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## A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa

Tristan Anne Borer\*

### ABSTRACT

In human rights discourse, victims and perpetrators are usually referred to as two completely separate and homogenous sets of people. This article challenges this discrete and binary approach to these concepts. Through an analysis of the South African Truth and Reconciliation Commission, especially its final report, the article demonstrates that the reality of many post-conflict situations is more complex. More often than not, within the group of victims, not all victims are the same. Similarly, within the group of perpetrators, not all perpetrators are the same; and the two groups are rarely separate and distinct: some individuals are both victims and perpetrators. The article concludes with some thoughts on the implications of this research for understanding the challenges of reconciliation in South Africa.

### I. INTRODUCTION

In human rights discourse surrounding the concepts of victims and perpetrators, the two groups tend to be talked about as if they were two completely separate and homogeneous groups of people. We have victims and we have perpetrators. In general, the concepts are usually referred to in the following three ways:

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- (1) Most often they are referred to as two distinct groups: in a situation of Gross Violations of Human Rights (GVHR), you have victims and you have perpetrators.
- (2) Implicit in this approach is the assumption that both groups are homogenous: victims and perpetrators are referred to as if they are all the same. *The* victims and *The* perpetrators.
- (3) In the worst cases, the two are set up as diametrically opposed—i.e. victims versus perpetrators. This has especially been the case in the debate surrounding amnesty in South Africa—that is, that somehow the rights of victims were sacrificed and perpetrators got off scott free with amnesty.

Very often the South African Truth and Reconciliation Commission (TRC), and especially the granting of amnesty, is referred to in this victim versus perpetrator dichotomy, reflected in discussions of truth versus justice, amnesty versus prosecution, and perpetrators versus victims. Entire conferences have been held on this subject, with books resulting such as the Robert Rotberg and Dennis Thompson book *Truth versus Justice*.<sup>1</sup> The perpetrator/victim dichotomy has also led to much discussion about whether the TRC was victim friendly or perpetrator friendly in South Africa with people coming down on both sides of the debate. This was highlighted in the following newspaper headlines. The 7 December 1999 headline of the *Business Day* in Johannesburg ran the following headline: "South Africa: Truth Commission 'empowered victims.'" In contrast, the October 16, 2000 edition of the same newspaper ran this headline: "Perpetrators Benefit from Truth Commission."

Reading through the 3500 page TRC final report, and reading commentaries by scholars, by journalists, by those working in and for the TRC, and by victims and perpetrators themselves, however, one begins to feel uncomfortable with this discrete and binary approach to these terms and concepts; that is, to the approach that someone is either a victim or a perpetrator. It soon appears that the reality on the ground is rather more complicated and much less clear, and that a fair amount of "muddying the waters" is warranted. Rather than two concentric circles (figure one), we might want to start thinking of overlapping circles (figure two).

In this case, we have a situation in which some victims are also perpetrators. And, muddying the waters even further, we might actually want to think of these circles as not the perfect circles that they have been portrayed as. Rather, we might better think of them as this (figure three):

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1. ROBERT I. ROTBERG & DENNIS THOMPSON, EDs., *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* (2000).

FIGURE 1

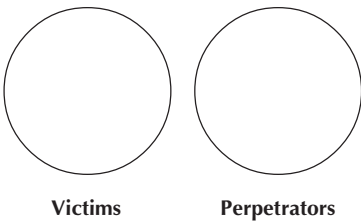


FIGURE 2

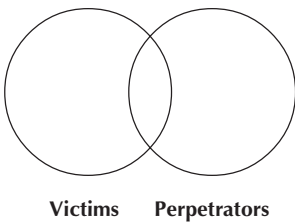
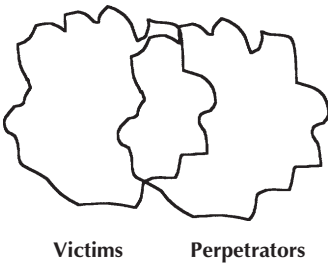


FIGURE 3



In this case, the uneven lines are meant to indicate that these groups are not as homogenous as we might think of them. That is, not all victims are the same, nor are all perpetrators the same. Three refinements have occurred between figure one and figure three:

- (1) Within the group of victims, not all victims are the same.
- (2) Similarly, within the group of perpetrators, not all perpetrators are the same; and

- (3) the two groups are no longer separate and distinct. Overlap has now occurred, so that some individuals are both victims and perpetrators.

So, in sum, this article rethinks the concepts of victims and perpetrators in such a way that highlights that the differences *between* the two groups are perhaps not as clear-cut as human rights scholars and activists, as well as journalists, governments, lawyers, and truth commissions themselves tend to portray them, and that highlights that the homogeneity that is assumed about the individuals *within* each group is similarly overstated. We need to rethink the idea that victims and perpetrators are always two separate and distinct groups, and we need to rethink the idea that separately victims and perpetrators can be thought of as a homogenous group. Not all victims are the same, nor are all perpetrators the same. This article is devoted to explicating the two concepts in light of the South African TRC. This research results from a process of inductive reasoning: it begins with empirical observations and moves towards drawing generalizable conclusions. The article proceeds with an overview of a half dozen of these observations drawn from the South Africa TRC which highlight the complicated relationship between victims and perpetrators in South Africa. Before doing so, a few words on the TRC's own struggle with these concepts is warranted here.

The fact that the categories of victims and perpetrators are not that clear cut was discovered by the TRC almost immediately. In setting up shop, the TRC had to decide how to interpret its mandate, how to structure the amnesty process, and how to determine who would be eligible for reparations. The debate over what constituted a gross violation of human rights, which in effect determined the definition of a victim, continued for several months. In the end, only four things qualified as a GVHR: killing, torture, severe ill-treatment, and abduction. And still the TRC battled with determining whether a person was a victim of one or more of these acts or not. What follows is but one example of this difficulty, quoted directly from the TRC final report:

On the definition of severe ill-treatment, "it became extremely difficult to decide exactly what constituted an act of sufficient severity to be included. . . . Damage to property was another very difficult issue, on which the Committee postponed a decision for many months. Arson was a frequent allegation, and at first it did not seem to constitute a gross violation in terms of the Act. The more it was discussed, the more it was seen as a deliberate tool used by political groupings to devastate an area and force people to move away, the more it became necessary to consider it seriously. Eventually a decision was taken: arson would be considered as 'severe ill treatment' if it resulted in the destruction of a person's dwelling to an extent

that the person could no longer live there. . . . (It did not make it any easier to have to decide that a person who lost cattle or vehicles, which might constitute their entire livelihood, did not qualify as a 'victim' of a gross violation.)"<sup>2</sup>

The implications of these deliberations were not merely academic: they determined whether a person would be eligible for monetary reparations or not. The decision of the Commission to concentrate only on violations committed as specific acts, resulting in severe physical and or mental injury in the course of past political conflicts was controversial and often unpopular. It meant that victims of forced removals or of Bantu education or any other of a myriad of laws passed by the apartheid government, or of the effects of those laws including hunger, poverty and the lack of basic health care would not be deemed victims according to the Truth and Reconciliation Commission.

Settling on an accepted definition of a perpetrator also proved difficult for the commission, which acknowledged that the single word 'perpetrator' made no distinction between the kinds of acts committed, the reasons why they were committed, their consequences or their context; nor did it distinguish between individuals who committed just one act and those whose entire operation and purpose was the commission of such acts.<sup>3</sup> In other words, the term was neither nuanced nor contextual. One indication of the difficulty faced by the TRC in defining the concepts of victims and perpetrators is the fact that it devoted forty-five pages in the final report to discussing its interpretation of its mandate.

