Mokoka, 1984:256). By defying the system, it meant pursuing national liberation through the armed struggle. "It is difficult to imagine how these organisations, notably the ANC and the PAC, could have carried on their activities non-violently after they had been banned" (Motlhabi, 1984:210). It was no surprise that Mandela called for the use of force in order to repel the force (*vim virepellere*) of the conqueror. Mandela wrote thus:

> I like to incite an audience, and I was doing so that evening. As I condemned the government for its ruthlessness and lawlessness, I overstepped the line: I said that the time for passive resistance had ended, that non-violence was a useless strategy and could never overturn a white minority regime bent on retaining its power at any cost. At the end of the day, I said, violence was the only weapon that would destroy apartheid and we must be prepared, in the near future, to use that weapon... I began to suspect that both legal and extra-constitutional protests would soon be impossible. In India, Ghandi had been dealing with a foreign power that ultimately was more realistic and far-sighted. That was not the case with the Afrikaners in South Africa. Non-violent passive resistance is effective as long as your opposition adheres to the same rules as you do. But if peaceful protest is met with violence, its efficacy is at an end. For me, non-violence was not a moral principle but a strategy; there is no moral goodness in using an ineffective weapon. But my thoughts on this matter were not yet formed, and I had spoken too soon.
>
> (Mandela, 1994:146)

From a Just war point of view, the conditions dictated resort to war. Contrarily, there are thinkers who oppose violence that violence creates more harm than its intended goal. Molefe (1981:108) argues that:

> "resorting to armed force is] evil in that it inescapably and inevitably involves the destruction of irreplaceable, sacred and unique human lives and the property which retrogressively takes a lot of time and energy for restoration. It further causes more harm and evil, increases more of a hostile separation of those involved rather than making room for both transformation and reconciliation"
>
> (Molefe, 1981:108)

Similarly, Kwasi Wiredu (1586) argues against the use of violence in the liberation struggle. For Wiredu, violence begets more violence and has a tendency of creating authoritarian mentality in the person perpetrating it. Accordingly, Wiredu (1586) asserts that:

> …by its very nature violence entails the overriding or blocking or even the abolishing of some human will. On the basis of this consideration about the authoritarian potential of violence, it would be possible to build a libertarian argument to the effect that although some limited purposes (such as colonial liberation) can be attained through violence, any real appropriation to the Good Society is bound to elude violent methods.
>
> (Wiredu, 1586:379)

As a solution to the effects that violence can have on property and human life, Molefe (1981) proposes peaceful moral pressure on the official perpetrators of social evils. By peaceful pressure he means, among other things, protest marches and publicity of the injustice done by the perpetrator. What about Wiredu's problem of violence to having a tendency of creating authoritarian mentality in the person perpetrating it? But it is a tendency, it is not an inherent property in the use of violence. We cannot know in advance whether the ANC will as well develop the authoritarian tendencies. Furthermore, violence in this regard, is perpetrated by a regime or leaders who are not prepared to listen to reason. Is it not therefore insensitive to refuse to stop the perpetrator of violence, including by killing the attacker, when one has the means to do so? Moving from perspective of the principle of forfeiture, he who is prepared to take life of another human being is equally forfeiting his or her life to live. For that reason, we object to non-violence advocates that "acts of omission are sometimes as morally reprehensible

as acts of commission" (More, 1980, 127). Non-violence at all cost in the face of death boils down to a violation of a right to life and that logically absurd because a right to life is basic to all rights such as the right to protest, to work even as cheap labour under colonial-apartheid, the right of movement, etc.

In this context a question arises, is non-violence not as equally destructive as violence? As Miller (1990) observed, the ANC did pursue non-violent strategies but in vain. For example, the ANC embarked on strikes, organised boycotts and peaceful marches. And the government would react with un-proportional force whenever it felt that the basic power structure of the regime was threatened even if by non-violent means of protest (Miller, 1990:91). The peaceful strategy advocated by Molefe (1981) has failed in South Africa. Life and property were being lost even when the indigenous conquered peoples were using non-violence to advance their liberation cause. The Sharpeville Massacre of 1960, the 1976 Soweto students' uprisings and many others are cases in point. Hauss (2001:84) puts the toll at about 40 000 of people who lost their lives in peaceful protests. Miller (1990) opposes the use of armed force for the reason the ANC does not meet the requirement of reasonable prospect for success. His argument is based on the assumption that the war was going to drag on for years and would provoke counter-violence from the State, and that might, in turn, ignite mass violence. Thus, the use of force would lead to full-blown terrorism, which would ultimately lead to evil consequences such as economic and social disruptions; and the destruction of property and lives. It is not clear for Miller (1990) on how much of time is long enough for the armed struggle to deteriorate into chaos in mass violence. Our view is that non-violence in the face of a violent attacker who is prepared to take life has the same destructive outcome as the same violence that the advocate of non-violence is not willing to stop. In the context of South Africa, we can only reach the same conclusion that was reach by Mandela that violent forms of struggle were the only means available.

For Mandela the colonial-apartheid government had consistently closed all available peaceful means to the resolution of the problems of racial oppression in his letter to the then State President Botha that:

> "Not only did the government ignore our demands for a meeting, instead it took advantage of our commitment to a non-violent struggle and unleashed the most violent form of racial oppression this country has ever seen. It stripped us of all basic human rights, outlawed our organisations and barred all channels of peaceful resistance. It met our demands with force and, despite the grave problems facing the country, it continues to refuse to talk to us. There can only be one answer to this challenge: violent forms of struggle"
>
> (Doxtader & Salazar, 2007:59).

Meanwhile, the ANC was not consistent on this principle. At one time, their objective was taking State power through mass insurrection. But, at other times, the objective was to force the then government to the negotiating table. Melber (2003) unravelled the inconsistency thus:

> It would be possible to draw a line from the founding leaflet of Umkhonto We Sizwe (MK), issued on December 16, 1961 (and from the 1962 South African Communist Party [SACP] programme, The Road to South African Freedom) to the Harare Declaration of 1989 – and to the eventual outcome and claim that the strategy of the African National Congress (ANC) was always for a negotiated settlement to achieve democracy in South Africa.
>
> (Umkhonto we Sizwe 1961), 1989a, 1989b)

This point is expressed by Mandela as quoted in Alister Sparks that "I started Umkhonto We Siswe ... but I never had any illusions that we could win a military victory; its purpose was to focus attention on the resistance movement" (Sparks, 1994:26). But, decisions of the ANC conference at Morogoro (April 25–May 1, 1969) and countless other ANC documents which insist that the goal was the armed seizure of power by the masses" clearly contradict the view that the objective of forming the MK was to take power from the colonial-apartheid government by force of arms (Melber, 2003:156).

Based on the foregoing, we would agree with Melber's (2003) position that the MK did not have a realistic strategy for achieving power, despite the heroic sacrifices of its combatants. In the end, the negotiated solution in South Africa was not a "choice" by the ANC leaders, it was forced on them because they had no alternative (Melber, 2003:156).

> But the question of politics and its supremacy over the military was strongly emphasised by both the ANC leadership and the camp administration. All commissars were required to inculcate this policy among their cadres. It was emphasised that our war was an extension of political objectives by military means, particularly in view of the arrogance and violence of the apartheid regime against defenceless people. It was stressed that the MK did not subscribe to the policy that says power grows out of the barrel of the gun.
>
> (Ngculu, 2009:65)

On this basis, it has been shown that attempts to resolve the colonial-apartheid oppression peacefully were met with violence. As a result, the ANC was justified in resorting to the armed struggle because that was the only method left to the indigenous peoples conquered in the *unjust wars* of colonisation. The option of resorting to armed struggle gave rise to an important Just War question that sought to determine whether there were prospects to succeed or not. Resorting to armed struggle should not be a hasty decision because it should be based on an assessment of the prospect of success. In terms of the Just War Tradition, if the prospect of failure outweighs that of success, the plan to embark on armed struggle must not be put on hold. We will now consider the Principle of Probable Success.

2.2.3 Probable Success

The principle provides that the probability to succeed in waging war of righting the wrong committed should be higher than the probability to fail. Before the sovereign can declare war, he or she must have assessed the odds first. Otherwise declaring war with going through the exercise of weighing the probabilities is itself morally wrong.

It is difficult to fulfil the requirements of the Principle of Probable Success because it is often not possible to gauge in advance whether the prospects success is high or low. Sometimes it is only during actual that such a determination can be made more especially because belligerents hide their weaknesses while posturing as strong. During the United States-led wars waged in Libya against Muamar Gadhafi and the one which was waged in Iraq to remove Saddam

Hussein, all prospects for success looked high. But at the end, both leaders were overthrown, killed and their regimes got changed, yet peace and stability did not return. The equilibrium which was disturbed was not restored.

Another difficulty with the Principle of Probable Success is that it is biased in favour of preserving the status quo because liberation movements launch their armed struggle, always from a weak position in as far as resources are concerned. They never command resources equal to the target regime at the initial phase. For example, they need support in terms of funding or friendly States to support their cause, supply of new recruits, training camps and instructors, etc.

In South Africa, for instance, the colonial-apartheid government had far more resources than the entire Southern African region. Other States in the international fora took a long period of time to recognise the ANC's just cause. The legacy of branding the ANC as a terrorist organisation was actualised by the detention of Tokyo Sexwale, a senior member of the ANC, as recently as October 2013 at the JF Kennedy Airport, while on a business trip to New York (*Mail & Guardian*, 2013, October 27). Sexwale was detained because the Homeland Security laws still recognised him as a member of a terrorist organisation during the apartheid era in South Africa and therefore it appeared on the list of banned persons in the United States.

In this regard, when Nelson Mandela, Oliver Tambo, Walter Sisulu and others declared war against the colonial-apartheid government by forming uMkhonto We Sizwe, the prospect of success was very low and remote (Miller, 1990:91). Upholding the principle under those circumstances would have meant abandoning the idea of armed struggle altogether. On this basis, the ANC had therefore failed to meet the principle, but this failure was justified because its opposite would have meant survival of the status quo – perpetuation of colonial-apartheid regime. We have come to the end of the discussion of the first phase of the Just war theory which is known as the *Ius ad bellum*. We will consider the second phase which known as Ius in Bello.

2.3 Ius in Bello (how to conduct war justly)

The *Ius in bello* is a phase of the Just War Theory that seeks to morally regulate the actual conduct of war once a legitimate authority declared it in line with the principles of the *ius ad bellum* as discussed above. The *ius in bello* consists of two principles namely the Principle of Discrimination or non-combatant immunity and the Principle of Proportionality. In this phase of the theory, the objective is to regulate war in such a way that a civilian population or people who do not bear arms is spared from military attack (adherence to the Principle of Discrimination or non-combatant immunity) and also that the attack against the opponent and or military target should mirror the wrong committed against the attacker (the Principle of Proportionality) because it is meant to correct it. if the attack is excessive, then it violates the principle. We proceed to discuss the conduct the liberation conflict through two principles of the Ius in bello.

2.3.1 The Principle of Discrimination

The Principle of Discrimination prescribes an exemption of non-combatants from attack during war. In terms of the Principle of Discrimination, people who bear arms should be discriminated from those who do not bear arms. As Walzer (1977) wrote, "once war has begun, soldiers are subject to attack at any given time (unless they are wounded or captured)" (Walzer, 1977:138). The underlying assumption is that, during a war authorised ideally in terms of the *Ius ad bellum* principles, soldiers or combatants forfeit their rights to life as they are themselves ready to take life of the enemy combatant. We will analyse the principle of non-combatant immunity later as we are now considering the ANC's conduct of the armed struggle.

The ANC's approach to the armed struggle was three-fold, namely: 'rural guerrilla warfare', 'armed propaganda' and 'mass protests', rhetorically called 'people's war'. The ANC's armed struggle was modelled on the Algerian and Cuban armed struggles most probably because the first MK combatants were trained by the Algerians as well as the influence of the Communist Party of South Africa. The 'rural guerrilla warfare' only took place in the initial years before it pivoted to the urban area over time. The rural phase of the struggle did not have the desired impact.

> For example, Sebatakgomo, an initiative of the Communist Party and the African National Congress (ANC), played a critical role in the Sekhukhune Revolts of

> 1958, and there were links between the ANC in Durban and the Pondoland Revolt of 1960. But while these links existed, they should not be overstated. Many migrants saw their resistance in more local terms…. But heavy-handed state repression, divisions within rural communities, and the fact that many chiefs and headmen succumbed to material blandishments and political elevation resulted in a thorough reconstruction of society in both the old reserves and the Trust farms.
>
> (Delius, 2017)

One of the operational plans for 'rural guerrilla warfare' in South Africa was codenamed Operation Mayibuye (OM). It was uncovered by the police in the raid of Rivonia on 11 July 1963. Those people who advocated for the OM argued that very little, if any scope, existed for the defeat of White supremacy other than by means of mass protest actions in which armed resistance played a leading role. They, however, acknowledged that their guerrilla operations and organisational readiness were not adequate enough to enable mobilisation of civilians into the mass insurrection plan. The South African armed struggle effectively gained traction in urban areas than the rural ones (Barrel, 1993:131).

South Africa was different from countries such as China, Cuba, Vietnam, Angola, Mozambique and Zimbabwe as their population composition was largely peasant and less industrialised than South Africa at the time. The 'rural guerrilla war' models used in the above-mentioned countries would therefore not be suitable in the urbanised conditions of South Africa. For example, SWAPO, in the neighbouring Namibia, successfully waged a rural guerrilla struggle, but the ANC had to opt for a strategy of armed self-defence of the workers' movement in preparation for insurrection, which would have implied far lower-key re-entry to the country for trained cadres. The challenge, however, was that the MK did not have sufficient numbers and the distance between Zambia and South Africa was just too long for any meaningful operation (Barrel, 1993:131).

The liberation of Angola in 1975 opened an avenue for a base and training camps for MK closer to the target or South Africa. The 1976 Soweto uprising brought a stream of young recruits approximately 3 000 to the ANC, unprecedentedly increasing the size of MK. However, those opportunities proved difficult for the ANC to exploit as the colonial-apartheid government of South Africa countered the new development by joining forces with *UniaoNacional para*

Independencia Total de Angola (UNITA). South Africa was acting in defence of its colony of South West Africa, but also in aggression against the Angolan non-capitalist regime. UNITA was engaged in a reactionary civil war against the socialist MPLA government of Angola. UNITA and the South African Defence Force jointly waged war in Angola from 1978 throughout the 1980s. South Africa's aggression was soon extended to Mozambique. The aim was to deny MK rear bases contiguous to South Africa. By this, the South African regime got encouragement from the United States support for the counter-revolutionary Contras in Nicaragua. Entry routes which were crucial only to a strategy of protracted guerrilla warfare were cut off (Anon, 1976:1-6). The liberation of Angola and particularly Mozambique fell short of assisting the MK in terms of establishing military bases closer to South Africa.

The front-line States were still not strong enough in military capabilities to stand up against a South African attack. "None of South Africa's immediate neighbours had permitted the ANC to set up military bases on its territory, for this would have invited trouble. South African commandos periodically blew up supposed ANC hide-outs in the region's capitals; and in 1985–86 the South Africans blockaded Lesotho's pro-ANC government until it collapsed" (Mallaby, 1992:216). The colonial-apartheid government was using a carrot and stick strategy in relating to neighbours. They raided Botswana, Lesotho and Zimbabwe by military force and pressured Mozambique into signing the Nkomati Pact. The Nkomati Pact was a diplomatic agreement between Mozambique and South Africa that Mozambique should not allow ANC military bases on their territory. And, in return, South Africa would reward Mozambique by allowing her citizens (migrants) to gain employment in South Africa with ease. But, also dishing out aid to Botswana, Swaziland, Mozambique and Lesotho "via the Southern African Customs Union, a regional common market which collected tariffs jointly, distributing a sizeable slice of these revenues to the smaller states" (Mallaby, 1992:216). So, where a particular State refused to cooperate, the commandos were ready to blow it up, but equally where there was cooperation aid was ready to reward it.

In 1983, the ANC leadership undertook a 'benchmarking' trip to Vietnam when it became clear to them that it was not possible to open military bases closer to home. Upon their return from Vietnam, they launched a new approach to the armed struggle known as the Strategy and Tactics. According to Ngculu (2008:180), implementation of the Strategy and Tactics meant

that they had to the rural oriented guerrilla warfare in favour of the insurrectionary tactics. A development of insurrectionary plan meant:

- Building a united front of anti-apartheid organisations operating legally and semi-legally inside South Africa;
- Influencing affiliates of the united front to furthering the aims of the ANC; and
- Using the united front as a recruitment pool for ANC underground cadres.

In 1983, the United Democratic Front (UDF) was launched and later in 1985 the Congress of the South African Trade Union (COSATU) was established. In the same year, the colonial-apartheid government developed counter measures to the mass insurrectionary strategy by supporting and promoting African groups in the townships which were opposed to the cause of liberation. In this regard ordinary black South African young individuals, some members of the Inkatha Cultural Movement in the then Natal; and other movements from outside South Africa, such as the UNITA and the Mozambique National Resistance (RENAMO). The MK's insurrectionary plan was thwarted and it left those individuals who were openly sympathetic the ANC's cause vulnerable to attack. The youth reacted by organising themselves into groups which were called Self-Defence Units against the Inkatha imps in the low-level intensity civil war of 1986 to the 1990s. The same was the case in Crossroads, Cape Town where the mass movement barely had any arms with which to resist the Witdoeke. A combination of counter-liberation measures and mass detention of about 25 000 people in 1986 completely put the activities of the insurrectionary plan to a stop.

The insurrectionary strategy inclusive of the UDF and COSATU was undermined at the end. By the end of 1986, the ANC found itself in "a profound strategic hiatus, if not crisis" (Houston, 1999:384, 44).

The insurrectionary strategy largely depended on the masses of civilians. From the *ius in bello* perspectives, the strategy failed to comply to the Principle of Discrimination because civilians were not only involved in the conflict, they were core participants with few individuals in possession of military skills and arms. Compounding the problem of involving civilians in the

guerrilla warfare is that guerrillas essentially function better within civilian populations. As Walzer (1977:184) wrote that:

> The issues posed by the guerrilla war paradigm, however, are not resolved by this distinction. For guerrillas don't merely fight as civilians, they fight among civilians, and this in two senses. First, their day-to-day existence is much more closely connected with the day-to-day existence of the people around them than is ever the case with conventional armies. They live with the people they claim to defend, whereas conventional troops are usually billeted with civilians only after the war or the battle is over. And second, they fight where they live; their military positions are not bases, posts, camps, forts, or strongholds, but villages. Hence, they are radically dependent on the villagers, even when they don't succeed in mobilising them for people's war.
>
> (Walzer, 1977:184)

The Principle of Discrimination is difficult to apply in the armed struggle for liberation because most of the time liberations fighters do not adhere to the basic requirement of the *Ius ad bellum* such being identifiable by wearing a uniform. And at times they do not have open support from other States because such support can easily create a diplomatic problem of political interference of one State into the internal affairs of the other State. So, freedom fighters do not only need the support of the civilian population, they hide among them. The question then arises, namely, are people who support guerrillas by providing shelter and food, automatically still qualify as non-combatants even if their actions are indirectly contributing to the sustenance of the fight? The answer is 'no'. Much as the enemy soldier who is naked and taking a bath does not pose a threat, a non-combatant who is merely showing moral or even logistical support to the enemy combatant is not a legitimate target. In our view, we should not analyse adherence to the principle of non-combatant immunity in isolation from other principles such the principles of Right Intention and Proportionality. Thus, taking into consideration other principles show that whether the harm of non-combats was intended or only came as a collateral.

Moving from the above, one can conclude that the ANC had the intention to comply with the moral conventions of war because the intention to adhere to the principles of Just war theory is often illustrated. For instance, in January 1981, during his speech to the mourners at the funeral of the 13 people who were killed in the Matola Raid, Tambo asked a question which

demonstrated awareness of the principle of non-combatant immunity. He asked whether farms and houses of Whites, which certainly had firearms and trained soldiers deployed to protect them, were to be viewed as legitimate targets (Ngculu, 2009:180). He went on to highlight that the intensification of conflict in South Africa was going to blur the distinction between hard and soft targets. The sentiment was echoed by Chris Hani when he stated that the theatre of the conflict was going to shift to the White areas and, as a result, White civilians would be caught in the cross fire. It was generally easy to identify White areas then as settlement patterns were racially segregated. Tambo challenged the colonial-apartheid regime to state whether every homestead or farm in South Africa with a gun was a legitimate target or not (Ngculu, 2009:180). On the basis of the above, it shows that the ANC was committed to making a distinction between combatants and non-combatants in its conduct of the liberation war.

However, it did not take long before Tambo made a call at the Kabwe Conference of the ANC on MK combatants to take the struggle to White areas. The Kabwe Conference of the ANC coincided with the declaration of the first State of Emergency inside South Africa. The Mogoo's Bar in Durban was bombed and the ANC claimed responsibility for the act. By the mid-1980s, the Whites were increasingly splintered, with big swings towards the ultra-right. Taking the struggle to White areas had inadvertently mobilised many Whites into supporting the White ultra-right. In Barrel's (1993) view, taking the struggle into White areas tended out to be counter-productive because it only served to unite Whites. And, if there was any fissure among White community, it was not significant enough to cause a split among them to weaken the State (Trevor, 1994:97; Barrell, 1993:420-3).

The ANC had subsequently launched two programmes of action, namely, Zikomo and Hurricane. Zikomo means 'thank you' in Nyanja – a language spoken in most of the southern African countries. According to the ANC, Zikomo symbolised their gratitude to the people of Zambia for their steadfast support, especially after the setback of the Nkomati Accord. It was also an appreciation to those people back in South Africa who responded to the call made by the ANC "to render South Africa ungovernable and apartheid unworkable" (Ngculu, 2008:185).

Operation Zikomo meant that members of MK were divided into small units and each unit got infiltrated into township and village communities. Since such guerrillas did not wear a uniform, it would not be easy to identify them from civilians. Their brief was two-fold, to train more people in military skills and also to mobilise communities into establishing a mass revolutionary 'army' inside the country.

Operation Hurricane was implemented in a form of a campaign in which land-mines were planted along borderlines, particularly in the then western and eastern Transvaal. The main targets were White farmers and patrol vehicles used by security forces in the border areas. In the ANC's view, White farmers along the borderlines had volunteered themselves as the buffer between security forces and its combatants. They were linked by radio to the police stations and/or military bases. Most of them were part of the armed commando units that were a reaction force against MK combatants. Thus, farmers were eventually made legitimate targets.

About 367 incidents of MK activities were recorded during the two operations (Barrel, 1993:421). In general, the ratio was three guerrillas captured or killed for each 13 attacks (Barrel, 1993:260). The relative success of the two operations led Ronnie Kasrils to remark, as quoted in *The Citizen* newspaper of 18 March 1986, that "our trained combatants are now able to emerge among our risen people, more and more of whom are being brought into MK units at home" (O' Meara 1996:337). In similar vein, Dan O'Meara had acknowledged that, by May 1986, there was a noticeable increment of ANC military operations and such activities were carried out by locally trained combatants (Barrel, 1993:441, 461).

The Operation Hurricane created fear among Whites and, as a result, tension between the colonial-apartheid regime and its traditional, racially based constituency arose thereby causing White civilians to put pressure to their government to tighten safety and security measures (Ngculu, 2008:185). The operations Hurricane and Zikomo violated the Principle of Discrimination against civilians because they involved civilians in combat activities. The point is reflected in Colonel Jan Breytenbach view, as quoted in Van Zyl Slabbert (2006) that:

> We can't fight a bush war in South Africa,' he said to the New York Times on 20 June 1980. Look at the map. It is all developed. There are roads, radios and

> landing strips everywhere... Our masses have to serve as our bush. The Black community is our bush.
>
> (Van Zyl Slabbert, 2006:34)

Colonel Jan Breytenbach's reference to Black community as their bush points to a potential violation of the principle of discrimination.

MK combatants who were infiltrated into South Africa after 1976 had targeted, to a large extent, urban national key points and installations such as courts, pass offices, police stations in Soweto; the sabotage of SASOL in early June 1980; the rocket attack on Voortrekkerhoogte in 1981; the coming-on-stream Koeberg nuclear power plant in 1982; and the attack outside the South African Air Force (SAAF) Pretoria headquarters in which 19 were killed in 1983 (Barrel, 1993:80, 220, 236, 299). The infrastructural points which were targeted above demonstrated a consistent adherence to the principle of non-combatant immunity.

The colonial government reacted to the campaigns in two ways that seems to have been proportional to the damage caused. Firstly, the State infiltrated their agents, known as Askaris, into the ANC 'bomb squads.' The Askaris started supplying ANC cadres and young naïve supporters with booby-trapped grenades which would explode in the hands. The aim was to cause suspicions and confusions among the genuine MK personnel. And second, on 19 May 1986, coincidentally during the visit by Eminent Persons Group in South Africa, the SANDF carried out bombing raids simultaneously on ANC properties in Harare, Gaborone and Lusaka (Ngculu, 2008:191).

Be that as it may, the ANC had several lapses regarding the *jus in Bello* principles. However, their public statements were underlain by the quest to adhere to the principles of the *ius in bello*. The condemnation of the Silverton (Pretoria) siege in which three MK combatants took refuge in the bank is the case in point. Thus, by taking refuge in the bank, the combatants put the lives of non-combatants inside the bank at a life-threatening risk.

Flowing from the above, it has shown that it is difficult to discriminate between combatants and non-combatants. *Ius in bello* principles are general difficult to comply. For Fiala (2008) Just war theory is an ideal in the sense that its standard is too high to for human beings and that no war is absolutely just.

> It is a myth to claim that any war is purely good or just. We can tell a simple story of good and evil that is used to rationalize war. But such one-dimensional moral language portrays the world as we want it to be, not as it actually is. The danger is, however, that the more ardently we believe this mythic language, the more likely we are to fight wars that fail to be just. The myth helps us avoid the nausea and makes it possible to do things that are morally repugnant.... I can, however, imagine a variety of situations in which I would feel justified in killing in self-defence. And I can also imagine some sorts of war that could be justifiable. But in general, I do not think that most wars are actually just. I think that the principles of the just war theory are good ones insofar as they set a very high standard for good behaviour. But I do not believe that it is easy to fulfil the requirements of these principles in practice. I also think that the just war theory can seduce us into thinking that it is a simple matter to wage a just war.
>
> (Fiala, 2008: ix)

Understanding the context within which Fiala wrote about the Just War Theory is crucial for us. Fiala wrote his book at the heat of the war of Weapons of Mass Destruction (WMD) in Iraq. The war in Iraq, which drew attention of almost all moral ethicists, was unanimously interpreted as unjust and unjustifiable. In his book, Fiala (2008:13) also addresses the war against terrorism in Afghanistan. Both wars have arguably caused more human suffering than their initiators had intended, because the continuing instability keeps on claiming combatant and non-combatant lives alike. From that of view of enormous loss of live, we would agree with Fiala (2008) that, given the advancement of military technology, "mankind [has] the capacity quite literally to destroy itself" (Haward, 1992:32). From this premise, a is purely good or just war is a myth.

