Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)

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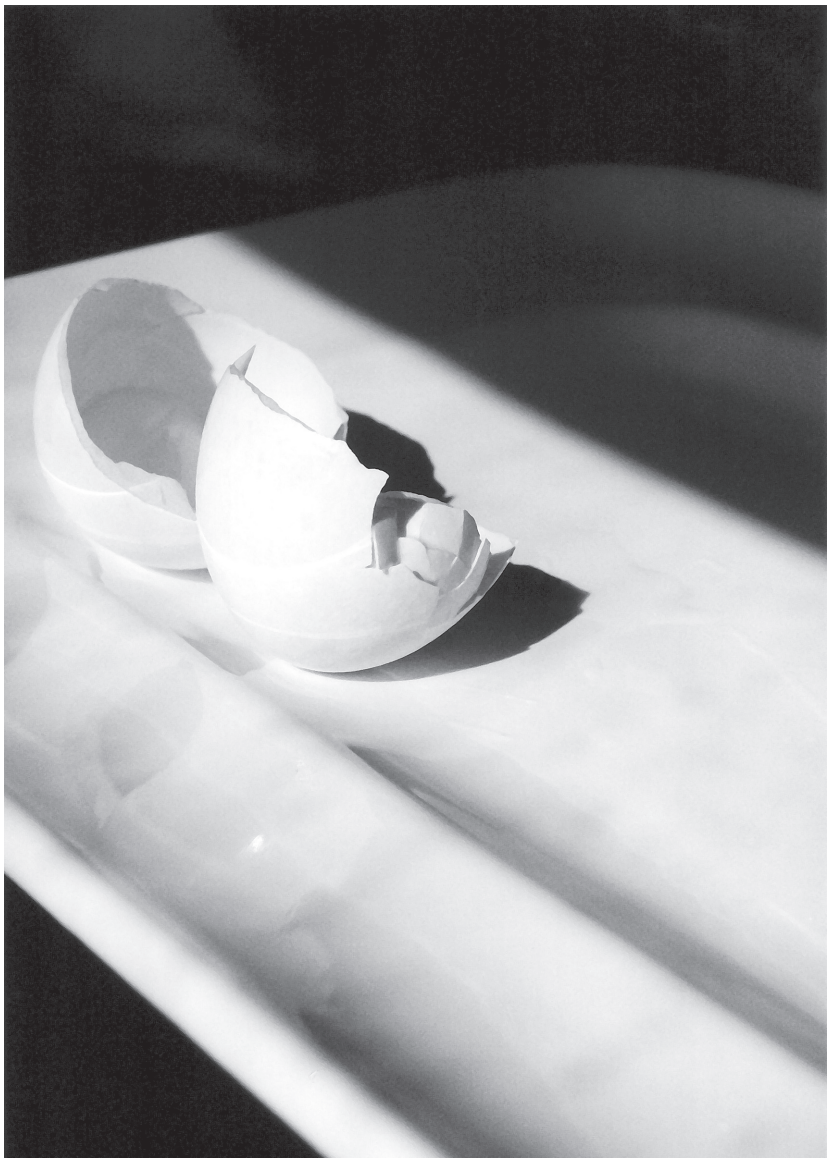

AMNESTY OR IMPUNITY?
A PRELIMINARY CRITIQUE OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (TRC)

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The Truth and Reconciliation Commission of South Africa was the fruit of a political compromise whose terms both made possible the Commission and set the limits within which it would work. These limits, in turn, defined the space available to the Commission to interpret its terms of reference and define its agenda. This paper takes the compromise legislation that set up the TRC as a historical given and focuses attention on the TRC's interpretation of its terms of reference.

The TRC claimed to be different from its predecessors, whether in Latin America or Eastern Europe. It would practice neither impunity nor vengeance. It was therefore determined to avoid two pitfalls: on the one hand, reconciliation becoming an unprincipled embrace of political evil and, on the other hand, a pursuit of justice so relentless as to turn into revenge. To do so, the Commission was determined to address *both* "victims" and "perpetrators," not just one or the other.

This double determination was first written into the interim constitution that paved the way for the legislation that set up the TRC. First, there would be no blanket amnesty. Amnesty would be conditional. It would not be a group amnesty. Every perpetrator would have to be identified individually, and would have to own up to his or her guilt—the truth—before receiving amnesty from legal prosecution. Second, any victim who is so acknowledged would give up the right to prosecute perpetrators in courts of law. Justice for the victim would thus not be criminal but restorative: acknowledgment would be followed by reparations. In sum, individual amnesty for the perpetrator, truth for the society, and acknowledgement and reparations for the victim—this was the pact built into the legislation that set up the TRC.