## II. EMPIRICAL CASES

### A. The African National Congress

The African National Congress (ANC), the main liberation movement which became the primary party in the new government in 1994, had a very complicated relationship to these concepts. The ANC had long seen itself as occupying the space of representing the victims. It was recognized around the world as a legitimate liberation movement; it received huge amounts of funding from anti-apartheid organizations and states around the world; and it even received office space in the United Nations—a sure sign of global legitimacy in fighting the oppressive apartheid regime. The ANC was, thus,

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2. TRUTH & RECONCILIATION COMM., VOL. 5 FINAL REPORT 11–12 (1998) (hereinafter TRC FINAL REPORT 5).

3. TRUTH & RECONCILIATION COMM., VOL. 1 FINAL REPORT 59 (hereinafter TRC FINAL REPORT 1).

universally acknowledged as the legitimate representative of apartheid's victims. Imagine its shock, therefore, when the TRC, in its final report, identified the ANC as a perpetrator. The TRC went to great lengths to place the vast majority of blame for gross violations of human rights on the apartheid state, stating for example that "The state—in the form of the South African government, the civil service and its security forces—was, in the period 1960–94 the primary perpetrator of gross violations of human rights in South Africa, and from 1974, in southern Africa."<sup>4</sup> At the same time, however, no group escaped without some blame being apportioned to it by the TRC. Its findings on the ANC include this statement: "the ANC and its organs . . . committed gross violations of human rights in the course of their political activities and armed struggles, for which they are morally and politically accountable."<sup>5</sup>

Outraged, and at some cost to its reputation, the ANC attempted unsuccessfully to block the publication of the final report in the days before its release date, seeking a court injunction against the TRC. At the core of the ANC's anger and disagreement with the TRC was the government's perception that the TRC was not properly distinguishing between the morality of the violence perpetrated by the state versus that perpetrated by those fighting against the state. In its affidavit seeking the injunction, the ANC stated:

any attempt to place on par guerrilla formations and state security forces, as well as irregular and regular warfare, will be fake and contrived and will necessarily lead to wrong conclusions. This includes conclusions based on requirements that a movement which does not control a state and a state machinery must be judged in the same terms as would apply to an oppressive state such as the apartheid state.<sup>6</sup>

The ANC's views on its relationship as a perpetrator were further expanded by then Deputy President Thabo Mbeki in his statement to the joint sitting of the houses of Parliament meeting to debate the final TRC report. Speaking as the President of the ANC and not as the deputy-president of the country, Mbeki stated, "One of the central matters at issue was and remains the erroneous determination of various actions of our liberation movement as gross violations of human rights, including the general implication that any and all military activity which results in the loss of civilian lives constitutes a gross violation of human rights."<sup>7</sup> The TRC's

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4. TRC FINAL REPORT 5, *supra* note 2, at 222.

5. *Id.* at 239. For further statements indicting ANC, see *id.* at 240–41.

6. *ANC Blundered by Trying to Block Tutu*, ELECTRONIC MAIL & GUARDIAN, 29 Oct. 1998, available at <http://weblist.mweb.co.za/mailman/private/dmgtext/>.

7. Statement on the Report of the TRC Joint Sitting of the Houses of Parliament, at 2, available at <http://www.anc.org.za/ancdocs/history/mbeki/1999/tm0225.html>. Mbeki's

response to the ANC's claims was succinct and clear: "Just war does not legitimate the perpetration of gross violations of human rights in pursuit of a just end."<sup>8</sup>

The ANC's position was thus that the TRC had erroneously equated the morality of the violence committed by the state with that committed by the ANC in opposing the state. The implication was clear: the state and its armed forces were the perpetrators; those fighting against it were the victims. This, however, is not a simple tale of the ANC viewing itself as the victim and being upset at being labeled a perpetrator. The story is, in fact, more complicated than this. No sooner had Mbeki made the remarks just noted in Parliament, when he turned around and said in the very same speech, in effect, *don't call us victims*. In a very controversial statement on the granting of individual reparations, Mbeki—sounding suddenly more like a state deputy-president—stated:

[S]urely all of us must agree that reparation will be offered to those who fought for freedom by ensuring that monuments are built to pay tribute to these to whom we owe our liberty. . . . We must however also make the point that no genuine fighter for the liberation of our people ever engaged in struggle for personal gain. There are many who laid down their lives, many who lost their limbs, many who are today disabled and many who spent their best years in apartheid prisons. None of those expected a reward except freedom itself. We must not insult them and demean the heroic contribution they made to our emancipation by turning them into mercenaries whose sacrifices we can compensate with money.<sup>9</sup>

Not only was Mbeki explicitly rejecting the TRC's recommendations in favor of individual reparations, he was also implicitly making a statement about the concept of victimhood. Only those individuals officially designated as victims by the TRC would have been eligible for individual reparations in the TRC recommendations. In his statement, Mbeki is, in effect, saying: *Our fighters were liberation heroes. Do not demean them by calling them victims*.<sup>10</sup> And, finally, to complicate the situation even further, the ANC, on at least one occasion, accepted the identification of perpetrator. In its first of two submissions to the TRC, the ANC referred to its internally appointed Commission to investigate its own conduct and stated,

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strong stance on the moral equivalence on violence was a very unhappy surprise for many in the TRC who point to a direct refutation of the ANC's position in the TRC final report. See TRC FINAL REPORT 5, *supra* note 2, at 211, ¶ 72.

8. *Id.* at 210, ¶ 71.

9. Statement on the Report of the TRC, *supra* note 7, at 4.

10. This was the basic message of Mbeki's statement. Whether the ANC meant this genuinely, or whether the state was looking for a justification for not providing money for individual reparations is a question much debated in South Africa.



"To the extent that the Motsuenyane Commission found that some detainees were maltreated and recommended that the ANC should apologise for these violations of their human rights, the ANC does so without qualification."<sup>11</sup> The ANC thus had an ambiguous relationship vis-à-vis its self-identification as victims and perpetrators. At times it said, "*we are the victims, how dare you call us perpetrators, but, o.k., maybe we were*"; while at other times it said, "*do not demean our freedom fighters by calling them victims.*"

## B. Perpetrators Who Became Heroes

One of the contributions of the TRC was to help decriminalize the actions of the majority of those who opposed the former state. During the anti-apartheid struggle, especially in the 1980s, thousands of people were sentenced to prison for arson, public violence or attempted murder. What was revealed through police testimony at the TRC was that political opposition was deliberately criminalized as part of the "total strategy" against the "total onslaught," and that this decision was made at the highest levels of the state. A secret memorandum to the State Security Council was uncovered which provided terminological guidelines for all members in the Council. An excerpt from that memorandum reads: "the main emphasis should fall on specific common law crimes and that references to crimes with political connotations should mostly be avoided, for example: arsonists, looters, murderers, muggers. Where it is not practically possible to refer to specific common law crimes, descriptions such as 'rioters,' 'boycotters,' 'protesters' should rather be avoided and replaced where applicable with descriptions such as hooligans, vandals, thugs."<sup>12</sup> At one hearing after listening to police testimony, a mother of an activist killed said that she was feeling comforted and reconciled; not because she was feeling any forgiveness yet, but because, "people now know that our sons were not criminals, but freedom fighters."<sup>13</sup> Similarly, the chairperson at another human rights violation hearing said, "We found that many parents are not aware whether their children died as heroes because at that time you couldn't go home and tell your parents what you were involved in. . . . What is important to me is that maybe the Commission will give out a report that will help you to go to your children's graves, to talk to your children—that you were not aware that they were fighting for their country—so that you can salute them."<sup>14</sup>

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11. TRC FINAL REPORT 5, *supra* note 2, at 240.