In order to resolve this moral quagmire, we invoke the Principle of *Double Effect* or *Collateral Damage* in order to deal with the inability to avoid civilian attack in the face of military necessity. The principle Double Effect provides that there are situations in which it is not possible to avoid attacking non-combatants. Situations as the one that was described above in which combatants hide in the civilians. Under such circumstances, "deaths are acceptable if

they are not directly intended" (Fiala, 2008:13). We invoke Walzer's (1977:138) four conditions in our attempt to address the moral dilemma encountered in the application of the principle, namely:

- The act is good in itself or, at least, indifferent. Which means, for our purposes, that it is a legitimate act of war;
- The direct effect is morally acceptable – the destruction of military supplies, for example, or the killing of enemy soldiers;
- The intention of the actor is good, that is, he aims only at the acceptance effect; the evil effect is not one of his ends, nor is it a means to his ends; and
- The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable under Sidgwick's (1977) Proportionality rule.

It should be taken into cognisance that there a is limitation to Walzer's four conditions by a Sub-Principle known as the Collateral Damage principle. In terms of the Collateral Damage principle, some processes and or actions are in-and-by-themselves evil or immoral and therefore fighters, regardless of their cause, ought to refrain from them. Examples of such methods are: rape, torture, maltreatment of prisoners and the use of poison to name a few.

Another principle known as the Principle of Forfeiture of the right from attack cuts across both the aggressor State and the defending State. Walzer (1977:136) elucidates this point as follows:

> Everyone else retains his rights, and states remain committed and entitled, to defend these rights whether their wars are aggressive or not. But now they do this not by fighting but by entering into agreements among themselves (which fix the details of non-combatant immunity), by observing these agreements and expecting reciprocal observance, and by threatening to punish military leaders or individual soldiers who violate them. This last point is crucial for an understanding of the war convention. Even an aggressor state can rightly punish war criminals – enemy soldiers, for example, who rape or kill civilians. The rules of war apply with equal force to aggressor and their adversaries. And we can now see that it is not merely the moral equality of soldiers that requires this mutual submission; it is also the rights of civilians.

Our discussion of the Principle of Discrimination or non-combatant is still continuing because its complexity goes deeper than we have experienced in this discussion. For instance, there are individuals who are not combatant as such, yet their occupations put them in a vulnerable situation. People working in military complexes (such as military hospitals, those who cook for soldiers and those who work in the arms industry), for example, do not engage directly in combat, but they support the effective continuation of the combat against the enemy. The defence advanced by a police man during his appearance at the Truth and Reconciliation Commission illuminates this difficulty much clearer: "Our weapons, ammunition, uniforms, vehicles, radios and other equipment were all developed and provided by industry. Our finances and banking were done by bankers who even gave us covert credit cards for covert operations" (Cronin, 1994:10).

On the basis of the above, it is clear that modern war is more than fighters who appear at the battle field. There are more personnel who are not fighters, but their skills and roles are key to sustaining war. These personnel occupy strategic positions in the scheme of war. It is our conclusion that such personnel should be made military targets, however, accept that since they are involved in a broader context of war, they might be collateral targets. No fighter should intention target them, but if the process they are hurt by say collateral fire, it is morally acceptable. This conclusion should be viewed in consideration with other principles. Let us move to the principle of proportionality.

2.3.2 The Principle of Proportionality

The Principle of Proportionality requires that measures taken to remedy the wrong committed should not exceed the crime committed. Punishment should mirror the crime because exceeding the harm is not morally permissible. Punishment should be proportional to the harm it seeks to remedy. If, for example, civilian residential areas and their means of survival such as agricultural farms are destroyed during war, it the principle is violated. The principle seeks to limit excesses in war situations.

It is not always easy to quantify the damage to be remedied. For example, it is difficult to quantify the harm committed against the indigenous peoples conquered in the *unjust wars* of

colonisation because the nature of the harm was not inflicted by military attack as such. It was more inflicted by the system of colonial-apartheid through successive legislation and methods of enforcement of the laws. The harm is continuing to reverberate in the economical, psychological and epistemological being of the majority of the conquered peoples of South Africa. The legacy is imprinted on all social units; from the smallest unit to the largest one – the individual, family and the nation at large (Doxtader & Salazar, 2007:165). It is immeasurable. Tlhagale (1986) describes the harm as follows:

> The apartheid machine has forcibly relocated more than 500 000 people in an attempt to streamline the apartheid policy. Thousands have been charged with 'pass' law offences. Thousands of blacks are in exile. The influx control system has generally destroyed family life for those who are denied the freedom of movement and the freedom to sell one's labour where there is a lucrative market. Imprisonment, torture and death in detention still continues on the basis of one's skin colour…. But the South African Defence Force has been swift in retaliating, destroying more lives and destabilising the neighbouring countries and holding them to ransom.
>
> (Tlhagale, 1986:144)

Long after the formal abolition of the colonial-apartheid system, the legacy is continuing to manifest itself through the dichotomy of economic power and privilege on the one hand and underdevelopment and poverty on the other. So, correcting the harm committed against the indigenous conquered peoples of South Africa cannot be limited to armed action. It is therefore imperative in terms of the *Ius post bellum* that there should be reconstruction of what was destroyed in order to restore the equilibrium.

2.4. Conclusion

In the chapter we have subjected the South African liberation conflict to the principles of the Just war theory namely, the *ius ad bellum* and the *ius in bello*. In our view, the ANC had generally satisfied the requirements of the theory. It was however, found wanting on the principles of legitimate authority and the prospects for success. The failure to meet the requirement of the principle of legitimate authority is largely to the theory did not accommodate fighters for liberation. It would seem that original thinkers of the theory did not anticipate conditions in which the sovereign authority could be alien to the governed and

therefore itself illegitimate. The distance between South Africa and the ANC's military bases was never going to allow it to meet the principle of prospect for success. It is conclusion that the ANC's armed struggle was pursuit of a just cause with the right intention. Despite of the ANC's armed struggle, the liberation conflict was at the end resolved through negotiations. In the next chapter we will consider the resolution of the conflict through the armed struggle.

Chapter 3

Negotiations for the resolution of the national conflict

3.1. Introduction

This chapter explores liberation negotiations between the ANC on the one hand and the National Party of the other. We look at the processes that let to negotiations and the outcome thereof. In that regard, we argue that the negotiations concluded in favour of the National Party and big business. Compromise is essential in any negotiating situation. However, it seems the ANC had compromised the very essence that they were fighting for, the return of land to its original owners. Compounding to the problem of failure to recover sovereign title is a shift from parliamentary supremacy to constitutional supremacy and a continuation of the neo-liberal capitalist system dominated by transnational business. The situation left the major constituency of the ANC poor and continuous disadvantage. The situation has brought South Africa into a perpetual propensity to socio-economic instability. And that propensity creates another difficulty, which is lack of investments because investors are afraid of investing in a

volatile situation. The key argument in this chapter is that the ANC has emerged from negotiations with a limping sovereignty because its ability to deliver to its constituency is constraint by the neo-liberal economic option it has taken. We propose at the end of the study that the indigenous conquered peoples should not allow the neo-liberal environment to kill the human agency. They should embark on a struggle new form of struggle, the struggle for socio-economic emancipation.

3.2. In Search of Change through Peaceful Protest

The banning of the ANC and PAC, the incarceration of all prominent leaders and the suppression of all liberation voices did not kill the aspiration for liberation. The aspiration for liberation continued in various forms including art works. Music and drama, for example, the plays by Gibson Kente and the music by Ladysmith Black Mambazo, led by UmShengu, were used as media both for entertainment and inspiration in the Black communities. This genre depicted the daily life experiences of Black communities, both in rural and township areas. They were effective in mobilising and inspiring the oppressed communities across the country that the suffering would someday come to an end, even if it is by God's providence.

Gibson Kente's two musical dramas illustrate the above-mentioned point, namely, Sikhalo (cry) and How Long? Both plays were appeals to God concerning the Black man's suffering in South Africa.

In Sikhalo, various oppressive forces operative in a Black township come into play. Among others, the black man is confronted with the brutality of the police agents and prison life as his lot. He is also confronted with poverty and frustration in his family as a result of the exploitative system. Sikhalo is addressed to the Lord as exemplified by Kente's other play, "HOW LONG." Despite the absurdities of oppression and suffering, the black man can entertain hope that God will bring suffering to an end. It is only by God that an answer can be given to the black man's urgent question: HOW LONG MUST WE SUFFER THIS WAY? (Mokoka, 1984:176).

The plays kept raising the consciousness of the situation within which Black people found themselves in South Africa. The song called Bhalamabhalani also depicted existential exploitative and oppressive situation within which Black people find themselves. Migrant labour as experienced by the Black communities poses as a threat to the peace enjoyed by

traditional life. That the community can survive the disruption by this threat is owing to God's mercy and providence. Thus, there is sense in talk about Mambazo's projection of African traditional life whose main thread in all social spheres is religion. This latter point came to be underlined by the Mambazo when, in the early 1970s, they made a shift from purely traditional to more religiously oriented music. "Up to now, Mambazo sing predominantly religious hymns, albeit from the traditional perspective. God was thus, posited as the ultimate power capable of solving human problems, an opaque pre-figuration of Black theology" (Mokoka, 1984:117).

With the plays, songs and other forms of art, the suffering of Black people found a medium of expression that was otherwise not available to the law-abiding Black communities. So, constant conscientisation of the distinctive mode of existence experienced by Black people formed ultimately, "an important basis for a leap into Black consciousness as a philosophy" (Mokoka, 1984:177). On this basis, the works of art filled the void which was left by sudden illegalisation of liberation movements.

To show that liberation aspirations did not die, new organisations emerged in a different form. Cultural groups, Community Based Organisations, student organisations and Black workers organisations came together and continued with the struggle for liberation. The organisation was in contrast to their predecessors, organising on the basis of what they called blackness, hence they became known as Black Consciousness Movement. Black Consciousness Movement was a direct negation of white supremacy that was propagating the view that black was inferior. It put emphasis on self-awareness and Black pride. It was an anti-thesis of whiteness as a standard bearer of humanity.

"Steve Biko, the founder of Black Consciousness Movement, defined the racial colonization of Blacks by Whites as the principal problematic of South African life and proposed the Black Consciousness philosophy as the corrective" (Kunnie, 2000:28). For Biko, blackness goes beyond the skin pigmentation to the attitude of the mind. To that extent, the Black Consciousness philosophy coined 'Black' as an umbrella term for all people in South Africa who were non-White and were racial oppression politically, economically and mentally because was presented by white superiority as an aberration. The philosophy sought to teach Black people to accept themselves as they were and stop aspiring whiteness because their

"pigmentation makes attainment of this impossible" (Biko, 1978:52). For Biko being black more than a skin pigmentation.

1. Being black is not a matter of pigmentation – being black is a reflection of a mental attitude.
2. Merely by describing yourself as black you have started on a road towards emancipation, you have committed yourself to fight against all forces that seek to use your blackness as a stamp that marks you out as a subservient being.

(Biko, 1978:52).

Unlike the ANC, the Black Consciousness Movement rejected reformation of the current system on the basis that by doing so one would leave the basic structure within which racial society was based. Biko acknowledged the history of colonisation of weaker nations by stronger ones in the history of evolution of society. He went on indicate that, "nowhere in the world today do we see whites exploiting whites on a scale even remotely similar to what is happening in South Africa. Hence, one is forced to conclude that it is not coincidence that black people are exploited. It was a deliberate plan which has culminated in even so called black independent countries not attaining any real independence" (Biko, 1978:53).

The Black Consciousness Movement reawakened the struggle for liberation after a period of protests through the work of art. That was a clear indication that harassments, intimidation and more oppressive legislation did not solve the political problem in South Africa. After a period of covert political activism, open protest flared up again in 1976. This time, the revolt was led by students in protest against the Bantu Education, specifically the curriculum that trained the indigenous conquered peoples for menial work. In the words of the then Minister of Native Affairs, HF Verwoerd, "Natives will be taught from childhood to realize that equality with Europeans is not for them" (Mallaby, 1992:18). Verwoerd went on to spend five times on a White learner more he did on a Black learner. The hidden curriculum of Verwoerd was more emphasis on tribal loyalty than on science and mathematics subject. But what triggered the revolt was the introduction of Afrikaans in schools as a medium of instruction in some subjects. The protests were continued into the 1980s, and were extended to boycotting White-owned shops and White-owned transport. As a result of political pressure, the National Party, which was the governing party during the colonial-apartheid, also reacted to the situation by initiating certain policy proposals.

3.3. Exploration of Alternative Arrangements by the National Party

In 1970, the Nationalist Party divided South Africa into smaller portions along tribal lines (what was popularly known as the Bantustans). Each tribe would be regarded as a country on its own and those who were residing in a particular tribal area would according the Bantustans arrangements lose his or her citizenship of South Africa (Pilger, 2006:266). The logic of the colonial-apartheid government is they were resolving the national conflict by stripping the conquered peoples of their birth-right citizenship of South Africa which in their view was the "Black problem". The Black problem in this context was referring to the indigenous conquered African majority. The devise failed because the indigenous conquered African majority rejected the Bantustan policy and liberation struggle continued.

Another attempt was made in 1983, by introducing a new constitution in which only Coloureds and Indians were accommodated in White-only parliament. The political arrangement was that the so-called the Tri-Cameral parliament would have three chambers, one chamber would represent Coloureds, the other one representing Indians and, lastly, the one representing Whites. Coloured served as Coloured, Indians served as Indians and Whites served as Whites. Accordingly, the indigenous conquered African majority were to remain in the Bantustans. The tri-cameral parliament proposal was well rejected by the majority of the co-opted groups.

In an attempt to win over some of its opposition, the government extended an invitation to the Coloured and the Indian communities for representation in the government. As in the 1910 union government, the indigenous conquered peoples were left out. In line with the invitation, the Parliament was reconstituted under the 1983 Constitution to have three chambers. The political arrangement was known as the Tri-cameral system which meant that Coloured people would serve their own as Coloured people, Indians would serve Indians and the same would go with Whites.

The Tri-cameral parliament did not receive support from the intended beneficiaries. The proposal of a Tri-cameral parliament got opposed even from within the parliament of the conqueror, especially the Progressive Federal Party. Van Zyl Slabbert (2006) wrote in opposition to the proposal that,

the Tricameral system is a political farce posing as Parliamentary Government; it is a complete waste of the taxpayers' money; nothing that has been done since its implementation could not have been done more efficiently and with less cost under the old Constitution. The government uses it to prevaricate, obscure, confuse and promote political mediocrities. It claims that it is only a constitutional point of departure and not the end of the road. That may be so. However, it can serve as a new point of departure to extend its Apartheid logic to other spheres of South African life, or to end it. So far, the former is the order of the day, rather than the latter, despite the repeal of some racially discriminatory laws as well as attempts to deregulate the economy.

(Van Zyl Slabbert, 2006:66)

Meanwhile, the Black townships were also offered councils within which they were supposedly to administer their own affairs as Black townships. The councils too did not receive the support from the intended beneficiaries (Kunnie, 2000:37). The late 1980s, however, saw the reform process put on course, although the conqueror could not break with the racial paradigm. The resurgence of civil disobedience, industrial strikes and riots precipitated the necessity for political change on the part of the conqueror.

In 1986, Chief Mangosuthu Buthelezi entered into a constitutional negotiation of a multiracial government in the province of Natal with the conqueror. The chief was popular amongst the liberal groups of the conquerors and, to an extent, seen as an alternative leader of the indigenous conquered people of South Africa because he supported capitalism, denounced economic sanctions, and was particularly opposed to the ANC's armed struggle (Mallaby, 1992:26). However, the negotiations neither did nor yield any solution to the existing national problems. The ANC continued to lead the liberation struggle to secure, amongst others, the right to equal opportunities for all who lived in South Africa and building a society based on non-racial principles.

Below, we use the Freedom Charter to illustrate the point, since it is the historic document on which ANC's vision for a free South Africa is based. We acknowledge the fact that there are debates about whether the ANC is still adhering to the document or not. The founders of the new splinter party from the ANC, namely, the Congress of the People (COPE), argue, amongst

others, that the reason for leaving the ANC was that the party had abandoned the principles of the Freedom Charter. Of importance, here is what made the Freedom Charter to become the prefiguration of the Constitution of the new South Africa.

3.4. The Freedom Charter

In June 1955, at Kliptown, the ANC called for a multi-racial gathering (Congress Alliance) in which all organisations opposed to racial oppression participated. Amongst the organisations which took part at the gathering were the Coloured People's Congress, the Natal Indian Congress, the Congress of Democrats and the Congress of Trade Unions. The Congress Alliance came up with the Freedom Charter, the document that the ANC subsequently regarded "as the only guide to a free, united and democratic South African society" (Bunting, 2005:1; and Motlhabi, 1984:2).

We extract from the preamble the relevant section that addresses the land question, and implicitly the Principles of Self-Determination and Recoverability. The preamble states that:

We, the people of South Africa, declare for all our country and world to know:

that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people; that our people have been robbed of their birth-right to land, liberty and peace by a form of government founded on injustice and inequality; that our country will never be prosperous or free until all our people live in brotherhood, enjoying equal rights and opportunities; that only a democratic state, based on the will of all the people, can secure to all their birth right without distinction of colour, race, sex or belief.

And therefore, we, the people of South Africa, black and white together equals, country men, and brothers adopt this Freedom Charter. And we pledge ourselves to strive together, sparing neither strength nor courage, until the democratic changes here set out have been won.

The Freedom Charter reveals several problems. The first sentence probably coached according to the composition of the representative constituencies of the gathering, "We, the people of

South Africa ….” Literally refers to all the people of South Africa regardless of race, colour or sex and irrespective of community loyalty. Flowing from the above, one can understand "…the Freedom Charter as united voice of the people of South Africa. Yet this view cannot be consistently upheld for the Charter does introduce some logical and historical oddities" (Ramose, 2010 :4).

The freedom Charter declares, amongst others, that "… our people have been robbed of their birth right to land, liberty and peace by a form of government founded on injustice and inequality". The declaration gives rise to a question, who are "our people" who have been "robbed"? The answer to this question is found in the Basic Policy Document of 1948, "that the African people, in the sense of the indigenous Black population of South Africa, are the people who have been "robbed". Is it not odd then that the Europeans who are historically part of the group that has "robbed" should declare in one voice with the Africans that our "our people have been robbed"? (Ramose, 2010 :4). The statement, "our people have been robbed" can only make sense when in this context when it is made by indigenous Africans. We, however, do not rule out that there would be Europeans or Whites who would like to co-operate with Africans in shaping a free and democratic South Africa. But whatever genuine intentions of Whites, such cannot change the facts of the South African history.

In the same vein, the Charter fails to make a distinction between ownership of land and living in a land. It ignores the fact that "although Africans till the land it does not belong to them at the moment but to the white boss farmers" (Mokonyane, 1994:119). There are thousands of farm workers who are currently living in farms and are employed there, but do not own those farms. If this declaration was meaningful, statistics of evictions of farm workers from farms on which they were born and bred would not be as overwhelming as it is currently alarming.

The Charter therefore leaves the legacy of the questionable right of conquest intact by pursuing democracy at the expense of the land question. The land question in this study is understood throughout as the issue of sovereign title to territory. Natural and historical justice would require that the land be returned to the rightful owner. Only then would the rightful owner allow foreigners to live in his or her land. Secondly, the Charter makes unrealistic and often

contradicting political declarations and aspirations. The preamble states that "South Africa belongs to all who live in it, black and white" and by omission not mentioning other national groups specifically the "Coloured" and Indian peoples whose political organisations were present at the Congress Alliance gathering. The phrase "our people" contradicts the declaration that "South Africa belongs to those who live in it, black and white." It begs the questions: Who is "our people"? This question is raised in relation to the groups which attended the Congress of the People in Kliptown, because it was attended by heterogeneous people of all types representing various social classes and cultural background. There is no way in which the phrase "our people" could be appropriate since the struggle was for a return of land dispossessed during the wars of colonial conquest. One explanation can be that the salient contradictions in the Charter are a reflection of the unresolved diverse and often conflicting interests which are characteristic of the Congress itself. The problem in South Africa is colonial dispossession and occupation, and the need to reverse it by force of arms. The process of reversing dispossession would benefit the indigenous conquered people, but negatively affect the privilege of the members of the Congress of Democrats as they were largely the beneficiaries of dispossessions. That, they would not accept as history has taught that no class has ever voted itself out of its powerful position. Hence, the reforms that took place in South Africa in the 1990s were instigated by White capital for its own stability and the guaranteed long-lasting White survival in South Africa because that would not have been realised under grand apartheid (Kunnie, 2000:66). Thirdly, the Charter speaks of "democratic changes" in a way that projects democracy as an end in itself. Democracy is only a means through which a nation organises its body politic and an expression of how it chooses to evolve and recreate itself. Fourthly,

the language and spirit of the Charter subsumes the all-important question of the return of the land to the indigenous conquered peoples under the desirability to achieve political unity among all the peoples who live in South Africa. In this way, the return of the land to the indigenous peoples is relegated to a secondary position.

(Mokoka, 1984:248)

We therefore agree with Mokoka that the Charter aspires for political ideals at the expense of natural and historical justice.

In the current dispensation, the Charter should be carefully interpreted because it was conceived as a rallying call for all progressive South Africans to forge a formidable force in the struggle against colonial-apartheid oppression. Adherence to the Charter is no guarantee to real freedom for the newly liberated because it is time and context bound.

The freedom Charter is:

…in essence, an appeal to overthrow the unjust and tyrannical regime of apartheid. Moreover, being a document of its time, the Charter's emphasis on rights is a direct consequence of the global currency of these notions at the time, thanks, in part, to the adoption by the United Nations (UN) General Assembly on 10 December 1948 of the Universal Declaration of Human Rights. …The Freedom Charter is therefore hardly a revolutionary document in a socialist or communist sense of that term or in the sense that is needed today in South Africa – to revolutionize existing forms of political representation to generate real freedom for all. Those who hold it up as policy panacea for all of South Africa's current political, economic and social problems are abusing the significance and function of this historical document.

(Hamilton, 2014:87). We did state some points on the Freedom Charter in the previous chapter. We will elaborate on the matter below.

3.5. The Charter as the prefiguration of the new Constitution and the Truth and Reconciliation Commission

Despite problems highlighted about the Charter, it is nevertheless the basis of the present Constitution of South Africa. In its preamble, the Constitution also states that

"We, the people of South Africa… believe that South Africa belongs to all who live in it, united in our diversity" (Act 108 of 1996). The Constitution, just like the Freedom Charter, does not address the historical injustice of colonial assumption of sovereign title to territory, dispossession and subjugation of the indigenous conquered majority; instead, it extended the political system to accommodate them. Hence Kunnie (2000:19) concluded that "although the Freedom Charter espoused essential democratic principles, the preamble tacitly accepted the occupation of South Africa by European conquerors when it stated that "South Africa belongs to all who live in it, Black and White.'"

The ANC's political concession on the land question started long before the Freedom Charter. We have highlighted the tensions which have emerged within the ANC as a result of the Freedom Charter. Since the Freedom Charter is the basis of the ANC's philosophy of liberation to this date, it is worthwhile to repeat some of the points that were stated in the previous chapter. Since 1940, the debate on the land question and the political relationships between the conqueror and the indigenous conquered peoples of South Africa was raging on within the ANC Youth League. The debate was between the radically minded members of the youth league and those who were accommodative of White liberals. The radical group was getting frustrated at what they viewed as a progressive compromise of the ANC's objective, the "independence for the Africans" (Kunnie, 2000:20). Members of the group, who for the sake of elaborating the point we will refer to them as Africanists, argued that the ANC was manipulated into accepting the Freedom Charter by organisations such as the Communist Party of South Africa, the Congress of Democrats, the South African Indian Congress and other foreign forces into adopting the Charter. For the Africanists, adopting the Charter was tantamount to selling sovereign title to territory to the colonial settlers (Kotzẽ, 1975:16).

The suspicion was based on the fact that the Freedom Charter was in conflict with the ANC Youth League Basic Policy Document of 1948 and the 1949 programme of action. The Basic Policy of the ANC Youth League was based on African nationalism. African nationalism was laid down as the ideological framework for the struggle against colonisation led by Africans for Africans.

The Africanists argued that the Charter was not a true reflection and expression of African nationalism as appeared in the policy document, but an expression of multi-racialism. The Charter would spoil the purity and independence of African nationalism and ultimately subject the ANC to domination by other racial groups. Secondly, that South Africa belongs to Africans not "to all who live in it". And further that the clause that reads "The People Shall Share in the Country's Wealth" that "the mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole" was tantamount to socialism, a "foreign" ideology that would bring class divisions and conflicts amongst Africans (Bunting, 2005:1).

The displeasure with the Freedom Charter led to the splintering of the Africanist group from the ANC and the subsequent formation of the Pan Africanist Congress of Azania (PAC) in 1959 under the leadership of Robert Mangaliso Sobukwe and P.K. Leballo (Kunnie, 2000:20). The PAC's approach was "Africa for the Africans, Cape to Cairo, Morocco to Madagascar!" (Kunnie, 2000:20). Their analysis and interpretation of the South African conflict was the return of the land colonised by Europeans from the indigenous conquered peoples of South Africa (Kunnie, 2000:21). Although the PAC subscribed to the philosophy that catered only the indigenous conquered peoples, the philosophy evolved overtime to accommodate "other black and oppressed groups" in the Black Consciousness sense. This was evident when the organisation invited the Coloured People's Congress to join the PAC in mid-1960.

Despite the broadening of their membership to other racial groups, the liberation principle remained entrenched. Thus, at the unification ceremony with the Coloured Congress, the PAC made it clear that the objective of their struggle was to go beyond liberal democracy or what they called 'white supremacy,' towards the complete transfer of the imperial enterprise to the people as a whole. Thus, the liberation struggle is not merely aimed at the removal of white supremacy in order to attain a so-called liberal democracy which leaves untouched the super-exploitation of the people by monopoly capitalism. To be completely free and independent the South African revolution aims at the complete elimination of all imperial monopolies and preferences in the country and the transfer of all imperial enterprises to the people as a whole (Kunnie, 2000:21). So, the Freedom Charter laid the foundation of reconciliation in future but also set a scope within which the ANC could emancipate its constituency. Due to a multiplicity pressure from the Black Consciousness Movement and other organisations such as trade unions, change was happening in South Africa though in a revisionist form.