Since the Act did not clearly define "victim," however, the definition of "perpetrator" was unclear as well. The task of defining "victim" and "perpetrator" was left to the Commission and was the single most important decision that determined the scope and depth of the Commission's work. Without a comprehensive acknowledgment of victims of apartheid, there would be only a limited identification of perpetrators and only a partial understanding of the legal regime that made possible the "crime against humanity." From this perspective, the paper identifies three key limitations in the Commission's Report.

First, the TRC *individualized* the victims of apartheid. Though it acknowledged apartheid as a "crime against humanity" which targeted entire communities for ethnic and racial policing and cleansing, the Commission majority was reluctant to go beyond the formal acknowledgment. The Commission's analysis reduced apartheid from a relationship between the state and entire communities to one between the state and

individuals. Where entire communities were victims of gross violations of rights, the Commission acknowledged only individual victims. If the "crime against humanity" involved a targeting of entire communities for racial and ethnic cleansing and policing, individualizing the victim obliterated this particular—many would argue *central*—characteristic of apartheid. Limiting the definition of harm and remedy to individuals center-staged political activists as victims of apartheid, as indeed happened with the victim hearings. The consequence was to narrow the TRC perspective to a *political* reconciliation between state agents and political activists, individual members of a fractured political elite, rather than the "national unity and reconciliation" mandated by the legislation that set it up. To pursue its actual mandate, the TRC needed to broaden its perspective: to work for a *social* reconciliation between perpetrators and victims required that the relationship between the state and the entire South African people be addressed.

Second, by focusing on individuals and obscuring the victimization of communities, the TRC was unable to highlight the bifurcated nature of apartheid as a form of power that governed natives differently from non-natives. If the apartheid state spoke the language of *rights* to the white population, it disaggregated the native population into tribal groups—each to be administered under a separate set of laws—in the name of enforcing *custom*. Rights and custom were two different and contradictory languages: the former claimed to circumscribe power, the latter to enable it. Whereas the former claimed to be a rule of law, the latter claimed the legitimacy of custom and tradition. The TRC's failure lay in focusing exclusively on the "civil" regime and in totally ignoring the "customary" regime. No wonder, then, that it failed even to recommend reforms that would put in place a single unitary regime—rule of law understood as formal equality before the law—for all South Africans in a postapartheid South Africa.

Finally, the TRC extended impunity to most perpetrators of apartheid. In the absence of a full acknowledgment of victims of apartheid, there could not be a complete identification of its perpetrators. To the extent that the TRC did not acknowledge the full truth, the amnesty intended to be *individual* turned into a *group* amnesty. For any perpetrator who was not so identified was a perpetrator who enjoyed impunity.

The essay is organized in four parts. Parts 1 and 2 deal with the findings of the Commission and the definitions that paved the way for these findings. The last two parts offer an alternative reading of the Commission's Report, and suggest lines along which the Report could have been rewritten if the TRC had defined its terms consistently with the acknowledgment that apartheid was indeed "a crime against humanity." The conclusion argues that the Commission's method of analysis—one that dehistoricized and decontextualized social processes, and at the same time individualized outcomes—provided the meeting point for two otherwise radically different perspectives and projects: the religious perspective dominant in the TRC and the secular perspective of the human rights community that reinforced it internationally.

1

Findings

When the TRC issued its report in 1998, it was sharply critiqued by leaders of major parties to the constitutional pact—the National Party and the African National Congress. For the TRC, this was proof enough that its report was not only nonpartisan but also nonpolitical. If anything, the critique from yesterday's main adversaries seemed to vindicate the Commission's work and affirm the credibility of its report.

More interesting than the criticism from political parties was their shared silence. It

was not just that the TRC's critique focused on the findings that implicated major parties and their leaders in violations of human rights; these same findings also rewrote the story of apartheid in a rather fundamental way, a fact about which the same parties remained curiously silent. This larger fact never did become the subject of a public discussion. Let me turn to some of the findings in the Commission's Report to illustrate my point.