12. *Id.* at 356–57.

13. *Id.* at 358.

14. *Id.*

### C. Heroes Who Became Perpetrators

The opposite also happened in the process of TRC hearings: some people who had been hailed as heroes were suddenly being revealed as perpetrators. This refers primarily to members of the security and police forces, ordinary soldiers, mostly white Afrikaners, who were seen as upholding the moral order and legitimately enforcing the law against “terrorists.” Suddenly, they were being told by the Commission and by the media, that it was they, in fact, who will be judged by history as responsible for the commission of the overwhelming majority of gross violations of human rights. One young Afrikaner, in referring to the media coverage of the TRC hearings, summed, this up: “I think the media, from the one extreme, they went to the other extreme . . . you know, coming from a background where everything was fine for all these years, now all of a sudden the picture [is] changing, that the police were the ‘baddie.’”<sup>15</sup> In fact, one could argue that categories (2) and (3) are inversely related—that is, it was precisely *because* perpetrators became heroes that heroes became perpetrators. As one psychologist involved in therapy with former army conscripts testified, it has been very difficult for those directly involved in the security forces to reconcile themselves with the decriminalization of their former enemies. She notes: “Central to most of these testimonies [by ex-conscripts] is the notion that the present has destroyed the foundations of ‘meaning’ these conscripts adopted to cope with their traumatic experiences. It is easier to cope with having killed someone you believe to be the sub-human agent of forces that wish to destroy everything you hold dear than it is to cope with having killed a normal man, woman or child. . . . This crisis is greatly intensified when it is revealed to you that the person you have killed is a ‘hero’ or ‘freedom fighter’ or ‘innocent civilian.’ For some, the contradictions of their experience might prove intolerable.”<sup>16</sup> Of course, this was not a phenomenon which affected white Afrikaners alone. As noted above, the ANC was outraged that some of its own heroes—its freedom fighters—were fingered as perpetrators of gross violations of human rights.

### D. Perpetrators Who Were Victims

This refers primarily to the phenomenon of innocent informers. Through its work, the Commission became aware that one of the most destructive legacies of apartheid was the labeling of sometimes innocent people as

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15. *Id.* at 359.

16. *Id.* at 360.

"informers" or "collaborators." Individuals and their families were killed, assaulted, harassed and ostracized as a result of their stigmatization. In its recommendations, the TRC stated "where people were accused of having been collaborators or informers, and had their lives destroyed as a result, a process should be established whereby their situation can be remedied. Political parties, community organizations, and other bodies involved should take action, possibly in the form of ceremonies or mediation, to facilitate a public process of reintegration and forgiveness."<sup>17</sup> The TRC, in fact, identified this lack of reintegration as one of the major hindrances to the process of reconciliation in South Africa.<sup>18</sup> At times, the Commission itself provided exoneration, such as during the hearings in which it was revealed that a young woman, Maki Skosana, had been falsely accused as a collaborator and necklaced (an act in which a gasoline soaked tire was placed over a person's neck and set on fire). After her sister's testimony, the hearing chairperson addressed the girl's family, saying, ". . . we would like you to note that the death of Maki was a national shame. . . . We salute you. . . . Maki and the family have emerged, after all these disclosures, as heroes. . . . I will, without shame, request this house to stand and observe a moment of silence."<sup>19</sup>

### **E. Victims Who Were Heroes**

This category relates to the identification issue of whether one saw oneself as a victim or not. One of the problems faced by the TRC is that many potential victims never came forward to testify before the Commission. One reason for this is that many activists did not identify with the label "victim"; rather, they saw themselves as heroes who fought for a just liberation struggle. This refusal to self-identify as a victim had several consequences, not least of which was that these individuals forewent their eligibility for state reparations. More will be said about the identification issues of both victims and perpetrators below.

### **F. Tom Wiltshire Robbins Versus Jeffrey Benzien**

On 14 March 1999, the TRC granted amnesty to Tom Wiltshire Robbins. Robbins, who had been a member of the National Union of South African Students (NUSAS) had applied for amnesty to clear his name of a conviction

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17. *Id.* at 310.

18. *Id.* at 310, 307.

19. *Id.* at 365.

for refusing to report for military training by the former South African Defence Force in January 1993. He was granted amnesty for contravening Section 126 A(1)(b) of the Defence Act in failing to report for Military Training. In his amnesty application, Robbins argued that by reporting for conscription he would have served to bolster the former apartheid regime. So, here is a man who, by applying for amnesty in order to wipe a conviction off the books, took on the identity of perpetrator. By definition, if one is granted amnesty, one is a perpetrator. The main crime that he "perpetrated" was that of conscientious objection. Tom Robbins cannot be compared with the likes of Jeffrey Benzien, a Captain in the South African police force and member of the anti-terrorist branch of the Security Forces. Benzien, one of South Africa's most notorious torturers, was confronted by one of his victims during his amnesty hearing and asked to demonstrate his torture techniques to the Commissioners and those in attendance. Benzien complied. He said he took pride in being able to break a man in thirty minutes or less and his personal specialty was the "wet-bag treatment," in which he placed a blindfolded and handcuffed suspect on the floor, face down and naked. Sitting on his back, Benzien would place a well soaked evidence bag over the suspect's head and twist it closed around the throat, applying pressure to the point of passing out. In 1989, Benzien was awarded the South African Police Medal for Combating Terrorism.<sup>20</sup> The point here is simple: not all perpetrators are the same. A conscientious objector is not the same as a torturer. Simply referring to all amnesty recipients as perpetrators, without taking the time to do a case by case analysis obscures the complexity of the category.

### G. Winnie Mandela

Mandela represents an example of those people who are both victims and perpetrators. There are many stories like hers, and others could have been chosen, but she represents a very clear cut case of a person who, under apartheid, was both a victim and a perpetrator. Because her reputation has been severely tarnished since the end of apartheid, especially through the revelations of her involvement in abduction and murder, it is sometimes easy to forget that she was the target of state harassment and abuse for years. She was both banned and banished by the South African state. Banned persons were restricted to certain magisterial districts and the orders were designed to ensure the complete withdrawal of the individual from political

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20. Colleen Scott, *Amnesty and the South African TRC*, available at <http://www.abc.nl/abc/general/guest/trc.html>.

life. The banned individual's involvement in organizations was restricted as was their speech and publishing. Banned persons could not communicate with each other, nor attend social gatherings of more than one person. Mandela was banned and jailed repeatedly, tortured and sometimes held in solitary confinement. A banished person was sent to a designated, usually remote and isolated, place and not permitted to leave. "No specific reason for banishment was needed, the 'removal' of the individual was in the interest of 'maintaining peace and good order.'"<sup>21</sup> Winnie Mandela was banished to Brandfort in the Orange Free State in 1977 for nine years, during which she suffered repeated harassment, anonymous attacks on her home, and numerous death threats. In its deliberations on defining Gross Violations of Human Rights, and especially the category of severe ill-treatment, the TRC included banning and banishment orders, and issued the following finding: "All those upon whom such orders were imposed suffered a gross violation of human rights, for which the former government and in particular the ministers of justice and law and order are held accountable."<sup>22</sup> Winnie Mandela was clearly a victim. She was also, as we know, a perpetrator.