3.7. Other Catalysts of Change in South Africa

The internecine interaction between the colonial-apartheid government and the liberation movements seemed permanent; however, the situation was changing. According to McGarry (1998:865), several factors contributed directly to change, the numerical decline of Whites meant that with time, they could not be able to occupy all strategic positions in the State

apparatus and the economy. The economic boom, which was recorded between 1960s and 1970s, stagnated in the 1980s. The internal instability of the country in the form of mass demonstrations, rent and White-owned business boycotts, the deployment of the police and soldiers in the townships, the international exposure of all the above-mentioned events by foreign journalists was not conducive to both local and international investments. The international sanctions were imposed inclusive of economic, cultural, academic and sports. Declaration of the State of Emergency after another was instead damaging very legitimacy government further because under such circumstances the security agents were accorded drastic powers which they misused and abused by unleashing violence including oppressing, suppressing and intimidating whomever they deemed fit yet without facing consequences.

The crises threatened Whites' privileges for example their standard of living was declining rapidly whilst inflation was beginning to hit hard on them.

Factories closed; whites grew poorer; and, as black unemployment spread, so did the riots. As in 1960s and 1970s, whip and water cannon could impose the peace of exhaustion for a time. But President De Klerk, clearer-sighted than his predecessors, knew the respite would be limited, which is why he decided to release Mandela and declare that Apartheid must go.

(Mallaby, 1992:23)

The regulations of the State of Emergency extend police and military powers: to stop and search anyone they so wish; to effect arbitrary arrest and detention without trial; and the police or any law enforcement of whatever rank are empowered to arrest any person within the emergency area without warrant and detain them for 14 days. Further detention may be authorised by the Minister of Law and Order at his discretion, it an offence punishable by up to 10 years imprisonment for any person to disclose the name of a detainee without prior written authorisation from the Minister of Law and Order or his representative, the police had arbitrary powers to impose curfews, control entry to and departure from particular areas, control the dissemination of news, close any public or private place, and remove from any area any person or section of the public in the interest of public order (Amnesty International, 1987:284).

So, the colonial-apartheid government had on more than once relied on the State of Emergency to maintain stability in the country. The international political and economic dynamics became extremely unfavourable to the colonial apartheid government on the one hand. For instance, in 1985, the government suffered a series of major economical setbacks.

According to Barrel (1993, 404):

...Chase Manhattan Bank decided to stop rolling over some US$500-milliion in loans to South Africa, choosing instead to recall credits as they became due and to freeze all unused lines of credit. A number of Pretoria's other major commercial lenders, a cluster of whose loans were due for payment, responded in similar vein. The commission of the European Economic Community called for economic sanctions against South Africa unless the government rejected apartheid; 10 EEC states withdraw their ambassadors from Pretoria; the French government unilaterally announced a ban on investment in South Africa; and the United States House of representatives voted overwhelmingly in favour of sanctions against South Africa.... The Johannesburg Stock Exchange's response in the last week of July [1985] was described as a 'bloodbath' as market capitalisation dropped 9.5% and the Rand's international value plunged 12%.

Despite of the moral bankruptcy of the colonial-apartheid government, Western powers together with the US continued secretly to actively encourage and support their nuclear armament. It is curious that these powers were non-committal with regard to applying pressure on White South Africa to enter into a nuclear non-proliferation treaty by then. But the prospect of majority rule alone, that is, a Black majority rule in non-racial terms and political logic in South Africa, compelled the conqueror to unilaterally enter into the Nuclear Non-proliferation treaty (Ramose, 1999:9).

Although the major Western powers and the US in particular declared their stand against apartheid, they were in practice talking left but acting right. It means that to a large extent they would not take direct action against apartheid, hence their opposition to trade sanctions against

White South Africa. Their policy on apartheid remained at declarative level more so when their interests were secure enough.

Meanwhile, the ANC was not spared by the international politico-military setbacks either. The Eastern bloc, the major and long-time source of material and skills support to the ANC was itself having domestic issues to attend to. The restructuring policies of perestroika and glasnost dictated that the Eastern bloc should have undivided attention to their domestic affairs (Ngculu, 2010:193). Perestroika is the Russian concept for restructuring of the political and economic system. Glasnost means the policy reform and openness. These are the terms associated with the Russian leader Mikhail Gorbachev in the 1980s when the Communist Party of the Soviet Union embarked on internal reformation. It is "often argued to be the cause of the dissolution of the Soviet Union, the revolutions of 1989 in Eastern Europe, and the end of the Cold war" (Wikipedia.org/wiki/Perostroika).

The Soviet Union was going through what Legassick (2002) calls "a period of what, in hindsight, was the beginnings of Capitalist restoration in the Soviet Union & Eastern Europe (though not in Gorbachev understands)" (Legassick, 2002:61). Within that context, officials in Moscow began pondering alternatives to the armed struggle. Legassick wrote thus: "At the same time Soviet academics began floating preposterous compromise scenarios for a South African settlement. The key Moscow bureaucratic relating to the ANC leadership, Vladmir Shubin, has written that the word 'armed' set before 'struggle' was by 1988 'becoming unfashionable in Moscow'" (Legassick, 2002:61).

The battle between the South African Defence Force (SANDF) and the Cuban backed Angolan forces; and the declining defence budget of the SANDF contributed to the conqueror's review of their maintenance of grand apartheid and to exploring negotiation. The Front-Line States had become independent and in principle pro–South African liberation movements (Adam & Moodley, 1993:42).

Although liberation organisations were banned, communication between them and the colonial-apartheid regime continued through repression on the one hand and defiance on the other. They would communicate through release of statements after conferences, parliamentary seating and letters. According to Sparks, one of the examples of such communication is when Mandela wrote a letter to Hendrik Verwoerd, requesting him to,

> convene a national convention, at which all South Africans would be represented, to draw up a new non-racial and democratic constitution. Only when Verwoerd failed to reply to that letter did the ANC decide to abandon non-violent methods and form a military wing. I started Umkhonto we Sizwe...but I never had any illusions that we could win a military victory; its purpose was to focus attention on the resistance movement. So, getting to see the government had always been a primary objective.
>
> (Sparks, 1995:25)

Prior to negotiations for the democratic South Africa, there were negotiations about negotiations in which various groups and individuals took part.

3.8. Negotiations before "Negotiations"

The bellicose relations between the two sides continued until 1984, a period at which individuals and Non-Governmental Organisations (NGOs), on the one hand, and the ANC, on the other, opened up to one another and initiated discussions known as talks with the intention of exploring a possibility of resolving the national conflict through peaceful negotiations (Barrel, 1993: 396).

Oliver Tambo sought a mandate from the Kabwe conference which was held in June 1985 to empower him to meet a group of business people from South Africa as well as engaging with other groups which were interested in talking to the ANC going forward. The conference gave Tambo a cautious mandate to begin exploring negotiations with the colonial-apartheid regime, but preparations remained in that regard an enclave of the few under the cloak of high secrecy. One of the resolutions of the conference was that the ANC should make a distinction between talks and negotiations. Talks were categorised into two. The first category was exploratory talks with representatives of White groups (business and the Progressive Federal Party (PFP). The ANC wanted to use this category to neutralise aggressive supporters of colonial-apartheid

regime while politically isolating the defenders of the regime and also to take advantage of an otherwise rare platform on which they hoped to get their views known back in South Africa, and to use it to mobilise more groups on to their side. The second category was talks with organisations that were sympathetic to the ANC's cause. The aim here was to "build maximum unity between all sections and formations of the oppressed, other democrats and progressives and to draw them in as elements of an ANC-led assault" (Barrel, 1993:397).

The groups that visited the ANC headquarters in Lusaka were among others an academic and director of *the Centre for intergroup Studies at the University of Cape Town*, Professor H.W. Van der Merwe, Piet Muller of *Die Beeld newspaper* and Hugh Murray of Leadership. They met the ANC delegation led by Tambo. The meeting was arranged by the journalist known as Haward Barrel. After the meeting, Tambo issued a public denial of any such secret meeting taking place, indicating that he would not engage in any talks with the South African government without the mandate of the movement (Barrel, 1993:395).

Several meetings between the ANC and leaders of the Afrikaner community followed suit. In 1985, for example, two groups of delegates visited the ANC, Van Zyl Slabbert and Colin Eglin both of the Progressive Federal Party (PFP) were among the delegates. The other group consisted of prominent business people such as Gavin Relly of Anglo American. The ANC was represented by Oliver Tambo, Thabo Mbeki, Chris Hani, Pallo Jordan and Aziz Pahad. In 1986, the leader of the Afrikaner Broederbond, Professor Pieter de Lange, met Thabo Mbeki in Lusaka and, in 1988, the president of the South African Rugby Board met with the ANC (Esterhuyse, 1912:36). Regular meetings involving members of the Afrikaner community; sport and culture; foreign government delegations; business; the Mass Democratic Movement; Members of Parliament from the Progressive Federal Party; think-tanks, such the United States South African Leadership Programme (USSALEP) and the African American Institute (AAI) kept on visiting the ANC in Zambia.

The National Intelligence Service (NIS) deployed Willie Esterhuyse to explore further talks with the ANC about the possible peaceful solution to the conflict in South Africa. The meeting established what Esterhuyse call the Afrikaner-ANC dialogue. The first meeting was on 21

February 1988 in Ashford, England. The dialogue group had a core group and bilateral group meetings. The bi-lateral group meetings were between Mbeki and Esterhuyse, on the one hand; and the core group meeting was between Thabo Mbeki, Aziz Pahad and Tony Trew from the ANC side, and Willie Esterhuyse, Sampie Terreblanche and Willem (Wimpie) de Klerk from the Afrikaner side. In the process, the following structures and groups were established, namely: Group Alpha which focused on Mandela's release, Bravo focused on the release of detainees, Charlie focused on setting up discussions at the political level while Delta focused on maintaining contact between the NIS and the ANC's intelligence service (Sparks, 1994:117). A total of four secret meetings which were held under the code name, Operation Flair were recorded (Sparks, 1994:110). The meetings that were mentioned above took place in different countries such as Switzerland, the United Kingdom and South Africa.

The talks were treated with high confidentiality on both sides of the groups (Pilger, 2006:291). Maharaj, of the ANC, emphasised the point that the talks should remain secret because, if they were open to the public, critics would make all the analytical noise about them and most probably influence the thinking of the political leaders. Maharaj is quoted as having said that, "academics are so naive that they took delight in analysing anything under the sun, but did not have to make political decisions" (Esterhuyse, 2012:325). Barnard, of the National Party, also kept a veil of secrecy on the talks to the extent that he would not even brief the cabinet about the progress or its absence thereof. For Barnard, the cabinet ministers could not be entrusted with the information because they would divulge it. Referring to Pik Botha, a minister in the then colonial-apartheid government, Barnard indicated that Botha was "genetically incapable of keeping something like this a secret" (Esterhuyse, 2012:325). Esterhyse also supported the secrecy of talks in that "preparatory processes that have to culminate in a settlement of deeply rooted conflict are not subject to the requirement of transparency and disclosure. Hence, the international acceptance of the notion of quiet diplomacy" (Esterhyse ,2012:326).

The operation flair was just but one forum where the future of South Africa was mapped out. The operation focused almost exclusively on political issues. The economic issues were determined elsewhere by different role players.

The theatre of the talks about the socio-economy of South Africa was the Little Brenthurst, Oppenheimer's estate and the Development Bank of Southern Africa (DBSA). It is during these meetings that the ANC's economic ideological orientation pivoted. The period between 1990 and 1994 saw the ANC's shift from the socialist economic outlook to the free market economic view. George Soros confidently told Davos World Economic Forum that: "South Africa is in the hands of international capital" (Pilger, 2006:284). It is incomprehensible that just in the 1970s the ANC was unwaveringly committed to its socialist redistributive economic system and that liberation and democracy were inseparable from Reconstruction and development Programme. It was no accident that they declared then that "it is a fundamental feature of our strategy that victory must embrace more than formal political democracy. To allow the existing economic forces to retain their interests intact ... does not represent even a shadow of liberation" (Pilger, 2006:284).

The ANC approached talks as a mere tactic rather than *bona fide* negotiations as such, because, in their view, negotiations would involve a clearly-defined framework that would provide for a possibility to settle the dispute. During the *Talks about Talks*, the ANC laid a number of preconditions for negotiations (Barell, 1993:397; Ngculu, 2009:195). The pre-conditions were, namely:

- Agreement amongst participants that the objective was to dismantle apartheid and to achieve a modality for a united, democratic and non-racial polity;
- Unconditional release of political prisoners and the return of exiles;
- Free political activity and equality inside the country; and
- The need to change the character of the defence force and the police.

While *Talks about Talks* between the ANC, the National Party and interested groups continued, Mandela in prison though, was also doing his bit on the side by negotiating with other leaders of the National Party driven by senior government leaders including the President P.W Botha (Legassick, 2002:170; and Sparks, 2005:36). It should be borne in mind that this was not the first talks with Mandela. In 1976, he was "approached with an offer by the Minister for Police serving under President BJ Voster, to renounce the struggle and settle in the Transkei" (Boddy-Evans, 2013:1). Mandela turned down the offer. During that period of talks, people who were

particularly involved in secret talks with Mandela were the leaders of the NIS, Neil Barnard, Mike Louw and Maritz Spaarwater and the then Minister of justice Kobie Coetze. On 5 July 1989, Mandela met the then President, P.W. Botha, at his Cape Town presidential residence, Tuynhuys (Esterhuyse, 2012:342). According to Sparks (1994:36), a total of forty-seven meetings between Mandela and the colonial-apartheid government were recorded in Mandela's diary. The talks with Mandela lasted for two years (Esterhuyse, 2012:342).

Since this is a thesis in the domain of ethics, it is imperative to raise the following germane questions: What about the public's right to be informed of all that affect their future? Are those, who supported the ANC, ignorant of the fact that the organisation did, undercover of secrecy, make the concession to retaining the structure of economic inequality, and without regard for the question of sovereign title to territory, still have reason for their continued support of the ANC in the light of the disclosures of the secret agreements?

Although *Talks about Talks* were about exploring real negotiations (CODESA) towards resolving the national conflict, they were, however, seen by both parties to the conflict as a continuation of politics or war by other means. Each party hoped to advance their respective interests through talks about negotiations.

3.9. Real Negotiations

As the ANC was preparing for negotiations about negotiations, the colonial-apartheid regime attempted to mobilise alternative groups, such as the Inkatha Freedom Party and the Progressive Federal Party, lobbying them for the so-called the National Convention to negotiate South Africa's future. The convention did not succeed because, at the end, the negotiations took place under the organisation that was called the Convention for a Democratic South Africa (CODESA). The ANC justified their participation in the negotiation as follows:

> We are negotiating because towards the end of the 80s we concluded that, as a result of its escalating crisis, the apartheid power bloc was no longer able to continue ruling in the old way and was genuinely seeking some break with the past. At the same time, we were clearly not dealing with a defeated enemy and an early revolutionary seizure of power by liberation movement could not be realistically posed.
>
> (Dixon, 2005:1)

Different interpretations were made in regard to the objective of negotiations. Some people thought negotiations were about democratisation, whereas others thought that they were about decolonisation. Rantete (1998:168) wrote that:

> …there were differences of opinion in South Africa as to whether or not the country was going through a process of decolonization. The government and a number of South African scholars viewed the transition as a democratization process similar to that in Latin American and in some totalitarian regimes around the world. For its part, the ANC saw the transition as little or no different from other cases of decolonization, hence its insistence on the formation of an interim government and the holding of national elections for a constituent assembly that would ultimately facilitate the transfer of power to an elected government.
>
> (Rantete, 1998:168)

But if indeed the negotiations were about decolonisation as Rantete asserts, it means some key elements were missing to the criteria of real negotiations for decolonisation. Whatever requirements there are for decolonisation to take place, there must be a neutral mediator and or such negotiations would have taken place in a different country (Ramose, 2012:25). In the case of Rhodesia's decolonisation into Zimbabwe for instance, the United Kingdom had to oversee the process. The British Governor, Lord Soames, was appointed to oversee the transition from the British rule to that of the indigenous peoples of Zimbabwe (Mandaza, 1999:90). Although the neutrality of the United Kingdom could not be guaranteed because, as a former colony, it was bound to have vested interests in the outcome of the transition, the procedure was comforting to the critical eye. This procedure is clearly captured by Nzombe (1989:162) thus:

> Despite the fact that Britain was not exercising direct rule over the territory of Southern Rhodesia, and despite the fact that she had conferred the status of self-government to the territory, the African nationalists raised the question of independence, not with the Southern Rhodesian regime but with the British government because for them and indeed legally, political logic required Britain, as the colonial power, to preside over the decolonisation process.
>
> (Nzombe, 1989:162)

The procedure that was followed by CODESA talks made the South African negotiation an extremely irregular kind of negotiations. Other parties on the liberation side like the Pan

Africanist Party – a patriotic party partner to the ANC and AZAPO –expressed the doubt on the genuineness of the CODESA negotiations. The ANC had to depend on the National Party government for some logistical arrangements in order to carry out some of its obligations. For instance,

> In order to do its work, the ANC members – Panuel Maduna, head of the ANC's legal department, Jacob Zuma, its intelligence chief, and a man named Gibson Mkanda – had to be smuggled into South Africa. But this time, the ANC itself had been legalized but individual members had not yet been indemnified against prosecution for their violations of the security laws: indeed, negotiating Indemnity Bill was the steering committee's first task. Maduna, Zuma, and Mkanda were therefore still wanted men when the NIS flew them to South Africa on March 21.
>
> (Sparks, 1994:122)

On this basis, the mere fact that the ANC received logistical assistance from the very enemy whose interests it threatened means that its independence was compromised. It is no surprise that CODESA negotiations produced what Glaser likened to the extension of the right to vote to another social group than a socio-economic transformation.

> …the enfranchisement of the South African black majority had more in common with the extension of the vote to the middle and working classes in Britain than to the processes of decolonization. It involved a surrender of exclusive political power by a domestic ruling class to its social subordinates, accompanied by an effort to protect social and economic privilege from the newly enfranchised.
>
> (Glaser, 2001:201)

The outcome of the negotiations was a government succession and not a State succession. Government succession is similar to a process in which one political party takes over the administration of government from another by winning elections. In that scenario the government machinery and public service essentially remained intact. This to a large extent, includes honouring of the international agreements and obligations entered into with the previous government.

In contrast, a State succession may include, amongst other things, the legal provision for the new State to choose whether to continue with multilateral treaties or not to cut ties with the

former colony altogether. The issue of State succession is usually expressed through two doctrines, the optional and *Tabula Rasa* or *Clean Slate Doctrine*s. The Optional Doctrine holds that the new State is under no obligation to continue with the multilateral treaties of the predecessor State. Furthermore, it has the latitude to pick and choose treaties that are compatible with its sovereign rights. Meanwhile, the *Clean Slate* Doctrine holds that, once the State succession takes effect, "the predecessor states' personality and its identity completely disappear. The entirely new international sovereign personality appears in its stead with no legal connection or derivation between the predecessor and the successor entities" (Turack, 2013:303). In the case of South Africa, there is no evidence that either of the two options applied as outcomes to the negotiations.

Flowing from the above, we have to conclude that although the liberation of South Africa differs with that of Zimbabwe in terms of procedure, the substantive outcome of the negotiations is similar. In both instances, for example, the conquered emerged from negotiations with political power, whereas the conqueror retained and entrenched his or her economic privilege (Mandaza, 1999:85). In both respects, the conqueror retained land. One of the salient points in the resolution of the conflict in South Africa is that a law was promulgated specifically to unite and reconciled the conqueror and the conquered. This is unprecedented in the sense that, elsewhere in Africa where decolonisation took place, it was not deemed necessary to impose unity and reconciliation by law. We elaborate on this point in the next chapter on the Truth and Reconciliation Commission. The socio-economic challenges poverty, inequality and unemployment are glaring in the democratic South Africa.

3.10. The Theology of Negotiation

Christianity had played a great role in sharpening social and economic consciousness of the forefathers of the struggle against colonial-apartheid (Walshe, 1970:9). For Walshe,

> "As a result of the earlier impact of Christianity and this continuing if attenuated influence, many congressmen retained a strong inclination to moralise on the basis of Christian ethics, an inclination therefore survived the transition from reliance on a moral regeneration of society to acceptance of the need for determined and mass political organisation."

(Walshe, 1970:345).

Christianity and Christians have been part and parcel of the liberation struggle throughout the history from the inception of the South African National Native Congress to date. Their guiding principle and point of departure, in this regard, was Jesus Christ. It is therefore relevant to look at the negotiations from the theological perspective. In the 1990s, when negotiation for the political transition in South Africa started, Christians raised funds in order to assist South Africans who were in exile to return home. However, the challenge is that, they moved exiles into South Africa when the colonial-apartheid government was still strong in every aspect. The environment was not yet conducive for the repatriation of exiles back into South Africa.

3.11. The Socio-Economic Transformation Challenges

Flowing from above, we have stated that the liberation struggle was waged in different phases. The first phase was marked by armed resistance when kings were resisting colonial encroachment on their territories; the second phase was marked by appeals and deputations by the indigenous conquered peoples to the UK requesting for their intervention in South Africa against exclusion of conquered Africans from political, economic and administration of the affairs of the country. The phase of deputations was followed by the one on the armed struggle and lastly the negotiation phase which culminated into a democratic dispensation. After all these phases of the struggle and their manifestations, little has changed in terms of the socio-economic condition of the indigenous conquered peoples of South Africa.

The challenge is that the previous dispensation, immoral and inhumane as it were, was replaced by an equally immoral and inhumane one. The immoral and inhumane nature of the new dispensation lies in the political electoral system and the economic policy options. For instance, the new dispensation had prematurely replaced the Parliamentary Supremacy with the Constitutional Supremacy. Furthermore, the electoral system of proportional representation wherein voter vote for a political party and the political party that had won the most votes become the ruling party. The party then chooses members from its ranks who would then represent voters without consultation with the voter who voted it into power. We will return to this point.

On the economic side is the adoption of the British-American led neoliberal economic system or the integration of South Africa into the global capitalist/ corporatist system. The danger with economic affiliation into the global capitalist or corporate system is that the centuries-long created poverty, unemployment and inequalities suffered by the majority of indigenous conquered peoples of South Africa are left intact (Terreblanche, 2012:124). Key reason for adoption of the neoliberal economic system is the "elite compromise that was reached during the informal negotiations" which started in the 1980s between the global powers, the elite from the Afrikaner business representing White interests in South Africa and the Black elites coming from the 'struggle aristocracy group' represented by the ANC (Terreblanche, 2002:419). The elite compromise had severely impacted on the sovereignty of the new government's ability to implement meaningful redistributive social and economic policies that would benefit the ANC's constituency, the majority indigenous conquered peoples of South Africa (Hamilton, 2014:125; Bond, 2005:16; Pilger, 2006:288; Mckinley, 2017: 38). The ANC has ability to transform the country in line with the aspiration of its majority was constraint by the triple capitalist formations with which it is confronted: namely; and the close integration of the triple capitalist formations with their joint embracing of financialism and the American ideologies of neoliberalism and market fundamentalism" (Terreblanche, 2014:8). As a result of the constraints, the ANC had no power to independently decide on the policy direction it seeks to take.

The integration of South Africa's economy into the global corporatists or capitalist system gave big corporations drastic powers enabling them to be self-centred, where possible, arrogant, while it was more globally focused than domestic, despite the urgent need to create jobs and alleviate poverty at its home front. A replacement of "a strongly redistributivist and interventionist Reconstruction and Development Programme (RDP)" with a "more fiscally conservative and monetarist policy of Growth, Employment and Redistribution (GEAR)", a self-imposed Structural Adjustment Programme was a signal of compliance to the international neoliberal capitalism (Hamilton, 2014:131).

> …the elite compromise reached during the transition to democracy - still strongly maintained today – that generated forms of economic and political representation that fail to empower and thus free the citizens of South Africa. This is the case because the elite compromise reified rather than enabled the transformation of power relations that had been generated under and inherited from colonial and apartheid regimes and conditions, hardly good bases for real modern freedom.

(Hamilton, 2014:124)

Although the elite compromise is somewhat shocking to the majority of the conquered indigenous people, a historical analysis of the ANC's behaviour indicates that compromise is part the DNA the ANC. From its inception as the South African National Native Congress, the ANC fought against the exclusion of indigenous Africans from the Union of South Africa. It was not fighting for reversal of dispossession and title to territory. It became vociferous and steadfast after the indigenous conquered peoples of South Africa were excluded from the formation of the Union of South Africa in 1910. Hence declaration in later years through the Freedom Charter that: South Africa belongs to all who leave in it, Black and White. In this regard, Ranuga (1996) wrote thus:

> The ANC was, therefore, not aiming at the establishment of a nation-state based on the government of, by, and for Africans, with all those who owe their allegiance to the African nation-state being considered Africans. There was no question of building an African state like Nigeria, Kenya, or Zimbabwe because the leaders of the ANC considered South Africa a multiracial country that, they insisted, it must be treated as an exception.
>
> (Ranuga, 1996:10)

The point stated above is further clarified by Mandela as quoted in Kunnie (2000) that:

> The ANC has never been a political party. It was formed as parliament of the African people. Right from the start the ANC has been a coalition, if you will, of people of various political affiliations. Some support free enterprise, others socialism; some are conservative, others are liberals. We are united solely by our determination to oppose racial oppression. That is the sole thing that unites us. There is no question of ideology as far as the odyssey of the ANC is concerned, because any question approaching ideology would split the organisation from top to bottom.
>
> (Kunnie, 2000:107)

For that reason, if the ANC were to shun the neo-liberal approach, it would alienate some of its major and important member groups of the congregation. It seems that it is not prepared to risk that option. The social consequence of the elite compromise's inability to address poverty,

unemployment and inequality (PUI) inherited from colonial-apartheid is instability in the form of wide-spread sporadic protests:

> The exact causes of the poor health of South Africa's polity and economy may not be plain for all to see, but what is currently unambiguously clear is that large cracks are beginning to appear in the ruling alliance's representation of the 'people'. From well before the FIFA Football World Cup in 2010, the country has been wracked by prolonged strikes and service delivery protests, only the most infamous of which was widely reported the Marikana massacre of 34 miners during an unprotected strike at the Lonmin Platinum mine in the North West Province. Matters were coming to a head even prior to Marikana: in 2012 alone, there were more than 400 community demonstrations and protests, popularly termed 'service delivery protests,' easily the highest per annum since 2004, 88% of them were violent.
>
> (Hamilton, 2014:82)

The State intervention by introducing Affirmative Action (AA) and empowerment policies such as Black Economic Empowerment fell short of addressing the challenges of PUI, because the beneficiaries of the intervention are the new Black elite of the liberation struggle. Pilger calls them members of the struggle aristocracy (Pilger, 2014:276). Candidates need to have some educational qualification to stand a chance for selection in line with AA. The unintended consequence is that unskilled members of the indigenous conquered majority are excluded from empowerment opportunities. This section of the population will never stand a chance to participate in "ownership deals, management posts, preferential contracts, or new small businesses to run" (Jeffery, 2014:390). In Jeffrey's (2014) view, the poor Black majority are in destitute because the ANC government has deviated from the agreed policy principles laid down at the party negotiations (Jeffery, 2014:21). The multi-party talks generally agreed to the following principles:

- providing excellent education;
- making major improvements to living conditions;
- quickening the pace of economic growth;
- encouraging direct investment; and
- Creating conditions conducive to the generation of every many more jobs.