The big finding, one that led to a public split in the Commission and appeared as a minority view in the Report, was that apartheid was indeed "a crime against humanity" [TRC 1: 70–71, ¶ 78]. At the same time, the Commission acknowledged 20,000+ "victims" of apartheid for whom it recommended reparations [TRC vol. 5, chap. 2]. Could a "crime against humanity" that involved a racial and ethnic cleansing of the bulk of its population have only 20,000+ victims?

Who were the victims, and who the perpetrators, of apartheid? The Commission's answer is worked out in the Report through a statistical analysis of victims and perpetrators of this "crime against humanity." It highlights two related conclusions. The first follows a historical overview of the Commission's mandate, which began with the banning of parties following the Sharpeville massacre in 1960, and closed with the first democratic elections in 1994. The Commission's research staff compiled a list of violations over the full mandate, and then divided this into four periods:

from 1960 (Sharpeville) to 1976 (the Soweto Uprising)
from 1976 to 1983 (beginning of the state of emergency)
from 1983 to 1990 (the unbanning of political parties), and
from 1990 to 1994 (the first democratic elections)

This is how the Commission concluded its statistical analysis of violations: "The graph below shows that most violations reported by deponents took place in the period after the unbanning of political parties (1990–1994) followed closely by the years in which states of emergency were in force (1983–1989)" [TRC 1: 172, ¶25]. Roughly half of all violations recorded by the Commission are said to have occurred during the period of transition from apartheid, and another 35% at the height of the popular struggle against apartheid, also the years of emergency rule in townships. Conversely, only 15% of the violations are said to have been committed in the heyday of apartheid. If these statistics are to be believed, then the "crime against humanity" took place not when the grand design of apartheid was *implemented*, but when it was *challenged*. If so, would it make sense to speak of apartheid, as and when implemented, as a "crime against humanity"?

The second conclusion concerns the killings. The Report identifies the organizations of the persons killed as"victim organizations" and those of perpetrators as "perpetrator organizations." The list of "victim organizations" places the African National Congress (ANC) at the head, followed by the Inkhata Freedom Party (IFP), with the South African Police (SAP) in seventh place, followed by the Azanian Peoples Organisation (AZAPO) [TRC 3: 7, table D2A.1–1]. The IFP was said to be the *primary* "perpetrator organization": "The number of violations allegedly committed by the IFP dominates the graph, with the SAP and the ANC showing the second and third highest numbers of alleged violations" [TRC 3: 3, ¶33]. The accompanying graph lists the South African Defense Forces (SADF) as the fourth "perpetrator organization," trailing the IFP, the SAP, and the ANC. The Report then clarifies the context in which the IFP emerged as the leading—and the ANC the third—"perpetrator organization" in the country: "The majority of reports of human rights violations in the region [Natal and Kwazulu] refer to the conflict between supporters of the IFP and the ANC-aligned supporters of the UDF" [3: 162].

A leading researcher for the Commission once remarked to me in a private conversation: "I could not believe that most perpetrators of apartheid were black." The observation raises a question the Commission never posed. If not only most victims, but also most perpetrators, were black people, was this "crime against humanity" primarily a "black-on-black" affair, whose principal perpetrator was the IFP, and third major perpetrator the ANC? Were the apologists of apartheid right in claiming that their order was a necessary check on "black-on-black" violence, or was the violence produced by the order called apartheid? I suspect the Commission never posed the question because it was in no position to answer it.

In this article, I argue that the Commission's conclusions followed from the way it defined its own mandate, particularly from how it defined "victim" and "perpetrator." Not only are these definitions inconsistent with the Commission's own acknowledgment that apartheid was "a crime against humanity"; they allowed the Commission to avoid acknowledging the evidence of this very crime—not because this evidence was not available, but because the Commission was unable or unwilling to underline the meaning of the evidence compiled by its own research staff and found in its own Report. To validate this evidence requires understanding apartheid as a form of the state, an organized power whose "victims" were not individuals but groups classified and administered by the same power.

2

A Matter of Definition

The Commission Report acknowledges two major debates that concerned the interpretation of the Commission's terms of reference. Both debates raged within and outside the Commission. The first debate focused on the understanding of "gross violations," the second on the meaning of "severe ill-treatment."

Gross Violations

"There had been an expectation," notes the opening chapter of the final volume of the Commission's five-volume Report, "that the Commission would investigate many of the human rights violations which were caused, for example, by the denial of freedom of movement through the pass laws, by forced removals of peoples from their land, by the denial of the franchise to citizens, by the treatment of farm workers and other labor disputes, and by discrimination in such areas as education and work opportunities. Many organizations lobbied the Commission to insist that these issues should form part of its investigations. Commission members, too, felt that these were important areas that could not be ignored. Nevertheless, they could not be interpreted as falling directly within the Commission's mandate" [TRC 5: 11, ¶48].