In 1986, upon completion of her banishment, Mandela returned to Soweto. Between August 1988 and the end of February 1989, the residents and associates of her household, including Mandela herself, were implicated directly or indirectly in a range of incidents, including assaults and abduction, and the murder and attempted murder of at least a dozen individuals.<sup>23</sup> In 1991 Mandela was convicted of the kidnapping of fourteen year old Stompie Seipei; an accessory to assault conviction was thrown out the following year on appeal, while the kidnapping conviction was upheld. The TRC investigated only a handful of cases involving Mandela in detail and has issued dozens of findings establishing her guilt, such as the following: "It is the finding of this Commission that Ms. Madikizela-Mandela had knowledge of and/or participated in the activities of club members, and/or that they were authorised and/or sanctioned by her."<sup>24</sup>

### III. CONCEPTUAL IMPLICATIONS

What are some of the larger theoretical questions and lessons that can be asked and gleaned from the above few examples cited from the South

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21. TRUTH & RECONCILIATION COMM., VOL. 2 FINAL REPORT 166 (1998) (hereinafter TRC FINAL REPORT 2).

22. *Id.* at 169.

23. *Id.* at 556.

24. TRC FINAL REPORT 5, *supra* note 2, at 243.

African case? While several comments are offered here, they primarily take the form of questions. All of these are related to refining and specifying the concepts of victims and perpetrators in terms of the scope or the level or the degree of victimization or perpetration. Although listed as six separate points below, they are all, in fact, variations on a theme and closely related. The TRC, it should be kept in mind, almost always employed the binary approach of victims and perpetrators and almost never qualified these terms. The hyphenated words, adjectival approach, and conceptual modifiers offered below are the author's creation.

### A. Official Victims and Perpetrator

Through the process of the TRC, South Africa now has a list of "official victims," and "official perpetrators." Victims are those individuals who were certified to have suffered gross violations of human rights either through the process of making statements to the Human Rights Violations Committee (HRVC) or as a result of an amnesty hearing. Both groups are officially listed. Each person who was found to have been a victim of a gross violation is supposed to have his or her name and a brief account of the violation described in the final report of the Commission.<sup>25</sup> The final numbers are still not entirely complete, but the TRC identified and named close to 20,000 victims. Similarly, the TRC named names in relation to perpetrators. A complete list of all amnesty recipients can be found on the Truth commissions official web site, and in other places such as the government gazette.

For the TRC, determining whether someone was a victim or a perpetrator was a highly technical, legalized process. A victim was someone who had suffered a gross violation of human rights, defined as killing, abduction, torture, or severe ill-treatment, although as noted above, determining whether a particular situation of violence fit one of these legal categories was often not at all clear. Victims and perpetrators were, thus, individuals—and a relatively small number of individuals at that. But, is this the whole picture? Through this legal certification of victims and perpetrators, what is obscured about the apartheid era?

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25. *Id.* at 14. While all victims determined by the date of the report's publishing are listed by name, a final count of all victims as well as detailed descriptions of their accounts have not yet been published.

## B. On an Individual Level: Direct Versus Indirect Perpetrators

The only direct perpetrators, thus, were those who came forward and applied for and were granted amnesty. Might there be other individuals, however, who were also responsible for the commission of GVHR? While the TRC never used the terms direct versus indirect perpetrators, it may, in fact, be useful to make this distinction. What about the Chain of Command issue? Did those at the top know about and indeed order killings, abductions, and torture, and if so, are they equally guilty as those who actually committed these acts upon their orders? The Commission categorically denied the notion of "plausible deniability," stating: we reject, "attempts by politicians to phrase instructions in a way that causes their subordinates to take responsibility for acts of which the politicians are the intellectual authors."<sup>26</sup> In the process of amnesty hearings, the Commission received evidence that, in fact, senior members of the government, including the State President, did indeed order senior security force officers and security police operatives to commit criminal acts such as sabotage, including blowing up the headquarters of the South African Council of Churches. Even further down the chain of command, these senior security and police force officers entrusted the carrying out of these acts to *their* subordinates. The bitterness and sense of betrayal felt by these direct perpetrators (i.e. those who actually carried out the gross violation of human rights) was made clear by at least one of them. While FW de Klerk declared in his submission to the TRC: "I have never condoned gross violation of human rights . . . and reject any insinuation that it was ever the policy of my party or government."<sup>27</sup> Eugene de Kock, one of the operatives convicted for murder, and subsequently an applicant for amnesty, responded: "Yet the person who sticks most of all in my throat is former State President FW de Klerk . . . because, in that evidence, he simply did not have the courage to declare: 'yes we at the top levels condoned what was done on our behalf by the security forces. What's more, we instructed that it should be implemented. . . .'"<sup>28</sup>

And so, we must take into account the indirect perpetrators. If we only considered those individuals who were direct perpetrators, only the foot soldiers, so to speak, would be held accountable. We need to account for the gap between authorities and their followers, who were often youth. Evidence indicates that torturers (the term which most comes to mind when we hear the word perpetrators) are not simply sadistic people. They almost

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26. *Id.* at 217.

27. *Id.* at 264.

28. *Id.*

always believe they are performing their expected duties.<sup>29</sup> Behind every torturer—the most direct of all perpetrators—are individuals with more authority—the indirect perpetrators. And, despite the fact that FW de Klerk insisted that torturers represented a few renegade policemen, for whom the National Party was unprepared to accept responsibility as it was unaware of these acts and would never have condoned them, Leon Wessels, the NP's former Deputy Minister of Police, maintained that de Klerk's position was untenable. Tolerance of torture was systemic and was evidenced by the regular promotion, sometimes to the highest levels, of security police officers involved in its act.<sup>30</sup> The problem, of course, is how to assess degrees of perpetration. Are direct and indirect perpetrators both equally guilty? Is one more guilty than the other? In a further twist on the direct versus indirect issue, the TRC found the following "directly responsible" for the use of torture against detainees: the Ministers of Police and of Law and Order; the Commissioners of Police; commanding officers of the security branch at national, divisional, and local levels.<sup>31</sup> In the case of torture, then, indirect perpetrators were held "directly responsible."

### C. Beyond the Individual Level: Group Perpetrators

While the TRC certified only approximately 20,000 individuals as victims and fewer than 10,000 individuals as perpetrators, there must have been something more going on in the realm of human rights. Apartheid surely had more than 30,000 victims and perpetrators. What about the masses of South Africans? The TRC did try to get at something that approximated group perpetrators, although it never used that term. These can be divided into two subgroups: institutional perpetrators and sectoral perpetrators, although again these were not terms used by the TRC.

In the first group (institutional perpetrators) we can place the institutions of the former state, including the South African Police and the South African Defence Force, as well as the National Party. All three of these institutions were asked to make submissions to the Commission, which were generally disappointing to the Commission and did little to further their work. In the Commission's words, these submissions "consisted of little more than recitations of the policies under which these groups operated and often unconvincing apologies for excesses committed."<sup>32</sup> This did not stop the

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29. *Id.* at 299–300.

30. *Id.* at 219.

31. *Id.* at 220.

32. *Id.* at 197.