Jeffery argues that on the basis of the above-mentioned principles, the poor Black majority could work themselves out of poverty. The solution for Jeffery lies in educating the poor majority and not in policies such as BEE. Jeffery's (2014) argument fails to appreciate the fact that education, without the eradication of exploitation of one man by another, will not solve the problems of poverty, unemployment and inequality. Also, the education system is currently inadequate to empower those it has disadvantage for generations, and the pace of change is so slow that it will take centuries before generations of anti-colonial-apartheid could realise their aspirations (Newman & Lannoy, 2014:239). The approach has failed in the United States. Ranuga (1996) wrote that:

> There are lessons in America for those Black leaders in South Africa who are still blinded by the glitter and gloss of capitalism and cherish the totally unrealistic hope that the eradication of the legal pillars of apartheid will mean an end to the structured inequalities inherent in that system of racial capitalism. In the United States, the most misused and mythical concept relates to 'equal opportunities' in a society that is anything but equal. That concept is in fact meaningless to those mired in grinding poverty because equality of opportunities has absolutely no relationship to equality of conditions. But the concept does serve the useful purpose of putting the blame on the victims of the system for supposedly failing to take advantage of those 'equal' opportunities.
>
> (Ranuga, 1996:132)

Jeffery was writing from the point of fear of the ANC's project known as the National Democratic revolution (NDR). For Jeffrey (2014), empowerment policies such as AA and BEE are the advancement of the National Democratic Revolution by others means driven by the ANC and alliance partners (Jeffrey, 2014:399). We would disagree with Jeffrey (2014) on this point because the BEE policy was not created by the ANC. It was created by captains of the Mineral Energy Complex (MEC) as a way of bribing the new political elite into accepting the neo-liberal economic system as the economic ideology of a democratic government. Moeletsi Mbeki, as quoted in Terreblanche (2014), highlights the fact that:

> Most people in South Africa, in Africa, and the rest of the world naively believe that BEE was an invention of South Africa's black nationalists, especially the African National Congress (ANC)…. This could not be further from the truth. BEE was, in fact, invented by South Africa's economic oligarchs, that handful of white business men and their families who controlled the commanding heights of the country's economy, that is, mining and its associated chemical and engineering industries and finance.… The object of BEE was to co-opt leaders of

> the black resistance movement by literally buying them off with what looked like a transfer to them of massive assets at no cost. To the oligarchs, of course, these assets were small change.
>
> (Mbeki, 2009:68)

On this basis, empowerment policies were never meant to benefit the poor majority of the conquered peoples of South Africa. The few who benefited from the BEE argued that the wealth generated from empowerment policies would trickle down to ordinary people. On the contrary, unimaginably high numbers of the poor majority lost their jobs as a result of mergers and restructuring by big companies. What has happened is that between 1995 and 2000, the majority of blacks who were empowered by the BEE joined power blocks of white wealth and privilege. As the gap between the white haves and the newly enriched blacks closes, the poor majority who happened to be historical constituency of descended deeper and deeper into lives characterised by poverty and destitute (Pilger, 2006:281).

Much as there is fact in Jeffrey's (2014) assertion that empowerment policies excluded majority of poor people, it is not true either that such policies were made for their direct benefit or that they were made by the ANC as such. Co-option of people with struggle credentials by White business leads to what Hodder-Williams calls "the Extractive View of Politics" (Hodder-Williams, 1984:95). What this means is that citizens participate in politics in order to gain power and status, not necessarily to make contribution to greater good. It is more about what one would gain as opposed to what he or she would offer for the common good.

> The dominant assumptions underpinning political actions are instrumental rather than programmatic…. Using politics is not merely an elite activity. It is followed also by the majority of African citizens. 'The dominant concern of the vast majority of participants in politics at all levels'… '[is] the receipt of the largest possible share of benefits in the shortest period of time.'
>
> (Hodder-Williams, 1984:97)

Let us return to the challenges of the current electoral system. There are problems with political institutions of a democratic government namely, the electoral system known as the proportional representation and the parliamentary system. Related to the two systems are that business, local and international is not represented in the legislature. As a result, they refrain from

investing in the economy because they do not have confidence in the legislature in which they do not have veto power.

The proportional representation aggravates the plight of the majority of the poor indigenous people. Voters vote for a party of their choice and a party that wins elections decides on who will represent the people in parliament. Voters do not have control on who will occupy what position and play what role in parliament. In the beginning, party members nominate members whose names should be in the party list for parliament in the event the party wins elections. The party sifts the names of suitable candidates and ultimately compile a list of MPs who are allocated to different portfolio committees in parliament. At that stage, MPs get concerned about national as opposed to local issues, and the voter would have lost total control of the process. The voter would not even know the MP accounting to his or her constituency office. Parliamentarians do not preoccupy themselves with any particular constituency. Instead, they become loyal to ministers and toe the line of party discipline. So, parliamentarians account to political parties not voters.

> The deployment policies referred to above, combined with the list system under our proportional representation electoral system, give the president of the ANC as the governing party power over the MPs who are supposed to hold him and his cabinet accountable. How can MPs be expected to stand up for what is right if that will put their jobs on the line? MPs' salaries are quite substantial at approximately R800 000 per annum and putting such a high reward at risk for most members of parliament who, but for their deployment, might otherwise have been unemployed, is not a reasonable expectation.
>
> (Ramphele, 2012:110)

During election campaigns, parties make promises to voters, as soon as elections is over and the National Assembly is duly constituted, the national executive is appointed and all positions are filled accordingly; and the voice of the electorate loses power until the next round of elections. The political elite and the governing party become the be-all and the end-all. Two cases in point are the recalling of Thabo Mbeki as president of South Africa by the ANC and the fierce defence of Jacob Zuma against motions of no confidence by MPs of the ANC caucus in parliament. The ANC took a decision to recall Thabo Mbeki from the presidency without

due regard for voters' opinion. Equally, Jacob Zuma was defended despite the court's ruling that he violated his Oath of Office as State president and head of government.

The gap that exists between the legislators and the voters create a situation where in the event that voters are not happy about the service delivered by government, they turn to direct their grievance against local councillors who do not have real political power over legislation. But local councillors are also accountable to their parties at national level the same as members of legislature are. They are elected through a proportional representation which creates an environment in which bigger parties with a strong financial muscle. Also, they take decisions in camera in municipal chambers from public involvement. Citizens appeal to them for services and direct their violence at them because they are the closest political authorities available. Citizens do not realise that the political and the electoral system disempowers them in as far as holding the elected representatives is concerned (Hamilton, 2014:81; and Ramphele, 2012:110).

There is a need for political institutions that devolves power to constituencies by enabling them to legislate and or repeal the law. Such power should be provided for at local, provincial and national levels. In this regard,

> [a] mixture of a proportional representation and constituency-based first-past-post systems is recommended as a solution to the current South African electoral system. The kind of electoral system that currently prevails in South Africa in effect provides impetus for all parties to be as catch-all as possible, and thus it is no surprise that the largest, predominant and now most catch-all party was once the alliance that spearheaded the liberation from apartheid. Ironically, this has meant not just a decoupling of parties from classes, [but] too much of a gap between the people and the ANC-headed ruling alliance. The combination of supposedly meaningful local participation within local, municipal structures with little power and the complete dislocation of national representatives from the people have generated a very dangerous blend of citizen frustration and poor accountability regarding the country's elected national representatives…. At the same time the country's elected national representatives can 'linger in indecision, laze in complacency and deliver poor (or no) service while local communities have no visible culprit at whom to point a finger. National representatives are not held accountable because the gap between them and the people is so wide and well-guarded by party interests that many feel a kind of impunity regarding their every action or lack of action.

(Hamilton, 2014:81)

While Hamilton (2014) proposes a change of the electoral system, Terreblanche (2012) proposes patience on the part of citizens until reconfiguration of the international system. For Terreblanche (2012), South Africa should wait for a global realignment of a new system that only then could South Africa decide on its own on preferred policy options (Terreblanche, 2012:129). It is our view that waiting for the fracturing of the current international configuration denies South Africa of its political agency and by extension the national sovereignty. Waiting for a period of international reconfiguration is no guarantee that the powerful countries would forego their interest in favour of South Africa. The opposite might be the case. Terreblanche (2012) has alluded also to the fact that there is always the "danger that when the 'system iron' heats up again the situation could turn out to be precarious that a traumatic 'system derailment' could take place" (Terreblanche, 2012:129). We will come back to Terreblanche's (2012) stance. Let us focus on another problem that is as troubling as the electoral system, namely, the replacement of the parliamentary system with the constitutional system.

The other problem is the replacement of Parliamentary Supremacy by Constitutional Supremacy. The principle of Constitutional Supremacy is a shift from the principle of Parliamentary Supremacy that has since 1806 characterised constitutionalism in South Africa. Parliamentary Supremacy was inherited from the British colonial system as it was first introduced and practised in the Cape and Natal colonies.

Parliamentary Supremacy means that the highest legislative authority in the land is vested in the institution called parliament. Accordingly, parliament has the power to enact any legislation, no matter how unreasonable or unjust, and as long as the prescribed procedures are adhered to. In this regard, the courts do not have the power to question the merits or demerits of the legislation. Thus, if parliament passes legislation without following correct procedures the courts could overrule such a law as un-procedural and therefore invalid. For example, in 1951 the NP in a desperate move to remove coloured voters from the common voters' roll introduced the Separate Representation of Voters Bill in Parliament. The procedural requirement(s) for the Bill to be passed was that both houses of Parliament should sit together

(unicamerally) and agree to it at the third reading of the Bill by no less than two-thirds of the total number of members of both houses. When the NP could not secure the necessary Parliamentary support to meet the two-thirds majority, they arbitrarily and in clear sidestepping of the procedure passed the Act bicamerally and by a simple majority in each house. The Act was challenged in Harris v Minister of Interior and the court held that the Act was invalid (Currie, 2001:47).

Essentially, all that the courts are authorised to do is to apply strictly the law as laid down by Parliament. For instance, in 1956, the South African Amendment Act of 1956 reiterated, amongst others, that "no court could henceforth rule on the validity of a law passed by parliament" (Rotberg, 1987:82). Constitutional Supremacy means that the courts have the power to test the constitutional validity of any government action, including parliamentary, provincial and local government legislation. Parliament remains the highest legislative body in the system though. Be that as it may, it is no longer the highest organ of the State vested with the power to determine the existence of individual rights and the extent to which they may be curtailed or not (Burns, 2003:33). As a result, any institution or action, inconsistent with the Constitution is invalid. Thus, prior to the new South Africa, wrote Malherbe (1998:90), Parliament was supreme, and now the duty of the court is to ask: what does the Constitution say and how do we give effect to its norms and values, even when interpreting and applying other laws of parliament. For example, Patricia de Lille was a member of the National Assembly (NA) who made a statement with the import that some members of the ANC were informers of the then colonial-apartheid government. The ANC then used its parliamentary majority to pass a resolution in the National Assembly suspending de Lille as a punishment for her statement. But the Constitutional Court ruled that the suspension of de Lille was not in compliance with the rules of the National Assembly. The resolution was therefore held to be a violation of de Lille's constitutional right of freedom of speech in the national assembly (Chaskalson et al., 2004:28).

In terms of the judgement handed over in the de Lille and Another vs Speaker of the National Assembly 1998 (4) SA 241 (A): the court found that, there had also, been a breach of the *nemoiudex in suacausa* rule, which required that an affected party be heard by an impartial and unbiased tribunal. At no stage was Mrs de Lille given a real and meaningful hearing. The

ANC had been the complainant, and then the prosecutor and ultimately the judge in its own case. This had violated the rules of natural justice. The court held, further, that the ad hoc committee had acted *mala fide*, and that no-one had the power to act *mala fide*, Parliament included. The Constitution also did not intend to authorise bias. The determination of the extent of privilege must relate to its exercise; otherwise, the court noted, Parliament would have a blank cheque to set the limits of its own powers.

The court held, further, that the supremacy of the Constitution is recognised and vouchsafed, not only in the Constitution itself, but also by the pronouncements of the Constitutional Court in the interpretation and protection and enforcement of the Constitution, with particular reference to the Bill of Rights. The task of ensuring that the supremacy of the Constitution is recognised and enforced by all to whom it applies, including organs of State, such as Parliament, has been entrusted to the courts.

This, the court stressed, is not an interference with the independence of Parliament and its right to control its own procedures and the discipline of its members. The court did not seek to dictate to Parliament; it could not have done so. It recognised the separation of powers and its desirability, as well as that the proper exercise of parliamentary privilege was a matter for Parliament alone. Where, however, the court can and must interfere is where Parliament has improperly exercised that privilege and acted mala fide or capriciously and in defiance of the inherent constitutional rights of a member, such as the right to just administrative action. The court held section 5 of the Powers and Privileges of Parliament Act to be inconsistent with section 1(c) of the Constitution and the rule of law as founding values of the South African legal order. The court ruled, accordingly, that section 5 of the Act was unconstitutional and invalid, and that no certificate issued under its purported authority was of any effect. The resolution passed by the National Assembly purporting to suspend the Mrs de Lille for fifteen days was set aside.

On Appeal to the Supreme Court of Appeal, Judge MAHOMED CJ held that the enquiry crucially rested on the Constitution of the Republic of South Africa. It is supreme and not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well meaning, can make any

law or perform any act that is not sanctioned by the Constitution. He went further to state that Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official or institutions are immune from judicial scrutiny in such circumstances.

He held that the assembly necessarily had no Constitutional authority to suspend Mrs de Lille from its proceedings in the circumstances which it resolved to do. The question therefore that needed to be determined was not whether the assembly or the Speaker of National Assembly had lawful authority to suspend the respondent from the assembly as an orderly measure to protect proceedings of the assembly from obstruction or disruption, but whether or not it had the authority to do so as a punishment or disciplinary measure for making a speech which was not in any way obstructive or disruptive of proceedings in the assembly, but which was nevertheless open to justifiable objection.

It was ordered that:

> It is declared that that part of the resolution of the National Assembly adopted on the 25 November 1997 which purports to suspend Mrs Patricia de Lille is void and is set aside (Speaker of the National Assembly 1998 (4) SA 241 (A).

It should be noted, however, that to say the constitution is the highest law does not mean Parliament cannot change the constitution at all. What it means is, it should be extremely difficult for Parliament to amend the constitution than to amend legislation. In this line of reasoning, "the 1996 Constitution distinguishes between at least five different types of constitutional amendment and prescribes different procedures for each" (Currie et al., 2001:180).

The significance of change of the principle, from parliamentary to constitutional one, particularly when a different racial group that happens to be the national majority was finally

accommodated in the political power structure, is that the conqueror still retains the legal leverage to veto the decisions taken at parliamentary level by the conquered. The conqueror retains a political-legal clout to counter-balance the numerical strength of the conquered. This led the former President Zuma and the former Secretary General of the ANC, Gwede Mantashe, to lament that the courts are becoming the new opposition to the ruling party (Terreblanche, 2012:86). On this basis, it means that, if commitment to the neoliberal globalism and the market fundamentalism neutralised the economic sovereignty of the democratic government, the adoption of Constitutional Supremacy took care of political sovereignty.

An analysis of the South African politico-economic crisis is self-contradictory in that in one sense it projects the ANC as a political agent who when faced with policy options such as social justice and redistributive policy or American neo-liberal capitalist/corporatist policy, they opted for the latter. On the other hand, the ANC is projected as a political cog in the machine as they did not have power to decide on their own policy preferences because they were 'instructed" to negotiate by big global powers (Terreblanche's (2012).

Terreblanche (2012) argues that the fact that the negotiation between the ANC and the National Party was an implementation of instruction or pressure by big global powers such as the then Soviet Union, the Great Britain and the United States of America.

> After Reykjavik, the Soviet Union put pressure on the ANC in exile to seek a negotiated settlement in South Africa, and after the enactment of the Comprehensive Anti-Apartheid Act of 1986 the US and other Western countries strongly increased their pressure on the apartheid regime to, similarly, negotiate a solution to the apartheid problem. It is quite remarkable that pressure on the ANC to seek a negotiated solution came in 1986 from Moscow, and in the same year South Africa's white government was pressurised to do the same by Washington.
>
> (Terreblanche, 2012:14)

Political pressure that was mounted against both the National Party and the ANC was not just a declaration policy on the part of the global powers. Actual steps and practical agreements were reached, thus directing peaceful settlement of the South African conflict, amongst others. In 1987 and 1988, both Reagan and Gorbachev reached an agreement at the summit that all the Great Powers would thenceforth work together in seeking negotiated and diplomatic solutions

all the important conflicts which taking place in the world. The conflicts or flashpoints were identified as the Namibia-Angola-Cuba problem, the South African apartheid problem, the conflicts between Israel and Palestine and between India and Pakistan, and the problems in Northern Ireland, Iran and North Korea ((Terreblanche, 2012:14).

Flowing from the above, it means that the ANC and the National Party, in their negotiating for a peaceful settlement, were to a large extent, actors in a drama authored by the US, the Soviet Union and the Great Britain. With an economically weakened Soviet Union of course, the ANC had very little space to manoeuvre and pursue their historic social distributive policy aspiration during the 1993/94 settlement. Furthermore, the ANC was not only persuaded to adopt the market fundamentalism policy as opposed to their preferred social distributive one, they were also threatened with destabilisation.

> The strongest foreign pressure on the ANC, in all probability, came from American pressure groups. In the years after the Soviet Union imploded in 1991, an atmosphere of triumphalism reigned supreme in American political and economic circles. The attitude was overwhelmingly that the 'American economic model' has triumphed and that every country in the world could only survive and prosper if it adapted as quickly as possible, and as completely as possible, to the American model of anti-statism, deregulation, privatisation, fiscal austerity, market fundamentalism and free trade. Promises were made to the ANC that as soon as the new government had implemented the 'American neoliberal model', conditions would be created in South Africa that would be conducive to the large influx of foreign direct investment, higher growth rates, higher employment and a trickle-down effect to alleviate poverty. The role of the American pressure group was, however, not restricted to exaggerated promises, but also included subtle threats that the US had the ability (and the inclination) to disrupt the South African economy if the ANC should be recalcitrant and not prepared to cooperate.
>
> (Terreblanche, 2012:64)

The major problem with integrating South Africa's economy with the global and local capitalism and corporations is that business leaders are not interested in addressing the challenges of PUI. These challenges unfortunately are troubling the major constituency of the ANC more than any other political party in South Africa.

The policy options adopted by the new government were based on the following assumptions:

- South Africa has a high economic growth potential;
- Integration into the benign global economy will enhance economic growth;
- A highly economic growth rate will unlock the labour-absorptive capacity of the economy;
- The benefits of a high economic growth rate will 'trickle down' to the poor; and
- The restructuring of the economy should be entrusted to market-led economic growth.

The assumptions were imposed on the new government by the big foreign business without taking into account the historical development of the South Africa's economy in which 350 years of colonial-apartheid have created a dual economy characterised affluence "mainly white-owned and white-controlled modern sector" on the one hand and the destitution mainly "black underdeveloped non–formal" on the other, the deeply institutionalised inequalities in the distribution of income, socio-economic power, and property and opportunities; and the emergence – over the past 30 years - of a modern, first-world, capitalist enclave that is detaching itself from the Black labour market and the *lumpenproletariat* because they are regarded as irrelevant to the enclave's operation and profitability (Terreblanche, 2002:425). On this basis, the gap between the two worlds had widened in such a way that their interaction can only "be at the level of crime, violence, and contagious diseases, which will be 'exported' daily from the third-world periphery to the first-world enclave (Hamilton, 2014:125).

Barnard (2015) glorifies the process that South Africans successfully negotiated for peace on their home soil without external mediation. "We pulled it off and, in the process, we made a unique contribution to conflict resolution" (Barnard, 2015:194). For Barnard (2015), the settlement was peaceful and widely smooth that the mechanism used to resolve the conflict should be exported as a model to warring parties elsewhere outside South Africa. However, less costly the transition was in terms of loss of life and destruction of infrastructure, Barnard's view ignores that the settlement has inherited a Manichean nation state with one of the developed economies in the African continent. It has advanced financial systems with modern physical and institutional infrastructure. The challenge with the situation is that only a few are able to benefit from the advancement while the majority are suffering.

> On the other, it inherited major socio-economic problems, including high levels of unemployment; the abject poverty of 50 per cent of the population; sharp inequalities in the distribution of income, property, and opportunities; and high levels of crime and violence. What makes these problems much more pressing is the fact that it is mainly black South Africans – and particularly Africans who are at their receiving end.
>
> (Terreblanche, 2002:5)

On the basis of the above, it is ironic that the key constituency of the ANC is at the receiving end of the economic policy option. What makes matters worse is that "a liberal capitalist version of democratic capitalism" is in direct opposition to the State intervention in reorganising the economy in line with the needs of the democratic society in which privilege and destitute appear be destined together, like Aristotle's opposites. We tend to agree with Terreblanche (2012) that democratic capitalism perpetuates the challenges of the PUI instead of addressing them (Terreblanche, 2012:124). Democratic capitalism is a true deviation from the liberation vision of the Reconstruction and Development Programme, which was based on a Social Democratic Capitalism in which the State plays a central role in driving the economy of the country.

By opting for a democratic capitalism, the democratic government had destined for itself a position of being a junior partner to the British-American capitalist corporations. Through what Terreblanche (2012) calls the Mineral-Energy Complex (MEC) the ANC was persuaded to abandon its socialist oriented policies (Terreblanche, 2012:59). The MEC is the big transnational business (comprised of the British, the American and local groups) which is in charge of mining and energy sector, but has also expanded to finance and other fields in South Africa. The MEC had wielded a proverbial carrot and stick to the ANC government. They promised the ANC that should they adopt the free-market system they would assist by mobilising Foreign Direct Investment into South Africa. The beneficiaries would be the Black elite and the poor majority alike. However, if the ANC opted not to heed the MEC advice, they had the capability to destabilise their regime probably to change it as well.

> Promises were made to the ANC that as soon as the new government had implemented the 'American neoliberal model' conditions would be created in South Africa that would be conducive to the large influx of foreign direct investment, higher growth rates, higher employment and trickle-down effect to

> alleviate poverty. The role of the American pressure group was, however, not restricted to exaggerated promises, but also included subtle threats that the US had the ability (and the inclination) to disrupt the South African economy if the ANC should be recalcitrant and not prepared to cooperate.
>
> (Terreblanche, 2012:65)

Flowing from above, the ANC's sovereignty was severely compromised and restricted by the MEC. They can engage in progress rhetoric about the need to empower their constituency, whilst they know very well that the business sector is in charge but not the ANC *per se*. Also, should they dare "implement the needed redistributive measures; the danger exists that the credit rating agency would degrade South Africa's credit status" (Terreblanche, 2012:65).

Additionally, the democratic government has challenges such as shortage of Black people with requisite education and professionalism to run the public service and administration. Even those people who are appointed at the highest positions of civil service lack the necessary "experience, professionalism, commitment, or culture of service needed to be productive and loyal civil servants…like their white predecessors (they are) indulging in nepotism, corruption, and careerism" (Terreblanche, 2002:449).

> In our situation, the ANC as the governing party has to deal with the complexities imposed by the legacy which denied the majority population access to education, training and opportunities to gain the experience needed for these tasks. How could the ANC be seen to be employing a majority of white people in the public service who would most likely qualify for positions because they have the advantage of history on their side? But the dilemma of the legacy of deliberately disadvantaging the majority population is no excuse for appointing incompetent people to critical areas in government, including all levels of the Department of Education.
>
> (Ramphele, 2012:145)

The challenge of inadequate education has been one of the greatest and strategic weapons of colonial-apartheid in producing Black adults who are economic misfits. The National Development Plan acknowledges the challenge of shortage of skills that:

> …our education officials opted for lower standards of performance. The bar between success and failure is set so low that young people do not have to exert

> themselves to succeed. How else can one explain setting 30 per cent in three subjects and 40 per cent in another three as the qualification for a high school diploma? This standard condones failure to demonstrate mastery over fully 70 per cent and 60 per cent of knowledge base of the chosen high school subjects as acceptable. We are destroying the seeds of the future of our country by making underperformance part of the institutional culture of our education system…. It is tragic that South Africa has failed to take advantage of its sophisticated infrastructure to use information technology to accelerate teaching and learning.
>
> (Ramphele, 2012:137)

As solution to challenges of PUI and poor education standard, amongst others, Terreblanche (2012) advocates reverting to the vision of Reconstruction and Development Policy under the Social democratic capitalism, because democratic Capitalism is inherently contradictory. Transparency, equality and the rule of law are the hallmarks of democracy on the one hand, whereas capitalism thrives on merciless competition, equality due to skill, power of resources and cunning on the other.

The democratic government is facing a challenge that calls for radical solution in the sense that while political elites, that is the new political and old economic classes have carved for themselves a comfortable social position, the position is fraught with social and economic ills. Such ills will, at the end, unsettle the elite compromise settlement itself for the following reasons:

> [firstly,] they have not secured the necessary inflows of international capital or foreign direct investment (FDI). (a) the old economic elite, only partially in the process of being transformed, do not have sufficient formal representation in parliament and so cannot act as a veto on policy formation, uncertainty still prevails for investors in south Africa or South African government bonds; (b) unresolved social cleavages based on extreme levels of inequality and unemployment generate violent conflicts or the constant threat of them (leading, in some instances, to brutal repression by the state, as exemplified recently by the horrors of Marikana), which further exacerbates economic uncertainty. What follows from this is that South Africa remains a risky place in which to invest, at least in the eyes of potential international investors.
>
> (Hamilton, 2014:14)

The risk inherent in the social and economic inequalities were also highlighted by Fanon when he wrote that:

> [I]n the colonized territories, the bourgeois caste draws its strength after independence chiefly from agreements reached with the former colonial power…. But deep-rooted contradictions undermine the ranks of that bourgeoisie; it is this that gives the observer an impression of instability.
>
> (Fanon, 1963:142)

While Terreblanche (2012) blames the ANC's ideological choice, Ntsebeza lays the problem squarely at the surviving traditional leadership system of rule in the rural areas and farms owned by White people. The democratic dispensation did not abolish traditional leadership system. Instead, the system was reinforced by three pieces of legislation, namely the traditional Leadership and Governance Framework Act of 2003, the Communal Land Rights of 2004 and the traditional Courts Bill that took effect in 2012 (Ntsebeza, 2013:156). The paradox is that both people in urban and rural do cast their vote for new political administration on a five-year basis. However, only people in urban areas are directly governed by the elected. On the contrary, their rural counter-part remains under the ascriptive leadership. The more the emphasis is put on local representative the more apartheid spatial representation is inadvertently reinforced.