The argument that prevailed in the Commission is outlined in "the mandate" chapter of the Report, and is anchored in section 1(1)(ix) of the Act that set up the TRC:

> . . . *"gross violation of human rights" means the violation of human rights through—(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a),* which emanated from conflicts of the past *and which was committed* during the period 1 March 1960 to 10

> May 1994 *within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person* acting with a political motive (section 1(1)(ix)). [TRC 1: 60, ¶42, emphasis mine]

The paragraph contains three limitations, which I have emphasized in the above quote. The first and most obvious is the time limitation: it limits the mandate of the Commission to investigating "gross violation of human rights" during the period from 1 March 1960 to 10 May 1994. The next two are limitations of scope: that these violations have "emanated from conflicts of the past," and that they have been committed "with a political motive." The limitation in time was unambiguous. But the limitations in scope were not: they would have to be interpreted by the Commission.

The matter of definitions is discussed in two chapters in the five-volume Report: chapter four, on "the mandate," in the first volume, and chapter one, on "analysis of gross violations of human rights," in the final volume. The Report acknowledges that the scope of the Commission's inquiry was defined so ambiguously that it required an interpretation: "Before findings could be made, clarity was required on definitions and criteria" [TRC 5: 10–11, ¶46–47]

Conflicts of the Past. The Commission majority distinguished "conflicts of the past" from "policies of apartheid." It went on to argue that "conflicts of the past" excluded "policies of apartheid," thus driving home its conviction that the Commission's mandate included violations emanating from "conflicts of the past," but not from "policies of apartheid." In the words of the Report: "This definition limited the attention of the Commission to events which emanated from conflicts of the past, rather than from the policies of apartheid" [TRC 5: 11, ¶48].

But nowhere did the Act contrast and distinguish "conflicts of the past" from "policies of apartheid." Section 3(1), which set out "the objectives of the Commission," required the Commission to establish "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 to the cut-off date, including the antecedents, circumstances, factors and contexts of such violations. . . . " The section that followed required the Commission to "facilitate, and where necessary initiate or coordinate inquiries into—(i) gross violations of human rights, including violations which were part of a systematic pattern of abuse. . . ." [TRC 1: 55–56].

Notwithstanding the emphasis on establishing "as complete a picture as possible" and highlighting a "systematic pattern of abuse," the Commission made the distinction between two kinds of violations, those emanating from "policies of apartheid" and those from "conflicts of the past," relegating the former to *context* and acknowledging only the latter as *violations* that would merit reparations. The result was to narrow the scope of the Commission's hearings so extraordinarily that the first phase of hearings was confined to individual victims. When disaffection with this narrow interpretation fed criticism both within and outside the Commission, the TRC responded with a series of institutional hearings. Instead of broadening the definition of victims from individuals to groups, institutionally defined and targeted, the institutional hearings were said to be of only background use, providing a backdrop that would further highlight individual stories provided in victim hearings. In other words, the institutional hearings were said to be about context rather than conflict, policies rather than violations. Referring to these hearings, the Commission wrote: "These submissions made a valuable contribution to the section of the final report dealing with the broad context within which the gross violations of human rights took place, although they could not be considered as victim hearings. They gave depth to the larger picture, but they still excluded individuals from recognition and from access to reparations, and many people remained aggrieved" [TRC

5: 11, ¶49]. After mapping the nature of apartheid in three eloquent but summary pages, "the mandate" section of the Report dismissed it in a single sentence as background to its real work: "It is this systematic and all-pervading character of apartheid that provides the background for the present investigation."[1] Reduced to "the context" or "the background" of gross human rights violations, apartheid was effectively written out of the report of the TRC.

Political Motive. The second qualification on acknowledging a violation was that it had to be carried out by a person "acting with a political motive." To qualify for amnesty, a perpetrator not only had to make a "full disclosure of relevant facts" but also had to establish that the violations in question were carried out "with a political objective" [TRC 1: 57, ¶32(d)].