Commission from apportioning accountability to them, however. The Commission was scathing in its findings regarding the former apartheid state, including the following: The state—in particular its security agencies and affiliated policy and strategy formulation committees and councils (such as the State Security Council or SSC)—was responsible for the greatest number of gross violations of human rights committed during the 34 year mandate period.<sup>33</sup> Other institutional perpetrators were also named. The Inkatha Freedom Party (IFP) was declared the primary non-state perpetrator of gross human rights abuse in South Africa from the latter 1980s through 1994.<sup>34</sup> The commission found that over one-third of the total number of gross human rights violations committed during the thirty-four year period of the Commission's mandate were committed by the IFP, and that in 1987–1988 the IFP “exceeded even the SAP [South African Police] in terms of numbers of people killed by a single perpetrator organisation.”<sup>35</sup> Finally, as no major group escaped TRC criticism, the ANC, as noted above, was also named as a perpetrator. The Commission found that “the ANC, and particularly its military structures responsible for the treatment and welfare of those in its camps, were guilty of gross violations of human rights in certain circumstances and against two categories of individuals, namely suspected ‘enemy agents’ and mutineers.”<sup>36</sup>

All of these examples can be seen as groups or institutions who actively committed human rights violations. Another group, the sectoral perpetrators, might best be seen as passive perpetrators. The TRC was charged with establishing as complete a picture as possible of the causes, nature, and extent of the gross violations of human rights committed between 1960 and 1994. One innovative way it devised to do so was through sectoral hearings. Their purpose was to further an understanding of the roles that various civil society sectors played in committing, resisting, or facilitating human rights abuses. Hearings were held on the following civil society sectors: health, legal, media, business, prisons, and faith communities. It is in this area that the Commission made a distinction between acts of commission and acts of omission, stating:

[I]t would . . . be misleading and wrong to assign blame for the gross violation of human rights only to those who confronted each other on the political and military battlefields, engaged in acts of commission. Others, like the church or faith groups, the media, the legal profession, the judiciary, the magistracy, the medical/health, educational and business sectors, are found by the Commission

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33. *Id.* at 213.

34. *Id.* at 232.

35. *Id.* at 233.

36. *Id.* at 242.

to have been guilty of acts of omission in that they failed to adhere or live up to the ethics of their profession and to accepted codes of conduct.<sup>37</sup>

In some ways, these sectors can be seen as “perpetrators by default” (the author’s terminology) because of their “failure to oppose the injustice around them vociferously and actively”<sup>38</sup> (the TRC’s terminology). Similar statements to the following made about the legal sector were made in varying degrees about all of the sectors examined by the Commission: “The Commission finds that both the judiciary and the magistracy as well as the organised legal profession were locked into an overwhelmingly passive mindset which characterised the judgments of the bench in the face of injustices of apartheid.”<sup>39</sup>

So far this article has covered individual perpetrators, both direct and indirect and group perpetrators, both active and passive. And yet things are still more complex than this, and the picture is still incomplete, for the relationship between individual and group perpetrators is a complex one. At least four relationships between the individual and the group can be identified. First, some individuals within institutions were definitely also perpetrators. Secondly, some individuals were neither perpetrators nor victims. Certainly not everyone within the institutional perpetrator was an individual perpetrator. Some individuals were extremely well-meaning. The majority of chaplains, for example, regarded themselves primarily as ministers of the Gospel, responsible for the pastoral care of their flock, despite the fact that the chaplaincy *as an institution* was deemed “a tool in the hands of the military, and thus an important cog in the apartheid machine.”<sup>40</sup> Third, some individuals were outspoken critics of the apartheid system, and while they were perhaps harassed, were never directly and overtly victimized for their stance. Individuals in this category might include Archbishop Denis Hurley in the Catholic Church. Finally, within each one of the institutions and sectors noted above, there were individuals who did

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37. *Id.* at 211. In fact, while the TRC found these sectors to be guilty primarily of acts of omission, it did also accuse them of being active perpetrators. For example, in reference to the business sector, the TRC commented that “hundreds and probably thousands of South African private sector companies made the decision to collaborate actively with the government’s war machine.” TRUTH & RECONCILIATION COMM., VOL. 4 FINAL REPORT 49 (1998) (hereinafter TRC FINAL REPORT 4). In reference to the faith sector, the TRC found that the Dutch Reformed Church “actively promoted apartheid.” *Id.* at 66. And, to complicate matters even further, some faith communities themselves were institutional victims (not just individual victims), through such actions as the enforced closings of religious schools and buildings, the bombing of Khotso House (headquarters of the South African Council of Churches), and the arson attack on Khanya House (the headquarters of the Southern African Catholic Bishops Conference).

38. *Id.* at 249.

39. *Id.* at 254.

40. TRC FINAL REPORT 4, *supra* note 37, at 72.

resist apartheid, many of whom paid dearly for their activism by becoming direct victims. A few examples in this last category bear mentioning. The faith sector came under some fairly harsh criticism from the TRC, which found, for example, that the "churches must . . . accept moral accountability for providing religious sanction and theological legitimisation for many actions of the armed forces."<sup>41</sup> And yet, people are familiar with the stories of individual acts of heroism and victimization by individual members of churches. Two examples of the gross victimization of clergy are Father Michael Lapsley and the Reverend Frank Chikane. Michael Lapsley, an Anglican priest, was born in New Zealand and transferred by his order to South Africa in 1973. In 1976 he was elected National Chaplain of Anglican students; in that same year he was expelled from South Africa and lived outside the country until 1992, both in LeSotho and Zimbabwe. He joined the ANC in exile, and served as a chaplain to the ANC. In April, 1990 Lapsley opened a letter bomb from the South African government, which shattered his eardrums, blew off both his hands, and an eye. In 1992, Lapsley returned to South Africa and the Anglican Student Federation of the church of the Province of South Africa re-elected him as their national chaplain. Today he is the director of the Institute for the Healing of Memories in Cape Town.

Just how convoluted the relationship between victims and perpetrators could be during apartheid is highlighted in the case of the Reverend Frank Chikane. Chikane was a cleric in the black section of the Apostolic Faith Mission (a church which was divided along racial lines). Chikane was repeatedly harassed by the state, poisoned, and tortured for fifty hours. This torture took place under the supervision of an elder in the white section of the same church in which Chikane was a cleric. The white elder went off to worship after supervising Chikane's torture.<sup>42</sup>

Likewise, the judiciary was found to have "collaborated, largely by omission, silence and inaction, in the legislative and executive pursuit of injustice."<sup>43</sup> Even worse, the legal profession was found to have "actively

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41. TRC FINAL REPORT 5, *supra* note 2, at 252. As in the case with the business sector, the TRC distinguished between different levels of perpetration in the faith sector. Their level of accountability was divided into Acts of Commission and Legitimization, and Acts of Omission. Within the acts of commission, the faith sector was found to be guilty of actively supporting state policies and agents; being involved in state structures, especially by participating in the military chaplaincy; suppressing dissidents; internalizing racism; and propagating state theology. Acts of omission included avoiding responsibility to speak out against injustice; lacking courage to promote a campaign of reform; failure to translate resolutions into action; and failure to support members who were involved in anti-apartheid activities. See also TRC FINAL REPORT 4, *supra* note 34, at 66–74.

42. TRC FINAL REPORT 4, *supra* note 37, at 68.

43. TRC FINAL REPORT 5, *supra* note 2 at 253.

contributed to the entrenchment and defence of apartheid" in various ways, such as "collusion with the police regarding the torture of detainees and those in police custody."<sup>44</sup> "History," the TRC concluded, "will judge the judiciary harshly."<sup>45</sup> And yet, there were individual victims within this larger group of perpetrators as well. One such victim was Albie Sachs. Sachs was an activist lawyer and member of the ANC. He was detained twice without trial by the Security police in 1966 and spent nearly six months in solitary confinement (during which time he wrote his now-famous Prison Diaries). He went into exile, first in England and then in Mozambique. In April, 1988 he was a victim of a car bomb planted by the South African security forces, in which his right arm was blown off above the elbow, he lost the sight of one eye, and suffered hearing loss and the diminished use of his legs. In 1992 he was made a member of the National Executive and Constitutional Committees of the ANC and in 1994 was appointed a justice of the Constitutional Court.