> One of the ruling party's responses to these problems regarding meaningful representation has been to focus on possible developments at the local government level. But this is not a response to the problem for two main reasons. First, given apartheid's obsession with separate development, locality, land and place in particular, and much of the history of colonial and post-colonial Africa in general, the emphasis on the representation of local community is often deeply retrogressive and the opposite of freedom–enhancing, as the continued political power of non-elected chiefs in South Africa's rural areas and the associated poor representation of women's interest exemplifies well.
>
> (Hamilton, 2012:79)

We would agree with Hamilton that rural do vote for municipal councillors in their municipal jurisdiction as well, just like their urban counterparts, but such councillors are only confined to providing services such water, electricity and roads. Day-to-day governance is effectively left in the domain of traditional leaders. For instance, the majority of rural residents still annual

fees to traditional leaders. Compounding to the problem is that traditional leadership is not transparent. For instance, it is not audited like municipalities. And there are no enforceable checks and balances from constituencies they serve.

Similarly, while we are arguing that South Africa's corporatised liberation left the majority of the poor people in destitute, it seems there is a 'forgotten' constituency which is residing in the rural area. The constituency does not have title deeds as is the case with their urban counter-parts. However, the constituency together with the other poor majority in general is unlikely to use the ballot to rescue themselves out of the claustrophobic situation of disadvantage. The education system is not responding to the needs of the industry; hence their graduates are unemployed and sometimes even unemployable, meanwhile the electoral system through a proportional representation will only perpetuate reproduction of the elite. The poor majority does not have meaningful political representation (Hamilton, 2012:8). For example, the basic problem with proportional representation in South Africa currently is that voters do not even know who will represent them until after the elections because they vote for a political party. It is a fact that during election campaigns, parties put a face of a particular individual, but the party retains the prerogative to make a determination on who will ultimately be fielded to the political office. It is the political party that has the final say on who will serve the voters. In any democracy, participation by citizens has to go beyond voting after every five years. Citizens have influence over the policy direction and the nature of governance. For this reason, we would argue with Ramphele that the majority of South Africans are yet to learn the responsibilities and obligations of a democratic system. Since democracy, the majority of voters have been under the impression that just putting a cross on the ballot is enough they can mind their own business until the next elections when they have to vote again. That the reason why voter apathy is getting higher and higher. Some of the voter do argue that they have been voting but they do not see any changes in they their lives. Instead of holding the elected administration accountable, they prefer to refrain from voting. For Ramphele, that is the vestiges inherited from political systems of "indigenous traditional African governance, colonial governance and apartheid governance" (Ramphele, 2012:148).

Still on the issue of representation, (Terreblanche (2012), Hamilton (2012), there is an almost natural symbiotic relationship between the corporate elite and the political elite in a neo-liberal system. The corporate world need politicians to create a favourable environment for business to flourish on the one hand. On the other hand, politicians want business to fund certain government programmes and political campaigns. But the trick in the South African situation is that big business is not represented in parliament and that makes them not to have a veto power to the undesirable legislation. Compounding to their situation is that they do not trust the ANC, because they know that its key constituency is not content with the current dispensation.

The most plausible explanation to the outcome of negotiations is that the colonial-apartheid government outsmarted the ANC at the negotiating table because the issue of socio-economic rights was raised in secret talks by Thabo Mbeki and Sampie Terreblanche (2012) though at different times and places. For Esterhuyse, "it was the one area where serious disputes could arise in future. Even within the ANC - "white fears" related directly to this. The protests and resistance from anti-apartheid circles were not just about political rights, but also about socio-economic rights – about political and economic injustice. As Mbeki put it: "The struggle is not only about the right to vote" (Esterhuyse, 2012:150).

3.12. Koma re bolela kgorwane, khupamarama re hwa le yona

This sub-heading "Koma re bolela kgorwane, khupamarama re hwa le yona" was chosen and presented in Sepedi because the intention is to preserve the original meaning of the expression. The expression was triggered by a curious observation that a group of authors, consisting of journalists, politicians and academics, decided to publish information detailing the nitty-gritties of negotiations, from colonial-apartheid to democracy. We think of Alister Sparks on "Tomorrow is another country" in 1994 just few months into democracy; Sambie Terreblanche on "A History of Inequality in South Africa 1652–2002" in 2002; John Pilger on "Freedom Next time" in 2006; Frederik Van Zyl Slabbert on "The Other side of History: An anecdotal reflection on political transition in South Africa" in 2006; Willie Esterhuyse on "Endgame: Secret Talks and the End of Apartheid" in 2012; Sambie Terreblanche again, but this time on "Lost in Transformation: South Africa's Search for a New Future Since 1986" in 2012 with the last book from the pen of Neil Barnard on "*Secret revolution: Memoirs of a Spy Boss*" in

2015. The books are presenting vivid details of the transition which include amongst others the live role players in the conflict resolution starting from 1986 through to after the installation of the democratically elected government. Some of the information is so sensitive that it was supposed to have been restricted or classified for a particular period of time or until after the death of some of the key participants in negotiations.

3.13. Conclusion

The national liberation struggle in South Africa has culminated into a consolidation of business interests in the sense that both British and American multinational conglomerates, the local English and Afrikaner business admitted into their ranks, the struggle aristocrats. Put differently, big business are the winners in the negotiations for a constitutional democracy. The indigenous conquered peoples gained many political and human rights, whereas the conqueror retained the economic power and wealth that was accumulated through the years of labour exploitation and depression maintained and enforced through legislation (Bond, 2005:265). In Mazrui's (2011) view, the indigenous conquered peoples gained political power out of the 1994 political settlement and the conqueror retained the economic power.

> The African National Congress had been banned for decades. A deal was struck in the early 1990s. The whites agreed to give blacks the crown if whites could retain the jewels. In 1994 Nelson Mandela was able to wear the political crown, while white South Africans still enjoyed the economic jewels.
>
> (Mazrui, 2011:7)

The crown-jewel dichotomy is not unique to South Africa. Fanon (1963) wrote long before South Africa obtained her liberation that the indigenous class of the rich enters into agreements with the rich of the former conqueror. Liberation does mean cutting of socio-economic ties. "In the colonized territories, the bourgeois caste draws its strength after independence chiefly from agreements reached with the former colonial power" (Fanon, 1963:142).

Big business did not only gain from the negotiation for the constitutional democracy, they also escaped responsibility for violation of the labour rights of the indigenous conquered people by suppressing their wages for many decades. Terreblanche's (2012) view illuminates this point as follows:

> For the MEC and rest of the corporate sector the 'great prize' was to be exonerated of the huge apartheid debt that accumulated on their 'accounts' as they exploited black labour relentlessly over a period of a hundred years. On this issue the MEC outmaneuvered the leadership core of the ANC by clever deal-making in the process of which the South African corporations were empowered to metamorphose themselves unjustifiably from ugly apartheid ducklings with a heavy apartheid debt on their shoulders into South African corporations exonerated of their apartheid debt.
>
> (Terreblanche, 2012:72)

The victory by the big business means that the intended revolution was blunted into an evolution. Revolution is an often violent and fundamental change of a status quo. In the case of South Africa, however, the new dispensation was brought about through negotiations. Once a political settlement or dispensation is negotiated, it ceases to be a revolution. This gives rise to a question, given the compromises made by the political elite, how can the South African society reconcile itself into a cohesive nation? Put differently, is genuine reconciliation possible?

As in any situation which political conflict had come to an end, there must ways and means in which political administration is handed over to the party that has usurped power either through the barrel of a gun or national elections. The truth and reconciliation Commission was established to ensure smooth political transition from colonial-apartheid administration to a newly elected democratic government. The Truth and Reconciliation Commission was not up to the task mainly because its idea of reconciliation was blunted. It preoccupied itself with national unity and reconciliation.

CHAPTER 4

4.1 Antecedents to the Truth and Reconciliation Commission (TRC)

South Africa had since 1994 operated in a constitutional democracy in which the indigenous conquered peoples and the posterity of the colonial conqueror are subjected to the same constitution. Unlike in previous conqueror only constitutions, the 1994 dispensation introduced a novelty in the constitutionality history of South Africa by elevating the constitution to the level of the supreme law of the country. This radical transition from parliamentary to constitutional supremacy is based exclusively upon the epistemological paradigm of the colonial conqueror. Put differently, this can be interpreted as skilful way in which the Nationalist Party countered the ANC's much coveted majority rule principle. Thus, the ANC has gained majority in parliament, it can pass legislation through the support of its majority. Constitutionalism does not work with numbers necessarily, it works with compliance with law. But such legislation has to pass a constitutional test.

The incorporation of all population groups in the same body politic did not deal with the legacy of social and economic divisions and the question of sovereign title to territory. Of significance is that the interim constitution of 1993 is totally silent about the injustice of the refusal to restore full and unencumbered sovereign title to territory to its rightful heirs, the indigenous conquered peoples. The question arising from this is: who is the actual beneficiary of the misrepresentation and distortion of South Africa's history? The 1993 constitution is ethically problematical and scientifically dubious because it glosses over the fundamental problem of historic injustice by merely acknowledging that the past is characterised by a deeply divided society characterised by strife, conflict, untold suffering and injustice without identifying the perpetrator of the injustice.

> This constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> (*The Constitution of the Republic of South Africa, 1993*)

Flowing from the above, it is our contention that the argument advanced with regard to the struggle for liberation by American Indians in Latin America and, by extension the Americas as a whole is transferable to the South African situation. The argument implores the relevant decision makers to interrogate the past with honesty in order to unravel the complex historical truths; and only then should there be a collective generation of innovative ways and means on how to move the country forward in a justiciable manner.

> Only by looking historical truth in the face shall we be able to embark upon the times to come with responsibility and efficacy.… Only historical honesty can deliver us from the prejudices, narrow interpretations, paralyzing ignorance, and the deceptions foisted on us by private interest, which lay our history on us like a permanent mortgage instead of transforming it into a thrust to creativity…. A concealment of the complexity of what occurred in those years for fear of the truth, in order to defend current privileges, or – at the other extreme - a frivolous, irresponsible use of offensive expressions, condemns us to historical sterility.
>
> (Gutierrez, 1993:4 & 457)

History as a scientific discipline can hardly exclude the subjective dimension in historiography, despite its claim to 'objectivity', it stands to reason that 'historical truth' is a contested concept. It is beyond the scope of this research to delve deeply into the problems of history as the "reconstruction of the past" (Collingwood, 1946:208). Suffice it to state, therefore, that, even if history is in a sense 'his-story' – notwithstanding the fact that it is yet to be recognised as 'her-story' as well – the concept of 'historical truth' is both meaningful and relevant to the knowledge and understanding of history.

The disclosure of the historical truth was restricted by the law that was to direct "national unity and reconciliation". *The Promotion of National Unity and Reconciliation Act* 34 of 1995 was promulgated for the establishment of the Commission. "National Unity" presumably where there was none before and "Reconciliation" were impositions by law. "It is therefore pertinent to ask why is it that 'reconciliation' was deemed to be so necessary that the 'new' South Africa was legally obliged to enact legislation for the purpose of advancing 'national unity' and 'reconciliation'" (Ramose, 2012:20). This question is particularly important because "justice" is missing in the original wording of the name of the Act. The Commission had come and is gone. It is buried in the history of South Africa. Yet, national unity and reconciliation remain elusive due mainly to the persisting inequality, poverty and unemployment.

4.2 International experience and the South African TRC

The conception of the TRC owes its historical and ideological influence from the Latin American truth commissions, particularly the National Commission for truth and Reconciliation in Chile and the informal and formal negotiations (Lephakga, 2015:167). The key underlying objective of the TRC was to legitimise the elite compromises reached during the formal and informal negotiations (Pilger, 2006:300). It is therefore imperative to bear it in mind that the TRC occurred within the framework of the elite compromise (Bond, 2005:55-73). The elites of the struggle for liberation in South Africa were aware that poverty, unemployment and inequality were the "principal stumbling block on the path to lasting reconciliation and peace" (Esterhuyse, 2012:165). In order to circumvent the 'stumbling block', the TRC became an effective instrument.

The term 'reconciliation' in the law mentioned above was carefully chosen and it strategically plays a psychological and to a big extent business role in the political dynamic of the new South

Africa. It was deployed to dilute the demand for historic and social justice due to the indigenous conquered peoples. "It also cushioned the political accommodation between the struggle aristocrats and big business, foreign and local. 'Reconciliation' was the apartheid regime's escape clause" (Pilger, 2006:300). Sambie Terreblanche's (2012) view on the elite compromise elucidates the point much clearer.

> Why was a justice and reconciliation commission not appointed by the ANC? As indicated above, the elite compromise (or the elite conspiracy) which was agreed upon between the corporate sector and a leadership core of the ANC before 1994 exonerated the white corporations and the white citizens from the part they played in the exploitation and deprivation of blacks, and it also enabled whites to transfer almost all their accumulated wealth, their social and physical wealth – and also the part that was accumulated undeservedly – almost intact to the new South Africa. The elite compromise allowed whites to perpetuate their white elitism almost intact. After agreement was reached on the elite compromise, the ANC leadership core was, admittedly, able to implement a policy of black elite formation, but it was deprived of the power to hold white corporations and white citizens accountable for the systematic exploitation and deprivation that was committed by them during the 'century of injustice: 1894–1994' towards black people. Without a justice and reconciliation commission whites would unfortunately never know how extraordinarily advantageous the settlement of 1993/94 has been for most of them.
>
> (Terreblanche, 2012:109)

Terreblanche's (2012) questioning cited above is a crucial moral basis for mounting a critique of the TRC. Although Terreblanche's (2012) focus is justifiably on economic justice, it extends even to the sphere of historic and social justice because economics is the history of interaction between and among human beings but this history unfolds in the context of the broader human relations. The question of justice is indispensable to any construction of a political and social order that will enable economic activity. Terreblache (2012) pursues the theme of economic relations from the perspective of justice in his recent book; Western empires, Christianity, and the inequalities between the West and the Rest 1500 – 2010.

4.3 **The Truth and Reconciliation Commission of South Africa**

The objectives of the Commission were to promote national unity and reconciliation in order to transcend the conflicts and divisions of the past by:

> (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 (the immediate period before the 21 March 1960, Sharpeville killings of protesters by the South African Police) to 5 December 1993 (the date on which the Interim Constitution came into effect), including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings; (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act; (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them; (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights.
>
> (TRC Report, vol. 1, 24)

It is significant that the mandate of the Commission is restricted to a focus on "human rights violations." The discourse on "human rights" historically began after the 1960s. In view of this factor, it is pertinent to pose the question, why is it that the language as well as the norms of the 1960s is discarded and, instead the language of "human rights" is invoked? Why and, in what manner does the "human rights" discourse illuminate the problem of justice as it was understood in the 1960s? This question leads to the second, but related question, namely, is there any historical justification for beginning the 'history' of the struggle for justice in colonial conqueror South Africa from 1960? The insertion of this ahistorical beginning is a reflection of the fear to face 'historical truth'. The result of this fear is to conceal vital truths and thus deprive them of a role in the search for justice. The TRC's situation is paradoxical, because it has to establish "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights," whilst at the same time, it perpetuates injustice by concealing vital truths and thus depriving such truths of a role in the search for justice.

Conceptually, history in the West in regard to the rights of human beings reveals the evolution from 'natural rights', (Rosmini) 'individual rights', (Locke) "the rights of man" (French

Revolution and Thomas Paine) and "human rights". It is important to note that throughout this evolution, it is the human being who remains the constant invariable. Human rights are conditions of norms and issues which derive value from protecting the foundation of human existence. Human beings have human rights by virtue of being human (Seleoane, 2001:20). Human beings are inherently dignified. So, conceived, "a central function of rights is precisely to insulate right-holders from claims based on principles such as utility, which otherwise would be not only appropriate, but decisive, reasons for public or private action. This priority is not absolute – rights are 'defeasible'; in some circumstances they may be justifiably overridden – but it is essential to the way rights 'work' (Seleoane, 2001:5). For instance, in a life-threatening conflict, the aggressor forfeits, amongst others, the right to life as he or she puts an innocent life of the victims in danger. This is to emphasise that the efficacy of the Truth and Reconciliation Commission lies in its institutional ability to help bring about social justice.

4.4 The Structure of the Commission

The Commission was structured into three committees. The Human Rights Violations Committee (HRVC), the Reparation and Rehabilitation Committee (R&RC) and the Amnesty Committee (AC).

The main function of the HRV Committee was to investigate human rights abuses which took place in the period between 1960 and 1993. The committee had powers to gather, receive evidence and information. It held meetings throughout the country, with almost every hearing receiving media coverage. The coverage of the Truth and Reconciliation Commission was so dramatic that Krog referred to it as a ritual. According to Krog:

> [T]he ritual with which most people are probably most familiar is that seen frequently on television news. Reporting the Truth Commission has become a ritual in which the nation participates via television both because of its regularity and because of its repetitive use of certain visual symbols.
>
> (Krog, 1998:6)

For instance, Lucas Baba Sikwepere, who happened to lose his sight during a police attack on protesters, gave testimony on how he lost his sight. A platform to give testimony gave him some form of relief. When asked how he felt after giving a testimony, his reply was that an

opportunity to tell his story was sufficient to make him feel like he had regained his sight. He was healed (Krog, 1998:6). Nevertheless, it should be taken into cognisance that Sikwepere's cathartic experience, which was generated by an opportunity to have a TRC platform, was not a universal experience, because there is a young man on the other hand whose exposure to the same opportunity generated more grief. He was quoted in Winslow as having said:

> I am not quite happy about the TRC because those who are the perpetrators are still free here in the Boland, and we the victims are still suffering the same way.… The negative side of the TRC is that the perpetrators are still occupying those high ranks. There is no change. We are still suffering as before. This is my major problem. (My wish) is that the perpetrators not be part of the security police anymore, for them not to get any money from the government.…
>
> (Winslow, 1997:26)

At the initial stages of the televised hearings and testimonies, the majority of the White population in South Africa were trivialising the fact that atrocities had happened in South Africa, hence pursuing the narrative that testimonies given by survivors were not tested. It was until some of the perpetrators began acknowledging their terrible deeds that the doubters realised that those testimonies were historical facts. The strength of the Committee is that it provided a platform to both perpetrators and survivors to tell their stories (Krog, 1998:15).

The Committee was, however, not without shortcomings. Firstly, not all who were invited to the hearing were afforded the opportunity to give testimonies. Secondly, testimonies that were given were not transformative in the sense of changing the quality of lives of the survivors. Linked to this point is that the truth that emerged at the hearing was confined to the moral realm at the expense of the political. Put differently, the experience did not remove the condition of victim-hood. It was a major shortcoming because the political provides the dialectical relation between oppression and resistance to it. Mamdani (1997) wrote thus:

> Reconciliation may be a moral imperative, but it will not happen unless it is also nurtured as a political possibility. This is why if truth is to be the basis of reconciliation, it will have to sum up not only the evil that was apartheid, but the promise that was the resistance to it. This is where we begin to glimpse the dilemma involved in a claim that it is possible for a Commission to sum up the truth as a basis for reconciliation.
>
> (Mamdani, 1997:23)

The function of the R&R Committee was to gather information and receive evidence as well, but for the purpose of making recommendations for suitable reparations to victims of gross violations of human rights. By reparations we mean, a deliberate effort by the perpetrator in restoring the social, economic and political balance that was disturbed prior to the violations. Brophy, (in Booker, 2008), defines reparations as "programs that seek both to repair past damage and to build things that will help bring about racial justice and equality. They are both 'corrective justice' (correcting past harm) and 'distributive justice' (redistributing wealth in the present for the future)" (Booker, 2008:104). Reparation payments were made to approximately 17,000 victims in South Africa in which R30 million was paid to each of the 18 communities identified. The amount was meant to increase by 6% annually. Community reparations meant infrastructure development such as building schools and improving on health and social services, and skills development support (Khululani Support Group, 20014). However, the principle is in sharp contrast to the practical reality, because individuals who were directly responsible for human rights violations were not conscripted to pay at least a fraction of compensation for damages. It was the government which carried out the costs.

4.5 The TRC and Reparations

Reparation was both a symbolic and a socio-economic material compensation to individuals who had suffered human rights violations. It is a deliberate mechanism to repair the past injustice caused by colonial-apartheid. Reparation has taken a double-pronged approach namely the Truth and Reconciliation Commission and the Commission on Restitution of Land Rights (Du Bois, 2014:116).

The TRC facilitated reparations that were concentrated on individuals and families of individuals who in the Commission's opinion were negatively affected by the atrocities of the past. Below are categories of reparation that were recommended.

4.5.1 Community rehabilitations – the aim was to promote the healing and recovery of communities by, amongst others, establishing programmes such national demilitarisation; resettlement of displaced persons; rehabilitation for perpetrators and their families; providing infrastructure by, for example, building schools where there was none and building health

facilities where there was none; as well as empowering victims by providing them with skills-training opportunities.

4.5.2 Symbolic reparations – the aim was to establish programmes which promoted the restoration of the dignity of the victims inclusive of communal processes of commemoration. Key among symbolic reparations were the issuing of death certificates, exhumations and reburials of victims who were buried in places not approved by their next of kin, the expunging of political criminal records, the renaming of streets and the building of memorial sites and freedom museums.

4.5.3 Institutional reforms – the aim was to initiate transformation of the administrative and legal institutions which found expression to the Bill of rights.

4.5.5 Individual reparations – individuals and families who were identified as victims of gross human rights violations were provided with some form of financial grants.

The above-mentioned approach to reparations has serious limitations. Its scope of violations of human rights is confined to political activism within the period of apartheid. By singling out political activism, it left out the labour system which had, for example, deliberately depressed wages of the indigenous conquered peoples for decades. Depression of wages by employers impacted on generations of the oppressed majority. The current poverty, inequality and unemployment is, to a large extent, the direct consequence of that system. The point raised above substantiates that the harm suffered as a result of violations of human rights goes beyond a sheer number of political activists as recognised by the TRC's approach. The approach failed to appreciate that there are generations current and unborn who be subjected to the effects of violations suffered by their parents through decades of apartheid. Such generations are unfortunate because their needs will compete with the needs of those who have not inherited the poverty and destitute by design (Du Bois, 2014:127).

Violations transcended political activism. Hence millions of people not only lost their homes, but also land as well as other properties invested on the land. Legal instruments such the *Prevention of Illegal Squatting Act* (PISA) 52 of 1951 and other congruent pieces of legislation such as the *Native Urban Areas Consolidation Act*, 25 of 1945, ensured that:

> [T]he usurpation and forced removal of black people from land compelled them to live in racially designated locations. For all black people and for Africans in particular, dispossession was nine-tenths of the law.... Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes. The Native Urban Areas Consolidation Act, 25 of 1945, was premised on the notion of Africans living in rural reserves and coming to the cities only as migrant workers on temporary sojourn.... Differentiation on the basis of race was accordingly not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones. The principles of ownership in the Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies. In this setting of state-induced inequality the nominally race-free the PISA targeted black shack-dwellers with dramatically harsh effect.
>
> (Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217(CC))

Those who were deprived of decent wages which led to lesser life opportunities did not receive compensation simply because they were not recognised as victims of atrocities in terms of the Commission categorisation of victims. It is in direct violation of the ethical principle of a just wage. The consequences of the unjust wage have had ripple effects over generations. A decent wage, although at face value benefits an individual, in the long run it benefits a community and therefore a common good.

> Anyone, therefore, (says Stattler) who chooses to live in society and to enjoy the conveniences flowing from the work of others, is rightfully obliged, provided he is sound in mind and body, to work usefully for the common good. Hence the beggar who can but will not work, has no place in society; anyone who wants to be supported at the public's expense and by the labour of his fellow citizens, and to obtain from them the necessaries and conveniences for his bodily life, must in return work for them – if not for their material, at least for their spiritual benefit.

> This universal obligation to work for the common good arises both from charity (towards those who work for thee and need thy work in return), and from the bond of civil society, however this may in fact be formed; for through this bond all the citizens expressly or tacitly promise to unite their energies towards promoting the common good.
>
> (Nijhoff, 1966:219)

Flowing from the above, it is well documented that the majority of the conqueror population in South Africa are characterised by opulence at the expense of the cheap labour of the conquered.

The ANC was probably aware that reparations to the indigenous conquered peoples of South Africa is an ethical imperative if the new dispensation were to be sustainable. Thabo Mbeki was quoted as having said:

> The political process of transition to an inclusive democracy with international status should not be too difficult. We would be able to manage that. The socioeconomic transition process, though, is the more complex issue. There is terrible poverty, and the legacy of apartheid is visible everywhere. There are also high material expectations on the part of the oppressed. The gap between rich and poor is massive. How are we going to integrate 30 million blacks, mostly poor, in an economic process that is currently controlled by rich, white elite? The right to vote isn't going to be our problem. Socioeconomic rights, access to the economy and a share in South Africa's natural resources, including land, will be the real issue. You can't eat the right to vote. You can use it, however, to achieve socioeconomic rights. Afrikaners, given their history, ought to understand that.
>
> (Esterhuyse, 2012:257)

The second approach to reparations focuses on the restitution of land that was carried out through the Commission on Restitution of Land Rights (Du Bois, 2014:118). The process of land restitution restricted the right to claim only up to 19 June 1913. This period covers what is popularly known as the forced removals in the consolidation of racial segregation (Du Bois, 2014:130). The 1913 cut-off date leaves out almost eighty-seven per cent of South Africa's land untouched and it is in the hands of the conqueror. The cut-off date goes against the *raison d'être* of the struggle for liberation, because the forcible dispossession of land has been and,

continues to be the vital bone of contention in the conflict between the indigenous peoples and the colonial conqueror.

The ANC's acceptance of the 1913 cut-off date is significant because it highlights the fact that going beyond the 1913 date would have contradicted the overall vision of creating a united South Africa mostly pronounced in the Freedom Charter. Going beyond 1913 would also mean slipping back to the social fragmentations of 1909 and beyond before the formation of the ANC itself (Du Bois, 2014:133). The concern of opening internal conflict and fragmentations amongst Africans is captured in the White Paper on Land Policy of 1997. It states that:

> In South Africa, ancestral land claims could create a number of problems and legal-political complexities that would be impossible to unravel:
>
> - Most deep historical claims are justified on the basis of membership of a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics.
> - The members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times in this century alone and are scattered.
> - Large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British.
>
> To what date should the clock be put back? Would it be possible for the courts to verify the historical land claims? On what basis would the legitimate descendants be identified and apportioned compensation?
>
> (Du Bois, 2014:134)

One can justifiably infer that the above-mentioned approach to land restitution had more to do with the balance of power which prevailed at the negotiating table between the indigenous conquered peoples of South Africa represented primarily by the African National Congress on the one hand and the conqueror represented by the National Party on the other. The National Party was in control of the levers of power in all the vital sectors of life in South Africa. So, a powerful National party during the transition was similar to chess game situation in the sense that even when the ANC had checkmated the National party, it still could not conquer its king. It was in self-constraint mode.