For the TRC's machinery to swing into action, a person had to file a complaint that s/he had suffered a "gross violation." The Commission then made a finding on the claim. One of the reasons for a negative finding was that "there appeared to be no political motive" [TRC 5: 14, ¶62]. To meet the Commission's criterion that a violation be shown as the outcome of a political motive, the violation had either to be committed by "any member or supporter of a publicly known political organization or liberation movement on behalf of or in support of that organization or movement, *in furtherance of a political struggle* waged by that organization or movement (section 20(2)(a))" or it had to be committed by "any employee of the state (or any former state) or any member of the security forces of the state (or any former state) in the course of his or her duties . . . *with the objective of countering or otherwise resisting the said struggle* (section 20(2)(b))" [TRC 1: 82–83, ¶123].

Whether an act could be considered political or not depended on the answer to a larger question: What was a political act and what a legal act? Was apartheid itself a political project or a legal project? We shall see that this question was central to the legal hearings: Was apartheid a rule of law or not? What happens when the state resorts to law to violate rights? Five top judges at the legal systems hearing urged the Commission to acknowledge "that apartheid was in and of itself a gross violation of human rights" [TRC 4: 288, ¶18].

Whereas the legal hearings concluded that apartheid was *not* a rule of law, the victim hearings proceeded on the narrow assumption that the project of apartheid—its policies—was *not* political. If the Commission had fully accepted the outcome of the legal hearings, it would have defined the very agenda of apartheid—and not just its defense—as political. But the Commission did not. At the same time, the legal hearings were unable to provide more than a one-eyed glimpse of the bifurcated legal regime that we know as apartheid.

Had the victim hearings been driven by the broader interpretation, they would have addressed all gross violations suffered—within the time limitation specified by the legislation—by the people of South Africa under apartheid. By championing a narrow interpretation, however, the Commission acknowledged only those violations suffered by political activists or state agents. It consequently ignored apartheid as experienced by the broad masses of the people of South Africa.

Severe Ill-Treatment

The Act defined "gross violations of human rights" as including "the killing, abduction, torture or severe ill-treatment of any person . . ." [TRC 1: 60, ¶42]. This provision gave

1. TRC 1: 62, ¶51; the summary is on pages 25–28 of the same volume.

those who did not succeed in getting the Commission to bring under scrutiny the entire project of apartheid, including its policies, an opportunity to organize for a second round of battle. Strong pressure was brought on the Commission to include the grossest forms of violations perpetrated through apartheid law under the rubric of "severe ill-treatment." The Report noted the pressure from a strong civil society organization: "The CALS submission argued that the definition of 'severe ill-treatment' should be interpreted to include apartheid abuses such as forced removals, pass law arrests, alienation of land and breaking up of families" [TRC 4: 288, ¶18].

The debate around the interpretation of "severe ill-treatment" is particularly illuminating. It went through several rounds. Each time, the Commission majority endeavored to justify a narrow definition of "victim." Every successive attempt attests to the failure of the previous attempt. At the outset, the Commission majority acknowledged that "the ordinary meaning" of severe ill-treatment "suggests that all those whose rights had been violated during conflicts of the past were covered by this definition and fell, therefore, within the mandate of the Commission." But it still resolved to set this ordinary meaning aside, and restated its original position: that "the focus of its work was not on the effects of laws passed by the apartheid government, nor on general policies of that government or of other organizations, however morally offensive these may be" [TRC 1: 64, ¶55]. But a mere restatement of this narrow definition of the political could not justify the refusal to acknowledge what obviously appeared as instances of "severe ill-treatment." To make it convincing, the Commission majority made three further distinctions—between "bodily integrity rights" and "subsistence rights," between individual and group rights, and, finally, between political and nonpolitical motivations behind each violation—and ruled that only politically motivated violations of bodily integrity (but not subsistence) rights of individuals (but not groups) fell within its legislative purview. But this too was difficult to maintain consistently in the face of mounting evidence that often showed the irrelevance of these distinctions in the specific context of apartheid.

"Bodily integrity rights" vs. "subsistence rights." "Severe ill-treatment," the Commission acknowledged at the outset, is "cruel, inhuman or degrading treatment" under international law and "ill treatment" under South African law. The Commission then resolved that only "bodily integrity rights" fell within its terms of reference. "Bodily integrity rights" were in turn defined as: "Acts or omissions that deliberately and directly inflict severe mental or physical suffering on a victim" [TRC 1: 80, ¶116].