A few final notes on this subject: First, some people who were involved in group perpetration became individual perpetrators through applying for amnesty. For example, the Afrikaner Weerstandsbeweging (AWB) was found responsible for gross violations of human rights. Its leader, Eugene Terreblanche became an individual perpetrator by applying for amnesty. Second, some individuals *were* able to articulate for themselves the complex relationship between direct perpetration and what we might call perpetration by default. One striking example came from Craig Botha, who had been a conscript in the Navy in the late 1970s and early 1980s. In the special hearing on conscripts, Botha testified, "I did not feel I needed to apply for amnesty for I personally did not kill anyone. I do feel, however, that I was part of the overall strategy of destabilisation during the apartheid years; and it was because of that, that I've come forward with this account."<sup>46</sup>

#### D. Degrees of Accountability?

The issues of direct and indirect, individual and group, active and passive perpetrators bring to the fore the fourth point: that is, how do we properly assess the degree of accountability? This issue arose throughout the work of the Commission, and the Commission's language in trying to wrap its head around the issue of degrees of accountability is interesting:

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44. *Id.* at 254.

45. TRC FINAL REPORT 4, *supra* note 37, at 107.

46. TRC FINAL REPORT 5, *supra* note 2, at 406.

- (i) in reference to the SSC, they were, according to the TRC, “guilty of ‘official tolerance’ of violations and are accountable for such violations.”<sup>47</sup>
- (ii) The majority of individual white South Africans, of course, did not actively engage in the perpetration of gross human rights violations. Even if we consider both the direct and indirect perpetrators, the number of perpetrators is relatively small. At the same time, however, most white South Africans did not overtly resist the system in which these violations took place. They were, in the words of the TRC, guilty of “bystander complicity.”<sup>48</sup>
- (iii) The TRC frequently found individuals (Winnie Mandela, PW Botha) and institutions “politically and morally accountable for gross violations of human rights.”<sup>49</sup> Is being politically and morally accountable the same thing as being a perpetrator (that is, being legally accountable)?
- (iv) In discussing the accountability of the health sector, the Commission found little evidence of direct involvement by health professionals in GVHR. However, they were “guilty through apathy”<sup>50</sup> of creating an environment in which the health of millions of South Africans suffered.
- (v) In its findings on torture of detainees in police custody, the TRC found the Cabinet “directly accountable”; in its findings on death of detainees in police custody, the TRC found the Cabinet “indirectly” responsible.<sup>51</sup>

The categories of active and passive perpetration or perpetration by commission versus omission are, of course, not mutually exclusive. Organizations, such as political parties, were found to be politically and morally responsible for not doing enough to protest apartheid, or to stop abuses by its members, and individual members of these parties or organizations applied for amnesty and were found to have directly committed gross violations of human rights. The ANC provides one example. The Commission found that members of the ANC security forces committed gross violations of human rights at their internment camps (direct perpetrators); they were following the orders of those in political leadership structures

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47. *Id.* at 218.

48. *Id.* at 168.

49. In reference to Winnie Mandela, see TRC FINAL REPORT 2, *supra* note 21, at 581. In reference to the faith sector, see TRC FINAL REPORT 5, *supra* note 2, at 252.

50. TRC FINAL REPORT 5, *supra* note 2, at 250.

51. TRC FINAL REPORT 2, *supra* note 21, at 220.

(indirect perpetrators). Finally, the ANC was found to be morally and politically accountable for not doing enough to stop civilians who saw themselves as ANC supporters (but who were not necessarily direct members of the ANC) from committing human rights violations in the course of their "people's war" to "make the country ungovernable" (perpetrators by omission).<sup>52</sup>

Several questions arise from these examples. One is, who should be held most accountable? In order to fulfill its mandate of identifying all persons, authorities, institutions and organisations involved in gross violations of human rights, the TRC had to look beyond only those who had actually committed violations and include those who had aided and abetted such acts. Beyond individual accountability, clearly apartheid could not have survived without the complicity of civil society groups, individuals, sectors, and institutions.

This then raises the second question: is it possible to rank order the perpetrators, or to somehow establish degrees of perpetration? Are some perpetrators more guilty than others? How would we assess that? Is it the person who pulled the trigger? Or the officer who commanded him to do so? Or the context of a militarized society which allowed such acts to happen? Or the vast majority of individuals who simply never spoke out? Who are the most guilty here? Most representatives of the various civil society sectors who appeared before the TRC acknowledged their omissions and apologized for them.<sup>53</sup> Other institutional perpetrators also accepted some level of responsibility. For example, Patrick "Terror" Lekota a former UDF leader stated "we accept political and moral responsibility"<sup>54</sup> for necklacing carried out by UDF activists. There were also some moving individual apologies for acts of omission, such as that by Constitutional Court Judge LWH Ackermann who testified before the Commission, "I did not do enough to resist the pervasive institutional culture and to dismiss my

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52. *Id.* at 347, 346.

53. See, for example, the statement by the spokesperson for the Stellenbosch Presbytery of the Dutch Reformed Church, TRC FINAL REPORT 5, *supra* note 2, at 384–86, and the statement made by the Medical Association of South Africa, *Id.* at 387, and the statements made by representatives of the legal profession, *Id.* at 389, and that made by the business sector, *Id.* at 389–90. On the other hand, not all sectors or their representatives felt compelled to adopt the identity of a perpetrator. During the business sector hearings, for example, Old Mutual Insurance stated in its submission, "in principle, the mandate of the Commission which focuses on gross violations of human rights would almost certainly exclude Old Mutual from having to make any submission" (TRC FINAL REPORT 4, *supra* note 37, at 20), and Ann Bernstein argued that "corporations are not institutions established for moral purposes. . . . They are not institutions designed to promote some or other form of morality in the world." (*Id.* at 53).

54. TRC FINAL REPORT 5, *supra* note 2, at 384.

fears that, if I did speak out, my career would be jeopardized. . . ."<sup>55</sup> Thus, members of both sets of group perpetrators were willing to accept some level of guilt. The question becomes how do we rank or weigh this guilt with that of direct perpetrators? They are clearly not guilty of Gross Violations of Human Rights; neither are they innocent, however, even by their own admission. So, they fit somewhere along the spectrum between direct perpetrators and innocents. The question is, where?

A final question is a moral one: How high a standard can we reasonably hold individuals to? Can we expect them to be heroes? What is the most that we can expect from them? Is failure to speak out enough to apportion blame for human rights violations?

### E. The Question of Scope

The first four issues addressed above are all, in some way, related to the question of scope: How far do we want to extend the concepts of victims and perpetrators? This question has already been raised implicitly in relation to perpetrators with the introduction of such terms as direct versus indirect perpetrators; group perpetrators; perpetrators by default; and perpetrators by commission versus omission. The same issues arise for the concept of victim. As noted above, there were approximately 20,000 "official" victims, as legally defined and certified by the TRC. However, as in the case with perpetrators, if we start scratching the surface, we immediately see a much wider group of individuals and groups who were victimized under apartheid. The victimization of one individual clearly has ripple effects on families and communities, and several indirect victims can be identified. The TRC devoted dozens of pages to the varied consequences for families and communities of gross violations of human rights perpetrated against individuals. Parents, for example, suffered extreme emotional stress at the disappearance of a child. One widow asserted, "the uncertainty and the utter feeling of helplessness that was caused by the disappearance of my husband was probably worse than receiving news of his death, one time."<sup>56</sup> Entire families suffered economically as the result of detention or death of a primary breadwinner. The costs of bearing the burden of death often stretched beyond the immediate family to extended families. While not the direct recipient of a human rights violation, these families might be seen as "victims once removed," or "secondary victims." At times these secondary

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55. TRC FINAL REPORT 5, *supra* note 2, at 389.