> "The negotiation of power between President De Klerk and Mandela culminated in South Africa's 1993 interim Constitution, …. Although it is conceivable that Mandela's government could have nullified that constitutional provision once his regime gained strength, such a course would surely have weakened the legitimacy of the new South African government"
>
> (Markel, 1999: 395).

South Africa is definitely not the first to experience the need for restoration of land to its original owners. Examples abound on how the struggle for land was resolved elsewhere. Due regard is given to the fact that not all South Africans are Christians, however, we can explore the Biblical example of restitution.

In Leviticus 25, the Bible outlines a mechanism for restitution. Ownership of land was not a permanent thing. After every 50th year, God commanded that the land be returned to its original owners. The system ensured that land could neither be owned nor sold in perpetuity (Van der Walt, 1996:21). Those who lose land in between the 50th year would still retain hope that a time for land-property redemption will one day come, even if the resource would go to the descendants.

> There was, in Israel, no absolute ownership of land by any man – not even the king – but only a holding-in-trust for the sole and permanent owner, viz. God, who gave every family its share (cf. Verse 23). When a piece of land was bought or sold, the transaction therefore was valid only until the year of jubilee.... No one could really buy land – one could only buy a number of harvests.
>
> (Van der Walt, 1996:21)

The jubilee tradition was a way of levelling the playing field and to protect the poor against dominance by the rich. Given the system, there was no permanent poor or rich family. Our idea of land is informed by the Hebrew conception of land as soil that encapsulates beneath it "minerals, water, forest resources, even the air" (May, 1991:51). Land is a cultivable soil where one can establish a home and sustain life. It is not a simple earthly space or geographical territory where one can erect a shack. In the unfortunate event of "deliberate acts of stealing,

violent behaviour and other forms of harm" reparation in the form of repayment or redress is compulsory (Van der Walt, 1996:20).

A secular example is that of the Jewish Holocaust in which an agreement with far reaching costs for compensation was reached "between the Federal Republic of Germany and representatives of Jewish people regarding compensation for the suffering inflicted during that terrible era" (Sebba, 1980:202). In terms of the agreement, the German government took responsibility for the payment of atrocities which were committed. The payment of reparations was threefold.

> First, the German government undertook to pay three billion deutsche marks (DM) to the state of Israel in recognition of the cost borne by that country in resettling and rehabilitating victims of the Holocaust ... Second, a further 450 million DM, while transferred to the state of Israel, were earmarked for the Jewish organizations that took care of the welfare of Jews resident outside Israel. Third, the German government undertook to introduce legislation providing for the submission of compensation claims by all victims of Nazi persecution. The three agreements thus corresponded with the three levels of beneficiary: (1) the Jewish state, (2) the Jewish organisations, and (3) the individual victims.
>
> (Sebba, 1980:207)

With regard to the Jewish Holocaust, the German government remained in existence after the Holocaust was committed and, as such, could be held accountable. In South Africa, the government that was supposed to take responsibility for the atrocities it had sanctioned had disappeared with the 1994 democratic elections. The government that was responsible for atrocities is gone, what is the way out here? Instead, the new government inaugurated since 1994 focuses on "reparations" within the narrow ambit of the TRC. The ethical imperative of historic justice was thus discarded without any assurance of its resurgence.

We would to a certain extent agree with Mamdani that "the Holocaust metaphor" is not entirely transferable to the South African situation because the Germans (perpetrators) and the Jews (victims) did not share a society and or government after the traumatic Holocaust. Israel came into existence as an independent State (Mamdani, 1997:23). Special differentiation made things slightly easier to punish the perpetrator. We, however, acknowledge the fact that, even

though perpetrators and victims of the Jewish Holocaust live in different territorial spaces, the discussions about reparations for the Jews started before the end of World War II, before Israel was established.

> Even before World War II ended, Jewish leaders and heads of Allied countries recognized the need for Germany to provide the Jewish people with compensation for seized property. At conferences across the world, from Baltimore in 1941 to London in 1943, Jewish organisations and the Allied governments were discussing the need for compensation…. As the Allies' upper hand in the war grew stronger, Jewish leaders began to draft proposals of postwar claims against Germany.
>
> (Weisshar, 1954:1)

Notwithstanding the differences between Germany and Israel, there is nothing that prevented innovative measures in which responsible individuals for violations of human rights could be identified and held accountable for the past deeds. Nonetheless, the aspiration for national unity and reconciliation prevailed over the one for reparations. South Africa has lost two opportune moments to answer to demand for justice in the form of reparations. According to Krog, (1998) South Africa missed two opportunities for compensation to take place. First, that churches and religious groups could have been given the responsibility to collect money for compensation after a month and a half into the work of the TRC because many people became aware of shocking stories which were coming from letters submitted by victims. All along perpetrators were refusing to take ownership arguing that the confessions were hearsay as they were not tested. The second opportunity was lost when perpetrators themselves began come forward and confessing their actions. According to Krog, that was an opportune moment for the government to create an account or fund to which people could have contributed money. Unfortunately, those who were seeking amnesty and ordinary people alike were never ask to make financial contribution on voluntary basis though (Krog, 1998:14).

The majority of the indigenous conquered peoples have suffered what we may call a double jeopardy in the sense that their rights were violated by the system of colonial-apartheid and again by the narrowing of the scope of victims which led to their exclusion as beneficiaries of compensation in the "new" South Africa.

The mandate of the Amnesty Committee was to consider applications for amnesty. The committee consisted of five persons of which the chairperson must be a judge. For one to qualify for amnesty, the applicant had to meet the following criteria:

(a) The act or omission had to be associated with a political objective committed in the course of the conflict of the past;
(b) The applicant had to make full disclosure of all relevant facts relating to their involvement in the conflict;
(c) The applicant should have been a member of a publicly known political organisation or liberation movement or an employee of the State acting within the scope of his or her express or implied duties; and
(d) The act or omission should have been committed in furtherance of the political objectives of the party concerned.

The Committee had powers to grant amnesty. In terms of Section 20 (7) (a) of *The Promotion of National Unity and Reconciliation Act*, amnesty recipients were exempted from criminal prosecution by ordinary court or civil court for their deeds. The section provides that:

> No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offense and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offense. (b) Where amnesty is granted to any person in respect of any act, omission or offense, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person. (c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offense committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offense.

The *a priory* granting of amnesty to perpetrators from criminal or civil liability prompted the Azanian People's Organisation (AZAPO) to file an application with the Constitutional Court asking the Court to declare section 20 (7) (a) unconstitutional (Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others, 1996 (4) SA 672 (CC)).

The Court dismissed AZAPO's application and held that section 20(7) was not inconsistent with the constitution. The Court, however, acknowledged that the section limited the applicants' right in terms of s22 of the Constitution. Section 22 provides that, "[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum"

The Court argued also that, in terms of s 33(2) of the Constitution, violations of rights are permissible either if sanctioned by the constitution or if justified in terms of s 33(1) of the Constitution (the limitation section). The Court concluded that the Constitution sanctioned the limitation on the right of access to court. And, further that amnesty for criminal liability was permitted because, without it, there would be no incentive for offenders to disclose the truth about past atrocities. The truth might unfold with such an amnesty, thus assisting in the process of reconciliation and reconstruction. The Court argued that such an amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being.

Similarly, the Court also considered the argument that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) authorizing amnesty for perpetrators constituted a breach of the Geneva Conventions of 1949. The Court concluded that it was doubtful whether the Geneva Conventions and their Additional Protocols applied at all to the conflict. It found that the amnesty provisions were not inconsistent with international norms and did not breach any of the country's obligations in terms of public international law instruments (Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others, 1996 (4) SA 672 (CC)).

Justice Mahomed stated that the reconstruction of a democratic order ought to be done "through a firm and generous commitment to reconciliation and national unity.... It might be necessary in crucial areas to close the book on that past" (Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others, 1996 (4) SA 672 (CC)). The judge's plea to the indigenous conquered peoples to give "a firm and generous commitment to

reconciliation and national unity and closure of the book on that past" is problematic for a number of reasons. Firstly, it undermines *jus ad bellum* principle of the *just cause* which was at the core of the liberation struggle. The indigenous conquered peoples cannot wage the liberation guided by the principles of the Just War tradition, against colonisation based on the questionable right of conquest only to seek a 'blind' generous commitment to reconciliation and national unity. As Bass (2004) has it, this is "just another way of masking a war of conquest or empire" (Bass, 2004:412). Secondly, and from a *jus post bellum* perspective, political and economic reconstruction (reparation) has to be undertaken after the destruction and the aggressor should pay the costs of rebuilding the country.

4.6 Reparations from the unjust war of colonial conquest

An amnesty undoubtedly infringes on rights of the aggrieved. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect and protection of dignity; and their right not to be subjected to torture of any kind. In the event that those rights are violated, the aggrieved have the right to obtain redress in the ordinary Courts of Law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively undermines such rights.

We recognise the fact that, at times, the aggressor could well be a large group of people and generations as is the case in South Africa. In such cases, the responsibility for the post war reconstruction should lie with aggressor leaders, war supporters and profiteers (Bass, 2004:412). We would agree with Bass (2004) that the aggressor should bear the responsibility for waging an aggressive war.

The fact that there is no consensus on the definition of an aggressor makes the situation even more difficult (Brownlie, 1963:355). The internationally powerful countries such as the former Soviet Union, the United States, France and the United Kingdom, for example, attempted a definition, but could not reach a conclusive answer (Brownlie, 1963:162). The aggressor State should be criminally held liable. Instead, only individuals of the aggressor State, who carried out the actual attacks, are held criminally responsible (Brownlie, 1963:166).

It would seem that countries which were involved in defining aggression were each preoccupied by self-interest, for each of them sought a definition that would leave room for their right to wage war whenever they so deem fit. The concept of aggressor is therefore definable primarily from the subjective point of each belligerent. Walzer (1977) defines aggression as "every violation of the territorial integrity or political sovereignty of an independent state" (Walzer, 1977:52). Walzer's (1977) definition does not assist either because it is too extensive. It is not clear what is included or excluded from the definition. Linked to the concept of aggression is the concept of non-combatant immunity.

Brownlie (1963) wrote that the crimes of the State on aggression are only delictual and that it is the private citizens of a State who bear the criminal responsibility on behalf of a State. This line of reasoning gives rise to a question: who should bear the criminal responsibility for war crimes. The question is necessitated by the fact that it takes many people to wage war. Thus "planning, preparation, initiation, and waging" involves many a large number of people" (Walzer, 1977:292). It will obviously take organs of the State and the indirect or direct contribution by multi-national, or transnational corporations, to challenge their state's capacity for war. Brownlie's (1963) view notwithstanding, political leaders declare war in the name of their people and on behalf of their people and soldiers fight wars in the name of their countries too. So, military industrialists and other occupations cannot escape culpability as legitimate targets of war. In pursuit of this line of reasoning it is rather hasty to limit responsibility for the post-war reconstruction to "aggressor leaders, war supporters and profiteers."

By contrast, Germany did not, and could not have committed aggression against a non-existent Israel, even though the "non-war supporters and profiteers" from the war, especially the unborn Germans, were nonetheless committed to and continue to remain obliged to pay reparations to Israel.

> Instead of addressing such an invitation to the conquered peoples, the learned Judge would have done better to invite the successors in title to conquest to act like Chancellor Konrad Adenauer" Ramose was drawing from the German experience wherein at the end of World War II, "the German Chancellor Konrad Adenauer, acted out of moral sensitivity and rectitude to bind even the unborn German, to pay reparations to Israel.
>
> (Ramose, 2012:29)

It would seem that morality was not the sole reason for Germany to agree on paying the reparations to the Jews. Adenauer's posture was underscored by political diplomacy as well, for various reasons. Firstly, he wanted good public relations in order to redeem Germany's image. Secondly, he was for the international reacceptance of Germany, especially by the United States, and to assure the international community that his administration was, by far, different from that of the Third Reich. Thirdly, restitution would guarantee that the people of Germany rose again (Weisshar, 1954:3). So, reparations were a double-edged benefit. Thus, the Jews benefited from reparations socially and economically, whilst, in reverse, the Germans benefited morally, politically and socially. Some lessons from this experience could be taken to the binary relation between the indigenous conquered peoples of South Africa and the conqueror.

4.7 Forgive and forget

The question then arises on whether or not it is politically and morally appropriate to forego justice in pursuit of national unity and reconciliation. We again ask with Soyinka (1999) on whether such a procedure will truly heal society, on whether "it will achieve the reconciliation that is the goal of the initiators of this heroic process?" (Soyinka, 1999:33). For Soyinka (1999), "South Africa was, of course never a candidate for the revolutionary formula, since it owed its transformation more to negotiations than the route of arms" (Soyinka, 1999:15). The political framework within which South Africa ordered her transition was a limiting factor in the sense that national unity became the overriding goal.

> The problem with the South African choice is therefore its implicit, *a priori* exclusion of criminality and, thus, responsibility. Justice assigns responsibility, and few will deny that justice is an essential ingredient of social cohesion – indeed; I have asserted elsewhere that justice constitutes 'the first condition of humanity.' And even as justice is not served by punishing the accused before the establishment of guilt, neither is it served by discharging the guilty without evidence of mitigation – or remorse.
>
> (Soyinka, 1999:31)

By forgoing justice or accountability, the South African Truth Commission violates the Just War Principle of Proportionality because receiving amnesty on the basis of the law that was

enacted retrospectively, provided the perpetrator shall have told all the truth is not proportional to atrocities committed.

The United Nations (UN) raised a critical voice regarding the granting of a blanket amnesty to those individuals who were involved human rights violation in the 1990s Sierra Leone civil conflict. In Sierra Leone, the Government of Sierra Leone and the Revolutionary United Front (RUF) signed what was popularly known as the Lomé Peace Agreement for the above-mentioned reasons. In terms of the agreement, no process similar to the TRC was undertaken (Alie, 2012:104).

4.8 Amnesty as an Ethical Problem

The Commission was vested with the power to grant amnesty to offenders provided they tell the truth regarding their involvement in the past violations of human rights. The ethical challenge is that the same Commission did not have the authority to implement reparations towards victims who were identified. All the Commission could do was to make recommendations to parliament. Making recommendations to parliament means that implementation of reparations was left at the mercy of politicians (Maepa, 2005:68).

The fact that, once the amnesty is granted, the offender is no longer liable for any civil or criminal damages, means that truth replaces justice.

Moving from the above, we are reminded once again that the TRC was a product of the elite compromise and therefore meant to ratify such a compromise, other than the search for justice. It was the advancement of the political and business agenda by other means.

Politicians often compromise justice by granting amnesty or indemnity to people who do not deserve it. This is done in the name of preserving life and limb, and preventing the breakdown of the social fabric. Argentina and Chile are cases in point. People such as Leopoldo Galtieri, Augusto Pinochet and many others were pardoned for the sake of national unity and progress in their countries. Equally, in South Africa, it was very clear that there was a State-sponsored violence and counter-violence, both inside and outside the country. The internecine liberation

conflict ultimately led to the "*new*" South Africa. Out of political pietism, people who were involved in atrocities of the past on both sides were absolved of responsibility and, at the end, evaded justice. Evading justice is tantamount to shunning responsibility, yet responsibility is the pillar of society. "A fact that is often conveniently ignored is that the territory of culpability in the South African instance was not limited to the state" (Soyinka, 1999:27).

It was not necessarily difficult to identify people and institutions who were involved in violations of human rights during apartheid. Records are there of:

> [individuals, groups of people, state agencies and businesses] political parties and voluntary associations - be they all-white political parties, segregated clubs and resorts, etc., self-defence militias (the volunteer backbone of the state system) …a host of privileged and/or profit-generating institutions that prospered through Apartheid. The essential is to establish the principle: that some measure of restitution is always essential after dispossession.
>
> (Soyinka, 1999:36)

Maepa (2005) argues that truth recovery should be linked with reparations because delinking the two creates a perception in the victims' mind that the TRC was bent on hastily closing the chapter on the past yet behind many untold miseries. A perception wherein victims feel that reparations are done to substitute truth recovery should be avoided. Reparations were done by the government on behalf of perpetrators. Individual offenders should voluntarily contribute towards reparations (Maepa, 2005:69). However, a space was not provided for that to happen, nor did individuals come forward to volunteer contributing reparations to the wider majority of victims. The situation points to one conclusion, the TRC had substituted justice for truth telling. The commission itself seems to have made it difficult for reconciliation to take place, we ask the question with Mahmood, as quoted in Krog (1998), "If truth has replaced justice in South Africa – has reconciliation then turned into an embrace of evil?" (Krog, 1998:112).

Maepa (2005) argues that many frustrated victims have made strong statements that there can be no reconciliation without justice. Very few perpetrators directly apologized and offered restitution to survivors and their families through the TRC process. This was not an essential

part of the process, as reparation was made by government and offenders were not obliged to make direct apologies to families of victims or to victims themselves.

As we have stated above, the idea of reconciliation was brought into the vocabulary of the Commission with the aim of protecting the privileges of the posterity of the colonial conqueror. Some Afrikaner politicians have used the word 'reconciliation' to their advantage by using it to threaten leaders of the "*new*" government to yield to their demands. According to Krost, most Afrikaner politicians used the word quite often, but not to cover-up on their shameful actions during apartheid. On the contrary, they used the word to blackmail government to give them what they wanted or they would not reconcile the black government (Krog, 1998:109).

One can infer from the above that such blackmail tendencies were signs of government with limping sovereignty. It was reconciliation without accountability and therefore with no repentance. The perpetrators are refusing to take responsibility and instead shift the blame to someone else. Shifting the blame in this manner is absurd and leads to infinite regression. Cronin (1999) captured that well thus:

> If we wanted to, we could push some of this into an absurd reductionism – English-speaking business blaming Afrikaans-speaking counterparts, who blame the political ambience, the politicians blame the securocrats, and the securocrats blame a few 'rotten apples'. In the end, we could all become the victims of a few rotten apples.
>
> (Cronin, 1999:9)

It clearly demonstrates that such perpetrators were reconciling for the sake of reconciliation, if at all. It is reconciliation without accountability. For as long as they do not own their evil acts, they cannot repent or show remorse.

4.9 "Truth" and the granting amnesty

South Africa did not grant blanket amnesty to all perpetrators of human rights violations; neither did they prosecute each and every perpetrator. The difference between the Commissions of South Africa and Sierra Leone is in the degree to which perpetrators are held accountable. The underpinning objective in both cases is the preservation of the *status quo* by

not pursuing justice and accountability. The two Commissions pursued the proverbial slogan that “the truth shall set you free” from possible criminal or civil liability. Confession of the truth and full disclosure were the guaranteed path to amnesty.

Based on the foregoing, the ‘truth’ has become an end, and not part of the process, whereas Truth, Justice and Reconciliation should be the “overall objectives of the policy and no one of them should be considered instrumental to the others. It is impossible to be certain that truth or justice will lead to reconciliation under all circumstances” (Mendez, 2000:28). “Justice, peace and reconciliation are therefore inseparable. The ultimate goal is to rehabilitate both the injured person or party and the wrongdoer. It is justice that heals; thus, justice is combined with reconciliation” (Alie, 2012:104). Truth is a necessary but insufficient component to national unity.

Truth in this context serves in the process of facilitating amnesty; beyond that it loses value completely. The only advantage is that, at least, after the truth shall have been told, the lies about what happened in the political past will be limited or eliminated. The problem is compounded by the manner in which the term ‘truth’ is employed because the ‘unintended’ message is that one had the licence to violate human rights as she or he is prepared to disclose fully. That way truth does not take the project of national unity forward. It is a corroboration of the view that the prosecution of the TRC and its conclusion was a decision by the political elite. The majority of the indigenous conquered people had to “give up their right to justice or compensation in exchange for the truth” (Hamber & Kibble, 2003:5). This is a case of sacrificing justice for social unity. The role, mandate and impact of the TRC were influenced by political constraints or the perceived balance of power between the negotiating parties at the negotiating table (Hamber & Kibble, 2003:1).

It is difficult therefore to discern whether the truth that was volunteered by both perpetrators and survivors is all there was to tell. Stanley (2001) asserts that truth was compromised in the TRC process despite the incentives of non-prosecution and amnesty. There are two principal reasons which led to the compromise of truth.

> First, given the right to reparations offered to 'victims' and the desire of 'perpetrators' to avoid prosecution through the receipt of amnesty, the commission has encountered tactical storytelling. Second, powerful groups and organisations have determined their own acceptable levels of truth through negotiation. With a desire to maintain positive identities in the new South Africa, these truth-tellers have not wanted to tell too much….in aiming to fulfil a particular identification, individuals have made a political choice of what to tell and, of course, what to leave out.
>
> (Stanley, 2001:531)

Censorship of truth will definitely have impact on justice. It is necessary to get all the truth in order to correct the lies and distortions of colonial apartheid. But the TRC preferred to balance "truth, mercy, peace and justice." Odendaal in (Hamber & Kibble, 2003:10) cautions that the process of revealing the truth was bound to avoid forms of retribution and revenge that would damage peace. And, to that effect, Tutu rightly put it that justice alone would reduce the country to ashes. Truth was secured for the sake of future stability and peace at the expense of justice. In our view, truth and justice are two sides of the same coin. For this reason, we would agree with Ramose that "the pursuit of truth without fidelity to history is the denial of justice whereas justice without truth is empty and arbitrary" (Ramose, 2006:3). Compromising justice is tantamount to shooting oneself in the foot because it nullifies the fundamental aim of the struggle, restoration of justice.

Mandaza wrote on the South African TRC machinations that rendered justice a major casualty at the end. Truth commissions, particularly those that take place in a political transition, are a symbol of an aborted liberation project. In countries where a liberation project served its term, conditions do not allow a need for a truth commission. Mandaza wrote:

> [Thus, reconciliation and social justice] more often than not, is the mourn of the weak, even when pronounced from positions of apparent moral and political superiority over the oppressors and exploiters of yesterday. The reconciliation exercise, therefore, serves largely a political function, facilitating the necessary compromise between the rulers of yesterday and the inheritors of state power, within the context of incomplete decolonisation. Conversely, it is inconceivable that African leaders would be preaching reconciliation in Zimbabwe, Namibia and South Africa if they had won outright on the battlefield and were therefore able to fulfil the agenda of the liberation struggle. It is not difficult to understand why the imperative of social justice – which must include both political and economic

> emancipation for the majority – cannot be achieved in the pre-emptive conditions of reconciliation.
>
> (Mandaza, 1990:79)

4.10 TRC and the Quest for Justice

A Truth Commission can be used for many objectives. For example, truth commissions can be used as forums for *catharsis* in regard to the memories of the past both by perpetrators and victims; and they are always setup during or in a post-civil war conflict so as to smoothen transition, "as in Chile and South Africa, after a negotiated settlement of civil war, as in El Salvador, after a military victory by rebels, as in Uganda and Chad, or in a rapid democratic opening after repressive military rule, as in Argentina and Uruguay" (Heyner, 1994:608). However, mandates given to truth commissions vary from country to country given the will of the prevailing political circumstances and the elite in charge. Some limit themselves to the investigation of disappearances, have powers to name the names of those responsible for atrocities yet without powers to grant amnesty, whereas others even have the powers to do so to those responsible for abuses. However, what is most distinctive about the Truth Commission of South Africa is that its proceedings were open to the public (Boraine, 2000:270).

Despite differences in truth commissions as highlighted above, Heyner (in Hamber & Kibble, 2003:4) has identified four basic common characteristics, namely:

- Their focus is on the past;
- Their aim is to provide a comprehensive picture of abuses and of violations of international law over a period of time, and not simply to focus on one event;
- They exist for a limited period of time, usually winding up when their report is complete; and
- They have authority to access information and demand protection; thus, they can examine sensitive issues and maximise the impact of their report.

On the same breath, it should be taken into cognisance that outcomes of Truth Commissions can be used in many ways. It depends on the intention of the political elite in charge. The political elite can use it to clean its tarnished public image especially if such elite has a record

of human rights abuse and or is facing international pressure to take accountability of its past (Heyner, 1994:608).

The Truth Commission in Chad is a case in point. The Commission found itself facing a huge criticism that it was used to cover up on atrocities even before it could complete its work. With regard to points (1) and (2), those that support the establishment of truth commissions believe that commissions will help prevent history from being lost or repeating itself. The assumption is that truth commissions shame perpetrators by naming them and publicising them. It was unjustifiably inferred that potential human rights violators are unlikely to recommit the crime. Nevertheless, experience elsewhere proves that there is no guarantee that truth commissions prevent recidivism in as far as human rights violation is concerned. From Neier's (in Hayner, 1994:608) view, it is not inherently true that truth commissions do influence future leaders in a positive way.

Neier, as quoted in Hayner (1994:608), stated that:

> I do not claim that acknowledging and disclosing the truth about the past abuses, or punishing those responsible for abuses, will necessarily deter future abuses. I doubt there is decisive evidence for this proposition. The same can be said of the contrary view, sometimes argued by proponents of amnesties, that an amnesty promotes reconciliation, while if a government making a transition to democracy attempts to punish those guilty of past abuses, it risks allowing those people to seize power again. Either outcome is possible. Whether the guilty are accorded amnesty or punished is only one among many factors that affect the pattern of events in any country.

The experiences of Uganda and Zimbabwe corroborate Neier's (in Hayner, 1994:608) point of view. In Uganda, for instance, a truth commission was established in 1974 by President Idi Amin Dada. That commission did not prevent a repeat of human rights abuse. It also failed to stop the continuing abuses that preceded the commission itself. Worst of all, truth commissioners were themselves subjected to government harassment after the completion of their work.

In Zimbabwe, the truth commission was established in 1985, but the report was never published despite the fact that the commission completed its investigations and submitted the report to the president of the country. It shows that it is not a given that establishing a truth commission is a guaranteed deterrent to violation of human rights. A truth commission is often a political instrument of the powerful class. What they do about it is determined by the interest of the class.

If the utility of a truth commission is variable to the interests of a dominant political class, then a question which impacts on justice arises: firstly, should it be peace or justice or both? Secondly, linked to the first question is the method of accountability. For instance, how perpetrators of the past crimes should be held accountable. Should it be Restorative justice, Retributive justice, indigenous justice system or a mixture of all?