The distinction between "bodily integrity rights" and "subsistence rights" echoes a familiar distinction in social theory between the realm of the political and that of the economic, that of the state and that of the market, the former the source of oppressive practices that directly deny rights and the latter the source of inequalities that indirectly limit the exercise of rights and thereby diminish the potential of life. But practices such as coerced labor and forced removals could be classified neither as just economic nor as just political; they were both. Where a command economy obtained, the familiar distinction between the political and the economic simply could not illuminate those practices where political power directly intervened in the sphere of economic relations. Like slavery, coerced labor and forced removals required the direct and continued use of force. They could not be dismissed as structural outcomes lacking in agency and therefore not signifying a *violation*. Rather than an outcome of "the dull compulsion of market forces," to use a formulation of Marx, these practices were characteristic of extra-economic forms of coercion. Rather than illuminate the divide between the economic and the political, they tended to bridge that divide.

The Commission, too, developed doubts about the familiar and rigid distinction between the economic and political, and voiced this in the final volume of its Report.

The doubt surfaced when the Commission dealt with "arson" and at first dismissed it as a violation of "subsistence rights" but not "bodily integrity rights." In time, however, the Commission wondered whether the loss of home and possessions may also not result in displacement and great mental anguish—precisely why arson may be employed for political purposes.

> *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 the extent that the person could no longer live there. The motivation for this decision lay partly in the result—the displacement of the person—and partly in the psychological suffering of a person experiencing the total loss of home and possessions.* [TRC 5: 12, ¶53]

In the end, the Commission found it necessary to stretch the meaning of "bodily integrity rights" to include rights over both person *and* property. Even if belatedly, the Commission came to acknowledge that "the destruction of a person's house through arson or other attacks" constituted "severe ill-treatment" and qualified as a gross violation [TRC 1: 81, ¶119]. The Commission thus came to distinguish between those who lost a home and those who lost only "cattle or vehicles," and thus not "their entire livelihood"—acknowledging the former but not the latter as victims of gross violations. But the concession, we shall see, only landed the Commission in deeper contradictions.

Individual vs. Group Rights. Following the above shift, the Commission went on to compile a list of acts "regarded as constituting severe ill-treatment." The list included "banning or banishment"; banning referred to "the restriction of a person by house arrest," banishment to "the enforced transfer of a person from one area to another" [TRC 1: 81, ¶119]. The list gives rise to more questions than it settles. Why was the "enforced transfer of a person from one area to another" a violation of a right over one's person, but not the migrant labor system, which involved both coerced movement and coerced labor? If "the destruction of a person's house through arson or other attacks" was a gross violation of a right, then why not a similar destruction through bulldozing, a practice characteristic of forced removals? Could it be that the former involved *identified* individuals, whereas the latter usually involved the implementation of state policy by *unidentified* individuals or groups?

In a discussion on why it decided to close the list of victims toward the end of its deliberations, the Commission gave a pragmatic reason: "it became increasingly clear that there would be no value in simply handing the government a list which included a broad category of unidentified persons for consideration as victims deserving of reparations" [TRC 1: 86, ¶134]. The Commission "resolved, therefore, to confine the number of victims eligible for reparations to three areas." These included "victims who personally made statements to the Commission," "victims named in a statement by a relative or other interested person," and "victims identified through the amnesty process" [TRC 1: 86, ¶136]. The result was a list of individuals, with no reference to groups. But if the violence of apartheid targeted groups more than specific individuals, it would not be surprising if most victims of apartheid turned out to be unidentified individuals. This, in turn, would be an argument for giving reparations to communities rather than individuals.

Political vs. Nonpolitical Motives. It is the Commission's narrow interpretation of "political motive" which decisively ruled out gross violations of rights suffered by

ordinary people, and limited the Commission's concern to gross violations that occurred in the course of the political conflict between state agents and political activists. We have seen that the Commission was willing to stretch its early emphasis on "bodily integrity rights" to include the violation of property rights. In rare instances, it was even willing to put aside its determination to focus exclusively on the violation of rights of individuals to include injury to groups. One such rare instance was its finding on the Seven Day War in Natal and Kwazulu:

> *The Commission finds that from 25–31 March 1990, the communities in the lower Vulindlela and Edendale valleys, south of Pietermaritzburg, were subjected to an armed invasion by thousands of unknown Inkatha supporters, and that during this week over 200 residents of these areas were killed, hundreds of homes looted and burnt down and as many as 20,000 people were forced to flee from their homes. These acts constitute gross human rights violations, and unknown members of Inkatha are held accountable. . . .* [TRC 3: 267, ¶292]

Yet, if the final list of victims acknowledged and published by the Commission for its entire mandate was 20,000+, it is doubtful that these victims of a single event—numbering "as many as 20,000 people"—found their way onto the list of acknowledged victims entitled to reparations. In other words, "unknown members of Inkatha" were held accountable as perpetrators, but their victims —"as many as 20,000 people" who "were forced to flee from their homes"—were not acknowledged. Had they been, the community would have been entitled to reparations.