56. *Id.* at 153.



victims became direct victims such as in cases when family members were detained in order to extract information about the whereabouts of wanted persons, or as an enticement for wanted persons to come forward or confess, or to provide an example to other possible dissenters. As one woman testified before the Commission, "As they were looking for my son, they used to arrest my husband. And they used to cover his face with black plastic bags, asking him where my twin [son] was."<sup>57</sup> These indirect-turned-into-direct victims can, in some ways, be regarded as "victims by proxy." Other family related consequences of human rights violations of individuals include domestic violence, and the secondary victims created thereby.

An even broader category of victimhood identified by the TRC is the community. Entire communities were affected by the state's recruitment of informers and collaborators. Pre-existing inter-community rivalries were exploited in this way to serve the state's goal of domestic destabilization. The sharp increase in violence (popularly mislabeled as "black on black" violence) in the area known as the Vaal in the early 1990s was a result of this type of manipulation by the state.<sup>58</sup> And although it lay outside the TRC's mandate, the mass forced removal and dislocation of entire communities under the Group Areas Act had severe communal implications, including unemployment and poverty. Broadening the category even further, the TRC claimed that the mental well-being of "the majority of South African citizens" was severely affected by apartheid.<sup>59</sup> And so, in the category of victim we move from the individual to the family to the community to the country as a whole. And, as noted above, the category of perpetrator can be equally enlarged to include the individual, his commander, the institution of the military as a whole, to entire sectors of civil society. This begs the questions: how far can we stretch these concepts before they lose their heuristic value? Is everyone a victim to some degree and a perpetrator to some degree? What are the consequences of making such a broad statement? Marie Smyth has written on these questions in relation to the Northern Ireland conflict. Smyth rejects the assertion that "we are all victims," on empirical, moral, political and practical grounds.<sup>60</sup> Empirically, not all victims are the same because not every individual (nor all communities for that matter) suffer equally from human rights abuses.

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57. *Id.* at 145.

58. In the Vaal, from March 1992 to February 1993, about 1650 murders took place; 2900 violent confrontations involving weapons other than firearms and 6700 cases of assault were reported. TRC FINAL REPORT 5, *supra* note 2, at 162.

59. *Id.* at 127.

60. Marie Smyth, *Remembering in Northern Ireland: Victims, Perpetrators and Hierarchies of Pain and Responsibility*, in *PAST IMPERFECT: DEALING WITH THE PAST IN NORTHERN IRELAND AND SOCIETIES IN TRANSITION* 31–49 (Brandon Hamber ed., 1998).



Stating we are all victims serves to hide the unequal distribution of human rights abuses across population groups and communities. Morally, according to Smyth, it is wrong to lay claim to victimhood if one is in any position of power or privilege. In relation to South Africa, Smyth would apply this sentiment to White South Africans. She asserts that the moral onus is on those who are in that position of privilege to forego any claim to victimhood even if they may have suffered in any way, in order to reserve attention and resources for those who have suffered most. "Claiming victimhood," Smyth says, "should not be institutionalized as a way of escaping feelings of guilt, shame or responsibility."<sup>61</sup> Finally, in a post-conflict society, the distribution of resources requires targeting those in greatest need. Universal definitions or claims of victimhood do not facilitate this task, as they imply universal needs.

In terms of perpetrators, Smyth asserts that like victimhood, responsibility for violence is not evenly distributed throughout society. Again, in an argument which rings familiar to the South African context, Smyth states, "the direct use of violence may have been the role of relatively few in the society, but the few cannot carry out their acts of violence without the support of the many."<sup>62</sup> So, for Smyth, while all of society may have been affected by gross violations of human rights, it is misleading to argue that all are victims. Similarly, while all of society may share the responsibility for the violations committed, not all are perpetrators in the same sense.

Three additional issues relating to the scope of these concepts bear highlighting here. The first concerns the concept of beneficiaries in South Africa, which generated widespread discussion in certain circles in South Africa during the life span of the TRC. The term was coined by Mahmood Mamdani, a vocal critic of the TRC. His critique, in part, rested on a too-narrow definition of both victims and perpetrators. In terms of victims, Mamdani argues, the narrow legalistic definition employed by the TRC has serious implications for how the injustices of apartheid will be historically remembered as well as implications in the practical realm of reparations and restitution. He states:

[I]njustice is no longer the injustice of apartheid: forced removals, pass laws, broken families. Instead, the definition of injustice has come to be limited to abuses within the legal framework of apartheid: detention, torture, 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

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61. *Id.* at 40.

62. *Id.* at 41.

reparations are for militants, those who suffered jail or exile, but not for those who suffered only forced labour and broken homes.<sup>63</sup>

A too-narrow definition also has serious consequences for the accountability of perpetrators. It is in this context that he introduces the term “beneficiaries.”<sup>64</sup> These include those people, for Mamdani the white majority, who—while never engaging in direct perpetration—nevertheless benefited from the system of apartheid. They were, in the Commission’s words, “ordinary, decent and God-fearing [individuals who] found themselves turning a blind eye to a system which impoverished, oppressed and violated the lives and very existence of so many of their fellow citizens.”<sup>65</sup> In some ways, we can link the concept of beneficiaries with the concept of sectoral perpetrators above. For the vast majority of individuals in the various civil society sectors examined by the TRC were not direct perpetrators; these sectors were, in effect, comprised of beneficiaries.

The “white community” as a whole, then, in some sense bears some responsibility and level of guilt for the gross violations of human rights committed in order for them to retain the benefits and lifestyle to which they were accustomed. It was in their direct interest, even if they never articulated it to themselves, to remain silent about the abuses of apartheid. In the South African context, perpetrators are a small group (as are their victims). In contrast, beneficiaries constitute a much larger group, and victims defined in relation to beneficiaries are the vast majority of society. The consequences of this focus on perpetrators as opposed to beneficiaries and victims as a minority as opposed to victims as a majority are great in terms of reconciliation, Mamdani argues. Ignoring the vast majority of victims risks turning disappointment into frustration and outrage, and is likely to generate a growing resentment among the excluded majority.<sup>66</sup> Mamdani, then, supports a position of a broad scope of victims and perpetrator, in which power is linked to privilege, and perpetrator to beneficiary. His focus is on individuals who benefited as part of the logic of an ongoing system. For him, perpetrators are personally and individually guilty, while beneficiaries may not be. They may be unconscious beneficiaries of systemic outcomes, where benefits cannot necessarily be linked to individual agency. In short, he prefers a “shift of focus from the world of agents and activists to that of winners and losers, from those who were victimized individually and personally to those whose victimhood was

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63. Mahmood Mamdani, *Reconciliation without Justice*, SOUTHERN AFRICAN REVIEW OF BOOKS, ISSUE 46 (Nov./Dec. 1996).

64. *Id.*

65. TRC FINAL REPORT 4, *supra* note 37, at 1.

66. Mamdani, *supra* note 63.

more anonymous and circumstantial, from gross human rights abuses—murder, torture, rape—to gross systemic outcomes like those of pass laws and forced removals, abuses which racialized both poverty and affluence.”<sup>67</sup> Reconciliation will not be durable, he argues, without this re-oriented focus.