The ANC argued that their struggle for liberation had a higher moral ground since it was internationally recognised that apartheid was "declared a crime against humanity by the United Nations" (Alie, 2012:98). In the ANC's view, theirs was a "just war." Similarly, the Commission made its utmost to "place what went 'went awry' in a broader context which serves largely to exonerate the ANC from full responsibility for wrongdoing" (Jeffery, 1999:112). This supposes that the ANC had an upper hand over the National Party. However, it is curious that, even though apartheid was a crime against humanity, apartheid itself as a crime was never tried. It is only crimes that were committed in the context of apartheid that were tried (Christodoulidis & Veitch, 2014:15). That is a fundamental flaw of the TRC.

The leadership of the indigenous conquered people of South Africa (in the form of the ANC as the dominant party during the struggle and negotiations) unilaterally decided not to demand justice from the conqueror: this, in violation of the standard practice wherein such cases elsewhere resulted in the Nuremburg, Tokyo, The Hague and Arusha trials. The decision was unilateral because the leadership had an option to subject the proposal to a referendum (Ramose, 2002:462).

On the other hand, the National Party emphasised the importance of even-handedness urging the TRC to take the broader context of the Cold War in which they were fighting the 'total onslaught' of international communism and the ANC by being part of the 'total strategy' to preserve the *status quo*" (Van Zyl Slabbert, 2006:18). And further that "the country was involved in a war in which all sides committed abuses, and that the commission should not support claims by any party to hold the moral high ground" (Parlevliet, 1998:157).

The preceding paragraphs have considered the elusive quest for justice within the legal parameters of the TRC. Do other theories and practices of justice fare better with regard to satisfying the demands of natural and historic justice due to the indigenous people of South Africa conquered in the *unjust wars* of colonisation? In the following paragraphs, this question is answered by reference to Restorative Retributive and the Indigenous justice conceptions.

4.11 Restorative justice

There is no universal definition of the concept of restorative justice. However, for our purpose restorative justice shall mean a philosophical approach that views crime and conflict principally as harm done to people and relationships. Restorative justice approach is relevant to a social situation where the equilibrium or balance is disturbed or a harm is committed against an individual or the community. For justice to occur, the offender must accept responsibility on voluntary basis. So, a third party should facilitate the process of restoring balance that was disturbed by the offender. The aim of this approach is to empower the victim to an approximate original balance. "The restoration of social equality after the offence is thus related to the restoration of equality in the relationship between the perpetrator of the offence and other members of society, including the victim" (Llewellyn and Howse, 1999:379).

The TRC partly implemented restorative justice because some individual perpetrators were called to account and face the victims in front of the panel. But the process was based on the assumption, erroneously, that only individuals from the conqueror's side were perpetrators. Accordingly, Krog (1998) states that "no black person assumed responsibility for the controversial black-on-black violence" (Krog, 1998:13). Yet, it is well known that a method of killing called 'necklacing' was almost exclusively practised amongst Blacks, especially in

townships areas. Necklacing was a method used by 'leaders' to 'discipline' those members of the community deemed to be dissenting against popular opinion during the struggle against colonial-apartheid. The weakness of the TRC in as far as restorative justice is concerned is that the community was not closely involved in its processes. Members of the community could only watch proceedings on television or listen to the radio. The recommendations were provided by the TRC and implemented by the government.

The Commission individualised the crimes of the past by calling out on certain individuals to account for the abuses committed. It called on individuals such as Basson, P.W. Botha and Malan to name a few. Individualising violations of human rights against the indigenous conquered peoples of South Africa is a challenge because there are crucial policy issues which impacted negatively on the livelihood of the conquered people of South Africa. The land question is but one case in point, forced removals, low and suppressed wages for the indigenous conquered working class, the education policy. The legacy of the policy implemented then is continuing to hound the indigenous conquered people.

In this context, we would agree with Hamber and Kibble (2003:20) that,

> the danger in constructing the 'truth' solely from the testimony of individual human rights victims and abusers is that the larger picture – centuries of systematic subjugation, enslavement, oppression and exploitation – can be obscured. Furthermore, the narrow interpretation of 'gross violations of human rights' does not identify women as victims, even though they bore the brunt of oppression through forced removals, pass arrests and other acts of systematic 'apartheid' violence.

The argument in support of individualisation of responsibility is that the government had to protect its institutions from suffering illegitimacy by being tainted by keeping public servants who are implicated in the gross human rights violations. Due to secret talks deals between the political elites, "one of the most far-reaching compromises agreed by the ANC guaranteed the full benefits of all public servants who left voluntarily, imposing a huge financial burden on the incoming government of national unity (GNU)" (Gumede, 2005:95).

Without addressing the policy consequences, the structural causes of conflict remain unaddressed.

4.12 The TRC's Victim

It is difficult to determine the criterion for one to qualify as a 'victim' of gross human rights violation caused by the political conflict of the past. According to the TRC, the victim is defined as:

> direct survivors, relatives or dependents of persons who suffered gross human rights violations as a result of the political conflict of the past. Gross human rights violations included torture, severe ill treatment, murder, abduction, aggravated assault, disappearance, and detention.
>
> (Maepa, 2004:71)

As highlighted under "Reparations" above, the definition focused on the physical harm of the victim and leaves out the impact that was caused by the policies of colonial-apartheid.

The principle of fairness was the major casualty because the TRC did not treat victims with the same dignity that was accorded to perpetrators. Perpetrators, whose majority was relatively from the privileged and better educated, received assistance in terms of legal advice and interpretations during their preparations for appearance at the TRC, whereas victims, who were most probably relatively poor and less educated, received little support. Lack assistance resulted in many of them not qualifying as victims and their tormentors getting away with it. Accordingly, Maepa (2005):

> The plight of the victims in the TRC process created a perception that the new government is unwilling to acknowledge the pain and suffering they endured. As a result, there is a sense of resentment among victims that the TRC was biased in favour of the perpetrators. This perception was deepened by the fact that while most amnesty applicants received legal assistance from the state, victims received poor, if any, legal advice. Most victims received little help when making statements, resulting in some being declared 'non-victims' by the TRC. This had a profoundly disempowering impact on those affected, most of whom struggled to follow the appeals procedure, which had many legal technicalities.
>
> (Maepa, 2005:70)

Interpreters were either poorly trained or they were just overwhelmed and could simply not cope with the job (Krog, 1998:129). Under such circumstances, reconciliation process becomes shaky.

> The definition of injustice has come to be limited to abuses within the legal framework of apartheid: detention, torture and murder. Victims of apartheid are now narrowly defined as those militants victimised as they struggled against apartheid, not those whose lives were mutilated in the day-to-day web of regulations that was apartheid. We arrive at a world in which reparations are for militants, those who suffered jail or exile, but not for those who suffered only forced labour, pass laws and broken homes.
>
> (Mamdani, 1997:25)

The TRC arrived at a total of only 22 000 victims of gross violations of human rights. Twenty-two thousand (22 000) is but a small percentage of those who suffered. The social, economic and political legacy of colonial-apartheid means the conquered people of South Africa continue to suffer a structural problem of landlessness, poverty, unemployment, inequality and crime (Villa-Vicencio, 2004:73). Unless these structural causes of conflict are addressed, lasting peace may not be realised in South Africa.

The scope of investigation of human rights violation should have gone at least beyond 1909, when the Union of South Africa was established at the exclusion of the conquered people. The political expediency, the compromise of justice for reconciliation and non-consultative process of decision making on the establishment of the TRC dictated this outcome. For that reason, we agree with Stanley (2001:526) that

> [T]he foundation of this problem can be traced to the shift towards democracy in South Africa. The public transition from apartheid, established through a negotiated settlement rather than a revolutionary process, framed the Commission's powers. Shaped by the historical context of this particular transition, the TRC was careful not to 'rock the structural boat.' Rather than pursuing truth and justice, as an integrated feature of social transformation, the Commissioners and, to a large extent, the government of South Africa, maintained an agenda that avoided a challenge to the status quo.

We need not forget that the TRC was the creation of law based on elite compromise and, as such, could not have more powers than those conferred upon it by law. So, although we agree with Stanley (2001), we are, at the same time, aware that the TRC could not go beyond its mandate – i.e., the framework set by the elite compromise. The implication is therefore that South Africa has lost two windows of opportunity in as far as the reversal of historical injustice is concerned. It failed to address the original and fundamental act of injustice through the phase of negotiations, and again it failed to do so through the TRC. Based on the foregoing, we argue therefore that, by being made to side step the issues of 'land dispossession' and 'title to territory', the TRC has only succeeded in publicly blessing the injustices of the past now embodied by the new constitution of South Africa. National unity and reconciliation were pursued at the expense of historic justice. We would agree with De Lange that there was no way in which the TRC outcome could be otherwise because the transition from colonial-apartheid to a democratic dispensation was gradual and was in general characterised by a legal continuity. The colonial-apartheid legal order remained the law of the land until it was amended by a democratically elected parliament and the Constitutional Court. The negotiation took place under the legal framework of colonial-apartheid, protected by state agents such as the police and the army. In that regard, the transitional system could not turn against them (de Lange, 2000:29. For that reason, it is difficult to see how genuine reconciliation is possible when the material conditions of the conquered majority have not substantially improved. We now examine the concept of 'retributive justice'.

4.13 Retributive Justice or Criminal Trials

Retributive justice is one of the mechanisms used in holding to account people who committed crimes. Perpetrators are tried by Western legal courts in line with the international and national standards. In line with retributive justice, crime is assumed to be committed against a State, even though it is individuals that are harmed or violated. So, it becomes the responsibility of the State to prosecute on behalf of the wronged. The mechanism is based on the premise that every community has what may be called 'a social balance, equality or equilibrium' that may be disturbed by the commission of a crime, thus violating fellow members' rights, be they human or property. "For most international lawyers and much of the Western public the criminal trials in The Hague exemplify the appropriate response" (Llewellyn and Howse, 1999:355).

The United Nations has also acknowledged the crucial role that this mechanism can play in realising transitional justice.

> Criminal trials can play an important role in transitional contexts. They express public denunciation of criminal behaviour. They can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes. Insofar as relevant procedural rules enable them to present their views and concerns at trial, they can also help victims to reclaim their dignity. Criminal trials can also contribute to greater public confidence in the State's ability and willingness to enforce the law. They can also help societies to emerge from periods of conflict by establishing detailed and well-substantiated records of particular incidents and events.
>
> (United Nations, 2004:12)

Criminal trials in Nuremburg, Tokyo and recently the Balkans and Rwanda are cited as good examples in assisting communities polarised by political conflicts towards peace building and social reconstruction. In an effort to strengthen the mechanism, a permanent international criminal tribunal was established and empowered to prosecute violations against human rights and crimes against humanity, especially if the local national authorities fail to hold the perpetrators to account. The former President of Iraq, Saddam Hussein, and former President of Liberia, Charles Taylor, were sentenced by the institution; and El Bashir is currently having a case to answer by the institution. Thus, it is a duty to prosecute and punish crimes against humanity. The perpetrator therefore is not treated as a robot or cog in a machine, but as free and therefore responsible. Taking into account the conflicting interests of the offender and victims is essential if justice is to be realised (Snyman, 2008:11).

The advantages of criminal trials are *inter alia* the message that the might never makes the law in whatever context. Political leaders would know that no one is above the law regardless of the amount of power they command in a political system.

Trials can help promote the value of the rule of law in a free society. Attributing individual rather than group responsibility to the human rights abuses is highly likely to lead to closure to the cycle of vengeance between the affected groups. Through trials an opportunity is created for society to know exactly what happened that led to the breakdown of the civil order. Trials present victims with the opportunity to tell their stories, confront perpetrators and begin the

process of healing. Lastly, trials may serve as a deterrent to the would-be perpetrators. Supporters of trials view them as alternative to suffering in silence and random vengeance (Llewellyn, 1999:359).

The criminal trial approach is attractive but it is not without short-comings. As the United Nations observed, "achieving and balancing the various objectives of criminal justice is less straightforward and there are a host of constraints in transitional contexts that limit the reach of criminal justice, whether related to resources, caseload or the balance of political power" (United Nations, 2004:12)

For instance, punishing perpetrators with the twin objective of using the punishment as a deterrent to recidivism and making examples to other would-be offenders is not fair to offenders because punishing offenders for the sins of others is itself an offense. It therefore violates the rights of the offender. Punishment should mirror the crime committed. An Augustinian would object to this criticism though by citing the *Principle of Forfeiture* that perpetrators have lost their human dignity in the first case when they violated the dignity of their victims. Thiroux (1986:134) submits that the theory of punishing an offender for deterrence runs int several problems. It uses a person as a means to an end which is itself immoral. There is no conclusive proof or evidence that punishment of someone deters anyone else from committing crimes. First, we cannot ascertain in advance as to how many people would commit gross human rights violation by contravening *the Principle of Proportionality*. Secondly, since it is difficult to apprehend witnesses, it would be difficult to apprehend or even prosecute perpetrators. It is our inference from the above therefore that under these circumstances, it is politics or force which often takes precedence over law.

Alie (2012:96) outlines four disadvantages of retribution as follows: Firstly, it has the potential of further polarising the community instead of healing it. Healing the community in this context is imperative as victims, perpetrators and survivors in general continue to live in the same communities. In the South African situation, national unity is encouraged by the law. So, retribution is therefore a less desirable option since it has the potential to foster a legacy of violence that will beget violence, hatred, tensions, fear, guilt and revenge. Thus, the task

of peace building is to transform communal relations from a state of "negative peace" (usually defined as an absence of armed conflict) to one of "positive peace" (defined as a structural transformation towards a socio-political and economic system capable of fostering justice and ensuring a self-sustained peace). Retribution is not capable of building such relations. Retribution is there to determine whether the accused is guilty or not. In that context the victim's role is minimised. For José Zalaquett, as quoted in Hamber and Kibble (2003:11), it is "justice to the extent possible." What is needed is a more holistic approach that takes care of justice, reparation and reconciliation.

Secondly, formal justice systems in most post-conflict communities are weak and therefore incapable of comprehensively addressing all the wrongs committed during the conflict. With the breakdown of the social fabric, is the breakdown of the justice system. The judiciary is in most cases virtually non-functional or non-existent. The security forces are likely to destroy evidence that is mostly needed for the process of accountability. Destroying evidence will likely lead some perpetrators off the hook while others are prosecuted. For Alie (2012), "that is shocking for victims; it is better to have no prosecutions at all than an operation which merely inflicts new pain" (Alie, 2012:96). However, not prosecuting at all is equally a miscarriage of justice, which will create another injustice.

Alie (2012:95) fails to realise the unintended consequences of widening polarisation of the community by not prosecuting perpetrators as a means to promoting healing and reconciliation. For example, one of the survivors of the human rights abuse lamented the decision not to prosecute in terms of section 20 (7) of *The Promotion of National Unity and Reconciliation Act* as follows:

> But ultimately, my concern is much broader than just De Kock's life, incarceration and/or potential release. My concern is that lack of commitment to seeing justice done as a result of TRC process...And then it let us all down. We as a country, failed to prosecute the named and admitted perpetrators who didn't get amnesty. It was hard enough to swallow the terms of TRC that would see self-confessed murderers and torturers walk free if they were deemed to be telling the truth and their acts were considered to fall within the political ambit of their side. But to fail to carry through the hearings into punitive practice through the [expedient?] loss of political steam is a travesty of justice. It diminishes the TRC and erodes its value for our present and future.
>
> (*Daily Maverick*, 12 July 2014)

Thirdly, the population of those who are directly involved in the civil conflicts in Africa is largely the youth. So, trying or sending a large number of young people to jail might have a huge negative social impact on the post-recovery community.

Fourthly, oftentimes communal conflict takes place over more than one generation. In South Africa, for instance, it took the whole generation to maintain and sustain colonial-apartheid. So, it would be impossible to haul the entire generation before the courts.

> Not surprising, therefore, even key leaders of the African National Congress (ANC) which had been in the vanguard of the struggle against apartheid in South Africa, opted for some form of amnesty and reconciliation to promote healing in the post-apartheid era, although the United Nations had declared apartheid a crime against humanity.
>
> (Alie, 2012:98)

Alie fails to realise that opting for some form of amnesty and reconciliation without the return of the dispossessed land cannot promote healing. The indigenous conquered people of South Africa are still without land. Land has vital, economic and religious value to a people. They build the houses on the land, mine minerals on it, till the land for food and most importantly bury their dead on the land. Without land, they are worse off.

The other point that Alie fails to appreciate is that the victims are not only across generations but are numerically in the majority as well. The fact that the victims of colonial-apartheid are in the majority puts the TRC in distinctive position from other truth commissions in the sense that, in almost all societies that have had truth Commissions, the victims are almost exclusively in the minority of some kind (Méndez, 2000:31).

The serious shortcoming of South Africa's TRC, in our view, is that it failed to carry out justice to its conclusion by omitting an important aspect whose foundation was laid in the interim constitution. It is traditional or indigenous justice. The aspiration of indigenous justice is captured by the inclusion of the philosophy of "*Ubuntu"* in the interim constitution. The provision of *The Promotion of National Unity and Reconciliation Act* commits to the effect that "…there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *Ubuntu*, but not for victimisation..." (Doxtader & Salazar, 2007:13).

The need for the inclusion of indigenous justice in transitional justice is recognised by the United Nations as well. For the United Nations, an indigenous justice system is rooted in the local traditions and it provides a 'blanket' access to justice for everyone affected in the community concerned.

> Additionally, while focusing on the building of a formal justice system that functions effectively and in accordance with international standards, it is also crucial to assess the means for ensuring the functioning of complementary and less formal mechanism, particularly in the immediate term. Independent national human rights commissions can play a vital role in affording accountability, redress, dispute resolution and protection during transitional periods. Similarly, due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often-vital role and to do so in conformity with both international standards and local tradition. Where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice. Particularly in post-conflict settings, vulnerable, excluded, victimized and marginalized groups must also be engaged in the development of the sector and benefit from its emerging institutions.
>
> (United Nations, 2004:12)

The expressions in the above citation, "in accordance with international standards" and, "in conformity with both international and local standards" are ethically problematical. One of the obvious questions is: who are the parties to the construction of "international standards"? The history of international politics, especially since 1945 leaves no doubt that the epistemological paradigm underlying the establishment of the United Nations is predominantly the Western one even though Russia, one of the victors in the Second World War and, with a high stake in the United Nations as a "Permanent" member of its Security Council, was present at the deliberations leading to its establishment. In this sense, the United Nations is a construction of the victors in the Second World War. Secondly, the majority of its members in the Security Council are the former colonisers of the many regions of the world including South Africa. By virtue of their ethically questionable "right of conquest" they imposed and implanted their epistemological paradigm in the colonised regions. It is their epistemological paradigm that continues to dominate the "post-colonial" states. They are thus the standard: a standard based on conquest in an unjust war. The subordination of "customary law" to the 1996 constitution of South Africa is a pertinent example of this. The apparent positive welcome of the indigenous

justice systems thus becomes, perhaps inadvertently, the denigration of the indigenous justice systems. The indigenous justice system was not part of the transitional justice in South Africa. We now turn to a brief exposition of the 'indigenous justice system'.

4.14 Indigenous Justice Systems

Penal Reform International defines indigenous justice system as "non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas" (Penal Reform International, 2000:vi). Colonial apartheid administration has influenced the socio-cultural aspect of every community in South Africa. It means we need to be careful when discussing about traditional issues in South Africa because we are always faced with the risk of inadvertently dealing with the distorted past. However, the risk is mitigated by the fact that the core values of the socio-cultural life in rural areas were resilient in relation to influence of colonial-apartheid.

"Tradition" may be spoken of every culture. For example, 'Western philosophical tradition' insofar as it means the abandonment of some values and practices and, the retention of other values and customs transmitted from one generation to the next. However, over time this meaning has changed to mean primitive, backward or even "uncivilised" as well as "inferior" in relation to other cultures, in this case Western culture. Thus, expressions such as "African traditional thought", "African traditional religions" or "African customary or indigenous law" have been used in the changed meaning of tradition. This changed meaning is rejected here. Thus, the use of "traditional" is in the first sense according to which it applies to every culture."

The indigenous justice system is characterised by the following:

- It is a community driven system in the sense that the violation of the rights, even in singular, of any individual member of the community is a problem of the whole community, hence it is participatory in nature. All the elders of sound mind in the village, having gone through the education for mature and adult membership of the community – disparagingly called the "circumcision school by the colonial conqueror, are eligible to attend the *kgotla* and participate in the proceedings without restrictions.

Kgotla is a village meeting held at the royal kraal with the aim of discussing a matter of concern to members of the village. Thus

> A conflict between two members of a community is regarded as a problem which afflicts the entire community. In order to restore harmony, therefore, there must be general satisfaction among the community at large, as well as the disputants, with the procedure and the outcome of the case. Public consensus is, moreover, necessary to ensure enforcement of the decision through social pressure.
>
> (Penal Reform International, 2000:26)

- A local language which is understood by the average person of the village is used in the deliberations, unlike in the formal justice system where the language of the colonial conqueror is used to conduct business. The issue of local language also facilitates access to the proceedings for the villagers. It also assists in the preservation of the cultural relevance of the proceedings.

- Emphasis is put on the process of achieving peaceful settlement or solutions rather than on adherence to rules as the basis to determining disputes (Alie, 2012:102). Linked to the process is that offenders are encouraged to voluntarily come forth for 'prosecution.' There are instances where coercion is used against the offender, especially if the offender is in contempt of a decision taken by the *kgotla*.

The indigenous justice system has been tested already in the Northern Uganda and Rwanda. In Rwanda, for instance, the system was used to facilitate trials of thousands of those people who were linked to the genocide of 1994 (Alie, 2012:99). The system is not without shortcomings though. For example, it has the tendency to exclude women from the proceedings and may not have the capacity to deal with human rights violations of a large scale. But, if the arbitrators are well trained in running the system, the above-mentioned challenges should be minimised or completely overcame. However, the fact that Africa knows women queens such as Njinga, (Heywood, 2017) in pre-colonial Angola and Modjadji in contemporary South Africa does not mean that the Queens did not have male councillors. The same is true with regard to women when men are Kings. The customary separation between females and male did not mean parallelism. On the contrary, the customary principle of complementarity assured the presence of the voices of males or females in the respective separate gatherings (*makgotl*a). The principle

of complementarity is presented thus: "Question: How many people live in the village? Answer: Two: Male and Female" (Oluwole and Sofoluwe, 2014: 108). Also, there is no reason to doubt the capacity of the *kgotla* to deal with "human rights violations of a large scale" especially because "large" is undefined by Alie and, it is also a relative concept.

One of the basic principles of indigenous law is that Molato ga o bole, (SeSotho), conqueror South Africa; Ondjo kai uoro, (Herero), Namibia; Mhosva haiori, (Shona), Zimbabwe; Ityala ali boli, (IsiXhosa) conqueror South Africa; Katika falsafa ya sheria ya Kiafrika, jeraha au kosa haliwi haki kwa sababu ya muda kupita, (KiSwahili). M'Baye underlines this Africa-wide principle thus:

> Prescription is unknown in African law. The African believes that time cannot change the truth. Just as the truth must be taken into consideration each time it becomes known, so must no obstacle be placed in the way of the search for it and its discovery. It is for this reason that judicial decisions are not authoritative. They must always be able to be called into question (M'Baye, 1974:147).

My focus upon the question of sovereign title to territory is based on this principle of indigenous African philosophy of law. I now turn to the experience of "reconciliation" in Rwanda to highlight the similarities and differences between it and South Africa.

4.15 The Case Study of Rwanda

In 1994, Rwanda was plagued by a genocide that resulted in more than 800 000 people dead and many more people critically injured as a result, and concomitantly, a large number of women were raped. At the end of the atrocious national experience, the social and political institutions, especially the judiciary, had lost their legitimacy (National Service of Gacaca Courts in Rwanda, June 2012:14). More than 120, 000 people were arrested and charged with war crimes, abuse and violation of human rights.

Gacaca justice means judgments on the grass. It is a justice system that is modelled according the traditional justice system where community members mostly men would get together, sit

on the grass and resolve a social conflict. According to Manyok (2013), the system has been used to reduce dispute over pieces of land, cattle and smaller crimes. So, Gacaca justice system is a home-grown solution to the national challenge that was faced by Rwanda after the period of genocide. But, the criminal justice system in Rwanda did not have the capacity to prosecute such a huge voluminous number of people in a short space of time.

> The judicial system was completely destroyed through the killing of judges and administrative staff, the escape of others usually due to their involvement in acts of Genocide and other crimes against humanity, the disappearance or destruction of working materials and equipment, loss of archive, collapse of the state machinery and judicial police. Nevertheless, everyone agrees that without justice, reconciliation among Rwandans was impossible. Thus, the Government of National Unity was committed to finding possible solutions at both the national and international level.
>
> (National Service of Gacaca Courts in Rwanda, June 2012:14)

Yet, there was a burden of reconstructing the nation, perpetrators had to be brought to book and the victims needed healing. There was a need for reparation. However, of critical importance is that, victims and perpetrators alike were bound to live together post genocide. Hence one of the objectives of the Gacaca was reconciliation through restoration of harmony and social order by punishing, shaming and requiring reparations from the offenders "…as well as giving everyone in the community an opportunity to participate in the deliberation of justice, for example on how to punish the violators as well as having a say in the reintegration of the perpetrators back into the country" (Manyok, 2013).

The remedial efforts were pursued on three levels (Outreach Programme on the Rwanda Genocide and the United Nations):

- The International Criminal Tribunal for Rwanda;
- The national Court System; and
- The Gacaca courts.

4.16 The Historical Context of the Gacaca Justice System

Several laws had to be modified in order to create a framework and guidelines within which the Gacaca courts operate (National Service of Gacaca Courts in Rwanda, June 2012:31). The Arusha Peace Agreement on power sharing was to be modified to be in conformity with the

idea of the creation of the Gacaca Courts Department within the Supreme Court. The law of 23rd February 1963 relating to the organization of the Supreme Court was to be amended to provide for the establishment of the Department in charge of Gacaca Courts**.**

Organic Law no 40/2000 of 26th January 2001, governing the creation of Gacaca Courts, was enacted to provide for the creation of the Gacaca Courts in Rwanda. The Organic Law provides for the organization, functioning and jurisdiction of Gacaca Courts, the crimes and individuals prosecuted as well as applicable sentences.

The duties of the Gacaca courts were as follows:

At the cell or most local level the court was empowered,

- To draw a list of people of who resided in the cell before and after Genocide, a list of those who are suspected of having participated in genocide and a list of victims and their damaged properties;
- To bring together the files forwarded by the public Prosecutions;
- To categorise suspects according to the provisions of the Organic Law
- To try cases related to properties;
- To give a ruling on the disqualification of members of the Bench of Gacaca Court of the cell;
- To receive confessions from individuals who participated in genocide; to forward the files which are not in their jurisdiction to the competent Courts; and
- To elect members of the Coordination Committee.