While beneficiaries were beyond the TRC’s mandate, the Commission did recognize that they too have to be brought into the reconciliation process in order for it to be lasting. To this end, in December 1997 the Commission established a Register of Reconciliation, located at the Commission’s web site, which individuals can sign and attach messages of reconciliation. It is aimed precisely at people who did not commit gross violations of human rights but who nevertheless wish to express regret or failing in the past to do all they could to prevent such violations. The Commission’s hope is that signing the Register will be a symbolic gesture by white South Africans of a commitment to a new non-racial South Africa.<sup>68</sup>

The second issue within the question of scope relates to the question—highlighted by Mamdani—of perpetrator agency, and that is: how do we properly assess the individual within the collective? One could argue, and several people have argued, that many direct perpetrators in South Africa—especially young Afrikaner soldiers and policemen—were themselves victims of larger societal factors. These young men can be viewed as victims of an authoritarian masculinized militarized society, in which they were forced to go through a cadet system at school, were conscripted into the army, were subjected daily to state propaganda about facing a total onslaught from communist enemies. Many of these young men suffer still from severe post traumatic stress disorder. One former conscript testified to the Commission that, feeling suicidal, he sought permission to see a psychiatrist. The psychiatrist, an army major, told him to grow up, that nothing was wrong him, and declared him fit for battle.<sup>69</sup> The questions this raises are: how do we assess individual accountability within this larger societal victimhood? What is the role of individual agency within collective victimization? How do we understand individual culpability embedded within a larger system in which that same individual can be seen as a victim? Where do we draw the fine line between explanation and justification?<sup>70</sup> In this case we have the opposite of the group perpetrators discussed above. In that situation, we saw group perpetrators with individual victims. In this situation, we see group

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67. Mahmood Mamdani, *When Does Reconciliation turn into a Denial of Justice?* THE SAM NOLUTSHUNGU MEMORIAL LECTURE SERIES 15 (1988).

68. TRC FINAL REPORT 5, *supra* note 2, at 430.

69. *Id.* at 137.

70. Transcript of the sixth public seminar held on 28 May 1997 by the TRC, entitled Perpetrators, available at <http://www.truth.org>, at 12.

victims with individual perpetrators. By recognizing that some perpetrators can also be seen as victims does not absolve or exonerate them, of course. It does, however, acknowledge that they, too, are in need of reconciliation, and not demonization.

The third and final point arising from the complexity of scope relates to assigning weights to victims and perpetrators. We now know that some people were both victims and perpetrators, but were they equally so? While we may acknowledge that a young conscript is a victim of the apartheid system, is his victimhood equated with that of the person he killed? Is he more of a perpetrator than a victim? Does or should the perpetrator identity of a person who physically carries out human rights abuses count more than his victim identity? Are some people both victims and perpetrators, but more one than the other? Trudy de Ridder, a psychologist who has worked closely with ex-conscripts has described the process of therapy with these individuals, in which in one session they will be the victim and in the next session they will be the perpetrator.<sup>71</sup> This question does not just apply to white Afrikaners, of course. It also applies to others, such as Winnie Mandela. She was a victim at the hands of the state, but she also engaged in torture and killings. Does her perpetration outweigh her victimhood?

## **F. Victims and Perpetrators as Self-Identity**

The TRC conducted its work through three committees: the Amnesty Committee, the Human Rights Violations Committee, and the Committee on Reparations and Rehabilitation. One of the primary functions of the Truth Commission was to gather as complete a picture as possible of the past—that is to get the truth. One of the primary ways the commission hoped to achieve this specific goal was through the testimony of victims themselves—both at public HRVC hearings and through statement taking. Almost 22,000 victims made statements to the TRC during the Commission's life span. While this is an impressive number, the TRC realized that one of the problems it faced was that many political activists did not regard themselves as victims, but rather as liberation heroes. Whether one is a victim—or a perpetrator for that matter—it became clear, was often a function of self identity. Besides the fact that this impeded the gathering of the full story of the extent of gross violations of human rights, it had particular individual consequences: in order to be eligible for any reparation money, a person had to be officially certified as a victim by the TRC. This could only happen

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71. *Id.* at 17.

if a person came forward and identified him or herself as a victim.<sup>72</sup> Whether one identified with the term perpetrator also had consequences. Many would-be applicants for amnesty never applied because they could not identify with the process—they were not perpetrators, they were defenders of the nation. They were fighting the good fight, upholding the safety of the state, and opposing communism. The reduced number of amnesty applicants meant, in part, that the TRC had a more difficult time of fulfilling the portion of its mandate which charged it with establishing as complete a picture as possible of the past.

#### IV. CONCLUSION

This article has attempted to problematize the concepts of victims and perpetrators. At a minimum it has tried to demonstrate that not all victims are the same, nor are all perpetrators the same, and that some victims are also perpetrators. Perhaps we are left with more questions than answers. Some of these questions include: can and should we rank victims and perpetrators? Can we or should we create some sort of classification system? What are the criteria that we would use? What are the potential consequences of doing so? Are there hierarchies of pain and responsibilities? Are all victims equal? Are all perpetrators equal? The TRC generated a list of 20,000 “official victims.” What does this mean for the status of “unofficial victims” who didn’t happen to qualify under the strict definitions set up by the Commission? Are they somehow lesser victims than those who did qualify? If we accept that motives and causes of violations are different for different groupings, are some motives and causes more acceptable than others? How far can we stretch the concepts of perpetrators or victims before they lose their heuristic value? Does human rights discourse need to be more nuanced to capture the complexity that is inherent in situations of violence? Do we need a taxonomy of victims and perpetrators? This article has introduced the new terms shown in Table One. None of these is found

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72. There were in fact two ways of determining victim status: the first came through the statements made to the Human Rights Violations Committee (HRVC), which together with the Reparation and Rehabilitation (R+R) committee, made findings regarding deponents. When the finding was positive (i.e. that a GVHR had occurred) such persons were notified by a notification unit which brought together the work of the HRVC and the R+R committee, and were invited to complete and return the application form for reparations. Secondly, some people were identified as victims through the process of amnesty, when a person was mentioned by an applicant a decision was taken by the Amnesty Committee, which forwarded information to the R+R committee. See TRC FINAL REPORT 5, *supra* note 2, at 13.

Table 1  
A Taxonomy of Victims and Perpetrators

Victims	Perpetrators
versus	
Direct Perpetrators	
Indirect Perpetrators	
Institutional Perpetrators (a.k.a. Active Group Perpetrators)	
Sectoral Perpetrators (a.k.a. Passive Group Perpetrators)	
Perpetrators by Default	
Beneficiaries	
Bystanders	
Passive or Complicit Perpetrators	
Direct Victims	
Perpetrators by Commission vs. Perpetrators by Omission	
Bystander Complicity	
Victims Once Removed	
Victims by Proxy	
Secondary Victims	

in the TRC report, which—like most human rights literature—refers almost solely to victims and perpetrators. Does this compound approach further our understanding of apartheid or of reconciliation in South Africa?

If truth is the first casualty of war, then complexity must surely be the second.<sup>73</sup> In the midst of conflict, it is easier and more satisfying for people to think in terms of absolutes. People want to see things in terms of black and white, with little acknowledgment that there may in fact be many shades of gray. And so, under apartheid, people were either victims or they were perpetrators, and the reality of a much more complex relationship between the two was buried. One’s life might depend on having a clear distinction between enemy and ally. However, in post-apartheid South Africa, the search for and process of reconciliation may well be better served by moving beyond the black and white of victims and perpetrators to a more nuanced understanding of a landscape painted in shades of gray.

73. Smyth, *supra* note 55, at 45.