According to Longman (2009: 307), the district or town and the province or Kigali City were empowered to:

- Making investigations, if necessary, on testimonies given;
- To receive confessions from individuals who participated in genocide;
- To give a ruling on the disqualification of members of the bench;

- To try cases falling under its jurisdiction, after making sure that suspects forwarded to it, have been categorized in conformity with the alleged offenses;
- Examining appeals against judgments passed by Gacaca courts of the inferior level within its jurisdiction;
- Electing members of the coordination committee
- Examining reports of activities from the lower Gacaca Courts of its jurisdiction.

The jurisdiction of the Cell Court level was to deal at first level with, amongst others, objections filed against the sentence it has pronounced in the absence of the accused. The cell then categorises alleged perpetrators of genocide. The jurisdiction of the Sector Court level is that it deals at first level with defendants whose offenses fall into the third category and opposition made against sentences pronounced in the absence of the accused.

The jurisdiction at the District or Town level is to deal crimes of category 2, appeals filed against judgments rendered at first level or on opposition by sector Gacaca Courts under its jurisdiction filed against the judgments that were rendered in absence of the accused. The jurisdiction of the Gacaca Court of the Province or Kigali City is to deal with appeals of judgments rendered at the first level or no objections by Gacaca Courts of the District or Towns under its jurisdiction filed against the judgments that were rendered in absence of the accused.

It is for the Gacaca court of the area where a crime has been committed, that is competent, to deal with it. However, in the event where a suspect is charged of crimes committed in different areas, the trial is adjourned. The Court to which a case has been filed will immediately inform the Department of Gacaca Courts in the Supreme Court, which will, in turn, inform the various concerned Cell Courts, accordingly instructing them to provide prosecution or defence elements of proof. Afterwards, The Department of Gacaca Courts in the Supreme Court transfers the received files to the concerned Court to take action. The court proceeds to a new categorization of suspects, using as base supplementary elements gathered and, if necessary, transfers the file to competent Court.

Gacaca justice system was multipronged in the sense that it was based on truth telling and confessions, rendering punishments to perpetrators whilst equally pursuing the need for harmony and social order. One of the positive outcomes of the Gacaca justice system is that the approach emphasized national healing and reconciliation between the Tutsis and the Hutus. Whereas the criminal justice system further precipitated the ethnic polarization between the two main tribal groups, Gacaca narrowed the gap between them.

Gacaca has empowered citizens, particularly women, in proportions that national judicial courts have never reached in the history of the country. The system has tried tens of thousands within a period of ten years when it could have taken approximatively fifty years in order to judicially prosecute every single case. However, within that space of time, the Gacaca convicted 64, 800 people with 15, 219 acquitted, excluding cases prosecuted by the conventional courts.

The Gacaca justice system is, however, not without criticism. International and National Human Rights Groups, for example, criticized Gacaca that its foundation of the Organic Law is not in concert with the fundamental principles of international laws. In addition, Gacaca does not have national standards to measure the works of the courts at the national level. Consequently, there were inconsistencies during investigations, trials and sentencing. And Gacaca courts were not independent from government influence. They were simply an extension of the Rwandan national courts run by an autocratic regime. The credibility of the courts is therefore in serious doubt. The courts were biased against the Tutsis because they only judged the genocide crimes and crimes against humanity of which the Tutsis were predominantly the victims. War crimes committed against the Hutus during the genocide, by the Kagame’s armed forces, were never taken on by the Gacaca Courts. Furthermore, the Gacaca justice system was in direct violation of the due process in the sense that it did not have qualified judges and professional trauma councillors. Also, the Courts were ill funded and did not have access to all areas of the country due to transportation limitations. In the localities where there were no roads, lack of helicopters made it effectively impossible to carry out investigations. The question of “international standards” has been dealt with already. This criticism should be seen against the background of that criticism. Furthermore, the question of

"qualified judges" also must be seen against the criticism already made because it begs it question: "qualified judges" according to whose epistemological paradigm."

Criticism notwithstanding, the fact that the Gacaca justice system is the home-grown solution was bold and encouraging. The example should be replicated into other parts of the world. The crucial element of the Gacaca is that it fostered national reconciliation based on truth telling, confession, shaming and reparation within an inclusive frame in the sense that ordinary citizens took part in determining how perpetrators would be reintegrated into the community.

The goal of the African justice is to empower the victim, the offender and the community at large. It is a victim-centred justice system because the first priority of the system is the safety of victims. Assistance is given to victims to restore their injury, property lost, and their sense of security and dignity. Again, the victims' needs for information, validation, social support, vindication, are the starting points of African justice (Elechi, 2004:1). In the Sepedi language – the language spoken by the Sotho people found in the Northern part of South Africa – we refer to the concept of African justice as *toka.*

Toka – means justice that is arrived at through community deliberations and not just a small group of people who are deemed to be experts in trying and passing judgement on suspects or offenders. *Toka* is justice geared towards the restoration of harmony between the victim, the offender and the community. The determination of guilt is aimed primarily at justice and restoration. Proportionate punishment is meted out as the road to justice.

In this context, *Botho/Ubuntu* is the basis of justice. Both the victim and the offender are the integral part of the community within which they live. *Botho* - *humaneness* - is the central principle of *toka.* Ordinarily, when the offender shows remorse for his or her misdeed, the community readily accepts it jointly with the wronged. Not accepting apology and the righting of the wrong is itself not in line with the *Botho* principle and therefore an offense to the community. However, in the event where the offender is recalcitrant and not remorseful the

community will apply censure because such conduct is against *Botho*. Linked to the concept *toka* is *tokologo*.

Tokologo in this context means that when the wrong committed against a member of a community is righted, the offender is free and the community accepts him or her back to its ranks. He or she is free to carry out social responsibilities with a clean conscience. However, when the case is not yet resolved, the community remains aggrieved and therefore the offender cannot interact with fellow members of the community with ease. The appropriate expression to describe such a person is: "*ga a lokologa*:" she or he is not free. In such a situation, the community keeps on shaming the offender. Shaming may not be verbalised; the mere knowledge of the offence is sufficient to keep the offender perpetually ashamed.

4.17 The Theology of Reconciliation with Particular Reference to the Question of Repentance

The word 'reconciliation' originates from the Greek words *katallassõ, apokallassõ* and the noun katallagē (Boesak and De Young, 2012: 11). The Greeks utilized the word to explain interpersonal relationships and in particular peace treaties between nations and groups. The term also often had political connotations. Reconciliation is understood as a transformation of relationships in which former enemies pledge solidarity to one another. Boesak and De Young's (2012) Biblical interpretation of reconciliation is that:

> Then the colonizer must reject this non-legitimate identity of superiority and privileges that go with that position. Sacrifice by people of privilege and power results in dramatic changes for members of the dominant group even when done intentionally. Unjust systems appear normal to those in power, and any change will produce feelings of loss. True reconciliation, through the cross of Jesus, will affect the lives of the privileged. The colonizer has to completely leave the confines of power and privilege and join with those who are colonized.
>
> (Boesak & De Young, 2012:20)

Reconciliation, in the Biblical sense, means that the dichotomy of the conqueror and the conquered (or the oppressor) and the oppressed gets destroyed in the process of transformation for social justice and new relations based on equality are born. "This is because Christians know that reconciliation as a Biblical concept goes to the roots, in addressing the critical questions of justice, equality, and dignity" (Boesak & DeYoung, 2012:1).

The term 'reconciliation' was introduced by the leader of the then Nationalist Party, F.W. de Klerk, to the Commission. His argument was that, his party or constituency was not happy with the term 'truth commission,' and that it felt strongly that South Africa would be better served if the Commission was to be a 'Truth and Reconciliation Commission" (Boesak & De Young, 2012:9). According to Boesak and De Young (2012), "the aim of including the term to the Truth Commission by de Klerk was not to allow the term to confront the country with the demands of the gospel, but to blunt the progress of radical change and transformation" (ibid).

In Fanon's terms, for reconciliation to take root, South Africa must first 'kill' both the oppressor and the oppressed because they are both creations of colonial-apartheid. And, out of their death should emerge new human beings based on equal dignity. South Africa must first "turn over a new leaf, [it] must work out new concepts, and try to set afoot a new man" (Fanon, 1963:255).

Part of the mandate of *The Promotion of National Unity and Reconciliation Act,* Act 34 of 1995 was to make enquiry into "the identity of all persons, authorities, institutions and organisations involved in such violations." A question arises, by adopting a legalistic and individualistic approach to perpetrators and victims while excluding millions of victims who were violated by the consequences of apartheid legislation, is the TRC expecting national reconciliation? The contrast here is that in Rwanda, perpetrators were in the majority and beneficiaries were only a handful, whereas in South Africa, perpetrators were a minority with a huge number of beneficiaries. Should reconciliation take place between victims and perpetrators; or between victims and beneficiaries?

Based on the foregoing, the TRC deployed the concept of 'reconciliation' in the work of the Commission, but utilized it narrowly and under constraint of the law geared towards blunting of the radical process of transformation and justice. Truth, justice, equality and dignity were subordinated to the settlement or elite compromise during formal and informal negotiations. We would therefore concur with Soyinka (1999) that:

> the reports that emerge - from observers of all races and divergent political tendencies – is that there is very little evidence of remorse at these public confessionals. Hardly any sense of credible transformation revealed among the actors in this unprecedented drama.
>
> (Soyinka, 1999:35)

Without prior conflict, there cannot be a need for reconciliation. Similarly, reconciliation cannot be genuine if it is not backed by forgiveness.

4.18 The TRC and Forgiveness

The TRC process focused on forgiveness. The rationale was that the victims or the next of kin of the victims would be willing to forgive the perpetrators of human rights violations. Those who without hesitation expressed their forgiveness against perpetrators were generally projected as heroes and icons of the new South Africa, whereas those who refused to forgive evoked disappointment. (Leman-Langlois & Shearing, 2014:214). At a distance to the observer, the TRC process appeared free and spontaneous. But a closer look displays a 'carrot and stick approach' to the detriment of those individuals who needed time to process what was revealed to them.

> The process validates and celebrates forgiving victims while the non-forgiving victims find themselves at odds with the official, historic process and its interpreters – an unstoppable, nearly unalterable institutional play that would eventually forgive for them, despite their objections, through amnesty. This provided very persuasive incentives indeed for hailing out 'spontaneously' generated sensibilities. One can easily see the effect of this context: victims generally tried to express themselves in the language of the TRC. As Claire Moon has noted, the TRC offers a cultural template, a language which can powerfully illustrate forgiveness – those wishing to express the absence of forgiveness were left to themselves.
>
> (Leman-Langlois & Shearing, 2014:214)

Flowing from the above, it goes without saying that a lot of victims who appeared at the Commission could have expressed forgiveness just for compliance not from their convictions. Forgiving is the victim's choice at his or her own time and pace. Some well-known families, such as the Harouns, the Ribeiros, the Mxenges, the Bikos and other survivors, "rejected what

they considered to be the imposition of a flawed remedy to their pain" and opted to seek legal "solutions through the Constitutional Court and more recently, the High Court" (Winslow, 1997:26). Forgiveness must come out spontaneously from the victim. For this reason, we would agree with Beyers Naude, as quoted in Randall, that:

> … forgiveness is an absolute essential element in the whole concept of reconciliation; without willingness to forgive all truly and fully, no reconciliation is possible….do we realize what this implies: that all talk of reconciliation remains meaningless and even dangerous if words are not transformed into deeds?
>
> (Randall, 1981:22)

In a situation where forgiveness is not offered willingly and fully, the victim remains powerless and such forgiveness is meaningless. Forgiveness must be transformative in such a way that the forgiver emerges empowered, assertive and with the power to,

> take away an unbearable heavy load from the guilty person – his guilt towards God and his fellowman. For that reason, forgiveness is often, in the Bible, placed on one continuum with the healing of real physical suffering. It almost has the same meaning as liberating someone.... Although it is unconditional; it presupposes that the person who has been forgiven will not commit the same sin again.
>
> (Van der Walt, 1996:18)

Forgiveness provides an opportunity for a new world in which both victims and perpetrators can coexist. This it does when the perpetrator enters into a conversation and communication *in* an effort to understand and acknowledge the effect of the human rights violation against the victim. The process of conversation (re)distributes power to both the victim and the perpetrator (Leman-Langlois & Shearing, 2014: 206).

Van der Walt proposes empathy as the probable way towards genuine reconciliation. Empathy for Van der Walt can be used as an instrument that will enable both the conquered and the conqueror to imagine themselves in the other's position. An appreciation of the complexities of reconciliation, the demands and resistance thereof would emerge from the 'psychological' exercise. For van der Walt, failure to reach to one another will, in the long run, even after centuries, only lead to social upheaval to the proportions of those that took place in Rwanda and the former Yugoslavia (Van der Walt, 1996:27).

Forgiveness that is aimed at a particular result such as national unity or reconciliation is worthless because forgiveness is spontaneous; it just happens to the extent that one cannot reason out whether to forgive or not (Jankelevitch, 1967: xxiii). Forgiveness that comes because there is a need for people to reconcile means that such people use forgiveness as their excuse or means to reconcile, and that means reconciliation is at issue, not forgiveness.

> But if there is something to be gained by reconciling with a wrongdoer, by forgetting about the past, by kissing and making up, or by realizing that there were mitigating circumstances surrounding the misdeed, then we do not need forgiveness because we already have ways of dealing with these situations: forgetting, reconciling, excusing, and so on.
>
> (Jankelevitch, 1967: xxii)

For Jankelevitch, there are circumstances in which forgiveness can be granted and there are those in which it cannot. One example is crimes against humanity. For Jankelevitch:

> crimes against humanity are imprescriptible, that is, the penalties against them cannot lapse; time has no hold on them…. The Holocaust is unlike any other crime that has been committed. Pardoning the country that perpetrated the Holocaust…would be a new crime against the human species.
>
> (Jankelevitch, 1967: xxiv)

Jankelevitch's (1967) argument that no prescription is possible for crimes against humanity, and further that punishment of such crimes cannot lapse with time, is transferrable to the South African situation because apartheid has been declared 'a crime against humanity' by the United Nations. Furthermore, it is not only the Holocaust which is at the level of 'crimes against humanity'. The trans-Atlantic slave trade is also 'a crime against humanity'. Pope John Paul II may be cited as an example here:

> The slave-trade is a tragedy of a civilization that called itself Christian. And the deep causes of this human drama, of this tragedy, can be found in all of us, in our human nature, in sin. I have come here to pay homage to all the unknown victims of this crime, whose names and number can never be known. *(Bujo, 1992: 6)*

Bujo assesses the Pope's plea for forgiveness thus:

> It is perplexing and astonishing that history has said comparatively so little of this drama in comparison with the crimes perpetrated by the Nazi regime. John Paul II was right to compare the slave-trade to the concentration camps which have so indelibly scared modern humanity's conscience. This is the reason why the Pope begs Africa's forgiveness when he declares in the speech, he made on the island of Goree: "Throughout a whole period of the African continent's history, black men, women and children were wrenched away from their families and their native lands, brought here to this tiny island, and sold as mere goods and chattels."
>
> "These men, women and children were the victims of a shameful trade, and those who encouraged and practised that trade were baptized Christians who did not live up to their faith. How could one forget the soul-searing sufferings inflicted on those deported from the African continent in violation of the most elementary human rights?
>
> "How could one forget the human lives uprooted and destroyed by slavery? In truth, it is right that this sin of person against person, of person against God, should be confessed in all humanity."
>
> (Bujo,1992: 6)

4.19 Discourse on Reconciliation and Reconfiliation

The problem of national unity and reconciliation in South Africa extends beyond the TRC project. For instance, the Afrikaners and Brits of South Africa have not yet resolved their differences after the Anglo-Boer war. Memories of this war are still vibrant today.

It was very important to our parents' generation for their children to become well educated, even learned, so that – unlike their parents – they would not feel inferior to their English-speaking counterparts. At Kakamas, where my mother grew up, the people harboured bitter memories of the Anglo-Boer War. Their teachers taught, 'You do not speak English. It is the language of the 'conqueror' (Barnard, 2015 :24).

The differences between the Afrikaner and the English were suspended only in relation to the consolidation of conqueror power over the indigenous peoples conquered in the unjust wars of colonisation. This mutual accommodation was present also in the search for "a new" South

Africa. On the basis of the above, it is clear that a lot still has to be done to unite peoples of South Africa because Afrikaans – and English-speaking people remain communities apart despite a unity an appearance of unity from a distance. Compounded by the division among white peoples is the unjustified fear of by whites towards non-whites. So, this scenario simply means national unity is a mirage because in the current South Africa because the peoples of South Africa cannot forget their past (Randall, 1992:24).

The post-amble of the 1993 constitution mentions "ubuntu" specifically in the founding of the basis for "national unity and reconciliation" in South Africa. This is a direct reference to abantu, members of the indigenous peoples conquered in the unjust wars of colonisation. Why is it that a concept not was invoked appealing to the Afrikaners and the English, including other white communities such as the Jews, the Portuguese and the Germans, to reconcile? Is it so that the Indian community would rather have "ubuntu" instead of satyagraha? The disregard of these questions suggests that the appeal to "ubuntu" restated the historical division between the conqueror and the conquered in the unjust wars of colonisation. On this basis, the question of title to territory is reinstated perhaps inadvertently by the successors in title to colonial conquest in an unjust war. "Reconciliation", on the terms of the colonial conqueror, thus becomes a strategic compulsory forgiveness by law. In these circumstances, "reconciliation" had within itself the seeds of failure even before the establishment of the TRC.

We acknowledge the fact that the fourth Governor-General of the Union South Africa, the Earl of Athlone tried by all means to reconcile the Afrikaners and the British South Africans by, amongst others, attending what was historically the exclusively sectional, Afrikaner celebrations and ceremonies. According to Lambert (2002:140), the Earl of Athlone and his wife, Princess Alice, took the trouble of learning to speak Afrikaans, attended "the unveiling in Pretoria in 1925 of President Kruger's statue which Athlone insisted on attending despite a very half-hearted invitation from Hertzog, which was obviously meant to discourage him" and the Dingane's Day commemoration at Burgersdorp on 16th December 1925.

In 1925, a crisis ensued in the Union South African in which the Afrikaners wanted to exclude the Union Jack on the new flag. But Athlone, in collaboration with other political figures,

wisely intervened and an agreement was reached in 1927 that saw South Africa introducing two flags, "a Union flag which included on it a Union Jack and the flags of the two old republics, and the Union Jack as a symbol of the country's membership of the Empire-Commonwealth" (Lambert, 2002:143). It would seem that, apart from Athlone's personal traits which endeared him to the majority of ordinary Afrikaners, the relative ease with which he seemed to be succeeding at his reconciliation mission also owed a lot to political pragmatism, particularly the "British South Africans' political dependence on Afrikaner leadership, and Smuts' dependence on their support" (Lambert, 2000:216). But, Athlone's attempts to bring about reconciliation within the Union of South Africa and consolidate a Dominion South Africanism ultimately failed (Lambert, 2002:147). It is evident then that much still needs to be done in as far as national unity and reconciliation are concerned in South Africa.

We now turn to consider the interplay between reconciliation and reconfiliation from Ramose's (2012) perspective. Ramose (2012) criticises the 'bookkeeping model' of reconciliation applied by the TRC. According to him, "Bookkeeping involves the periodic submission of reconciliation statements" (Ramose, 2012:33). The bookkeeper's critical goal is to achieve balance between debit and the credit sides. In the event of a difference then there is no reconciliation. The difference must be found in order to close the books. Once the difference is found then the books are closed. This is the logic of the TRC. The victim or the next of kin is identified. The perpetrator is also identified. The missing figure is forgiveness. Once forgiveness is granted then reconciliation ends. Here the ethical sense of sorority and fraternity does not have a distinct and prominent role. It is just a straightforward transaction of 'you wanted my confession. I did so and you forgave me. So, the matter is closed'. This is cold comfort. (Ramose, 2012:33) Reconciliation cannot be a once-off event; it should be a way of life of the parties who are involved.

Re - means again as in 'reconsider' and 'con' suggesting 'cum' means 'with'. Thus 'recon' taken together means again-with. 'Filiation', has a relationship with the words 'filial' and 'affiliate', both of which evoke a sense of belonging that approximates that of son or daughter in a family. 'Filius' and 'Filia' are Latin words for 'son' and 'daughter' respectively (Ramose, 2012:33). Thus, reconfiliation means becoming sister and brother again. The present continuous tense, 'becoming' is crucial as it gives the promise that brotherhood and sisterhood

are not once-off events. Reconfiliation applies in the context of bringing children of the family back home with other siblings and parents. Brothers and sisters do not need conditions in order to come together. Filial love between and among them is the requirement to the practical exercise of reconfiliation. Through 'reconfilaition', we are able to understand the process of

'" regaining and reclaiming the right of sonship and 'daughtership' in a family fellowship with other sons and daughters of the family" (Ramose, 2012:33).

Flowing from the above, we are inclined to advocate for reconfiliation as the viable alternative to the Commission's reconciliation

4.22. Conclusion

The Commission argues that it was not possible to reconcile the nation within the limited time-frame, due to insufficient resources and limited mandate (Leman-Langlois & Shearing, 2014:225). Be that as it may, the imposition of national unity and reconciliation and the granting of amnesty prior to the start of the commission itself was a sure ***basis for*** the failure by the TRC. Reconciliation should be underlain by justice and identification of what caused injustice. For that reason, we agree with Van der Walt that:

> Reconciliation comes at the end, it is the result of a whole process. One cannot, therefore, begin with reconciliation. Reconciliation presupposes that one is honestly and openly confronted with the past, that one acknowledges the injustice that one has committed, that one has the intention of making restitution for the damage as far as possible (for example, through judicial investigations, financial compensation and restitution of ownership of land), that one has received forgiveness from the other party and that, in this way, alienation, hostility and hatred between groups has been eliminated.
>
> (Van der Walt, 1996:24)

The TRC had come and is gone, but the glaring legacy of poverty, inequality and unemployment continue to haunt the majority of the people whose rights were violated by colonial-apartheid. We must once again remember Beyers Naude's warning that "all talk of reconciliation remains meaningless and even dangerous if words are not transformed into deeds?" (Randall, 1981:22). Failure to address the State-induced inequalities and therefore life

opportunities to meaningful livelihood and remains a major threat to the current democratic dispensation. Those who were rendered landless by the policies of colonial-apartheid remain subordinated to the control of those who continue to own the land unjustly. Thus "control of land is power and that power is used without pity against the poor" (May, 1991: xi). The experience of Latin America has demonstrated that those who are powerful usually exercise their power to further squeeze the poor into more poverty and misery (May, 1991: xi). In the narrative of South Africa today, the rich are getting richer and the poor are getting poorer.

5. Concluding chapter

This study is a critique of South Africa's transition from the colonial-apartheid dispensation to a post-1994 constitutional dispensation from a just war point of view. The study concludes that the transition has failed to eliminate the root cause of the conflict thereby perpetuating relations of conquest as reflected in the structural inequalities of wealth and destitute in line with the colonial-apartheid vision. The study highlights the adoption of the neo-liberal economic and political system and its link with the Truth and Reconciliation Commission as major sources of failure. Compounding to the failure is the pre-mature shift from parliamentary supremacy to the Constitutional supremacy. That marks a curious departure from South Africa's constitutionalism. The significance of the shift is that it reduces the potency of the parliamentary majority from using numbers to transform South Africa because the constitution will always be used to counter-balance the majority decision taken in parliament.

The shift from a parliamentary to a constitutional sovereignty highlights the thread of the ANC's compromises when it was faced with the need to make hard choices. In the 1940s, the African National Congress Youth league adopted African nationalism as their guiding philosophy for the liberation struggle. In this regard the youth league was inspired by the Ethiopian Atlantic Charter and the All Africa Convention of Kwame Nkrumah. The thrust of the Atlantic Charter and All Africa Convention was the rejection of government by foreigners in Africa. They frowned at what was called alien governments on the continent which effectively meant rule by Europeans in Africa. Instead, the youth league chose not to reject the European rule in South Africa, but to seek reconciliation and accommodation in economic and pollical structures designed by the alien rulers.

In the 1950s, the ANC adopted the Freedom Charter whose basic tenets signalled a compromise form pursuing the original objectives of the national liberation struggle, recoverability of land

and title to territory. In post 1994 election and after gaining a land slight victory on the basis of a "redistributive developmental plan in the form of the Reconstruction and Development Programme" which was popularly known as the RDP, it abandoned it in favour of a neo-liberal capitalist economic to the dismay of the poor majority (Mckinley, 2017: 29). We argue that the reason for the compromise by the ANC is that during the struggle the ANC had accepted and accommodated many organisations into its fold for as long as they were opposing apartheid. For that reason, the ANC was known as the brought church. In the church one would find big business, workers, traditional leaders, urban residents and rural residents. All these forces were united by a common enemy – apartheid. During that period the ANC was able to balance the struggle pendulum, however, in a democracy the dominant class has swayed the pendulum in favour of big business.

It is for this reason that the African legal philosophy maxim: *Molato ga o bole comes* to the fore. The lapse of time does not erase injustice committed in the past. On this basis, peace and stability that has returned to South Africa post-1994 remains under a serious threat. But at the same time, we argue that socialist democracy is not the only system which can be used to eradicate particularly poverty and unemployment. For instance, the Afrikaners were at one stage in history poor and with collapsed institutions due to corruption. "In 1939 Hendric Verwoerd remarked that Afrikaners were 'almost over-organized on the cultural terrain and unorganized for economic purposes" (Gileomee,2003:435). They were united in their mission for economic self-empowerment as an ethnic group. Similarly, the indigenous conquered peoples are currently more organised on cultural domain than economic sphere. They celebrate commemoration days and heritage events with more keen interest than other spheres of live such economic and educational planning and gatherings. In October 1939, for instance, Afrikaners convened the "*Eerste Ekonomise Volkskongres* (The First Economic Congress of the People)" in order to address the economic plight of Afrikaners (Gileomee,2003:437). Flowing from the above, it is our view that the neo-liberal economic system of post 1994 has not killed the human agency of the indigenous conquered majority. We therefore argue that they can take lessons from the Afrikaner people on how they empowered themselves as a nation without demanding hand-outs from other nations as such.

Our proposal does not negate the African legal philosophical maxim that: *Molato ga o bole.* Instead, it advocates for a continuation of a struggle for emancipation in a multi-pronged approach. The multi-pronged approach is remains relevant more so because the ANC is alliance with Communist Party which subscribes to the theoretical and conceptual framework of the

National Democratic Revolution (NDR). The National Democratic Revolution means that the ANC alliance was pursuing a liberation struggle in two stages. The first stage was to achieve a non-racial democracy in a capitalist system. That is the phase in which the revolution is currently. The next is the socialist stage. To achieve the Socialist stage, the Communist Party, an alliance partner of the ANC would use the democratic space and its institutions to advance the struggle for the last stage (Mckinley, 2017:6). The socialist democratic system as opposed to capitalist democratic system will provide an avenue for the ANC-led government to radically redistribute the economic benefits in favour of the poor majority.

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