The Commission was only loosely bound by the legislation that created it. Reflecting on its willingness to stretch otherwise rigid qualifications, the Commission recognized that it was indeed not tightly bound by legislation: "the Act did not provide clear guidelines for the interpretation of the definition of 'gross violations of human rights.'" This was no less than an admission that it had considerable latitude in interpreting terms, such as defining the meaning of "victim." When it made use of this latitude, the Commission argued that "the underlying objective of the legislators was to make it possible for the Commission to recognize and acknowledge as many people as possible as victims of the past political conflict," claiming that "this objective, in turn, was central to the Commission's overall task to promote national unity and reconciliation." The seven-page deliberation on "defining gross violations of human rights" ended with the claim that "the Commission made a conscious decision to err on the side of inclusivity" [TRC 1: 70–71, 78].

But the commitment to being inclusive is precisely what the Commission set aside when it defined its terms of reference to exclude the project of apartheid, determined that the project itself should not be defined as political. As a result, it turned a blind eye to gross violations that occurred in the course of the implementation of apartheid. In the end, the Commission was forced to concede that it had really ignored a substantial part of "gross violations of human rights" under apartheid. To justify this exclusion, it pointed to the same legislation that it otherwise complained "did not provide clear guidelines." The result was often a hopeless muddle as in the following instance, where the Report speaks of the Commission in the third person:

> *Hence, the Commission fully recognized that large-scale human rights violations were committed through legislation designed to enforce apartheid, through security legislation designed to criminalize resistance to the state, and through similar legislation passed by governments in the homelands. Its task, however, was limited to examining those "gross violations of human rights" as defined*

in the Act. This should not be taken to mean, however, that those "gross violations of human rights" (killing, torture, abduction and severe ill-treatment) were the only very serious human rights violations that occurred. [TRC 1: 65, ¶59]

3

The Big Picture the Commission Obscured: The Crime against Humanity

In an appendix to the chapter on "the mandate," the Commission argued thus: "The recognition of apartheid as a crime against humanity remains a fundamental starting point for reconciliation in South Africa" [TRC 1: 94, ¶1]. To explain why apartheid was a crime against humanity, the appendix goes to cite the 1996 Draft Code of Crimes against the Peace and Security of Mankind proposed by the International Law Commission: "A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group: . . . (f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population" [TRC 1: 96, ¶13]. The grounds for declaring apartheid a "crime against humanity" were not the individual violations—killing, arson, etc.—that the Commission acknowledged but the racial and ethnic cleansing—"institutionalized discrimination"—that the Commission refused to acknowledge. This, surely, was why this is the last the Commission Report speaks of apartheid as a "crime against humanity," instead of considering it as the promised "fundamental starting point" for reconciliation in South Africa.

In this section of the paper, I intend to pursue a line of inquiry that uses some of the evidence scattered through the pages of the Commission's Report to sketch the outlines for the kind of report the Commission could have written had it considered apartheid—and not just the attempt to defend it—as the political project whose implementation led to gross violations of rights in South Africa.

Forced Removals

The legal basis of apartheid was a system of law that distinguished between "natives" and "non-natives." Those indigenous to the land were defined as "natives"; immigrants—including those alleged to be so (Coloreds)—were defined as "non-natives." The law ethnicized natives and racialized non-natives. Non-natives were further distinguished between the master race (whites) and subject races (Indians, Coloreds), all governed through civil law. In contrast natives were divided into so many "tribes," each to be governed by its own "customary law." The earliest tribe to be subjugated to a colonial customary law was the Zulu in colonial Natal.

The 1891 Natal Native Code conferred on the British governor general the title of Supreme Chief of the Zulus. His powers included the power to move natives from one location to another. The 1927 Native Administration Act transferred that power to the Minister of Bantu Administration and Development, now in charge of all natives in South Africa. The TRC recognized that the 1927 Act

empowered the Minister of Bantu Administration and Development (acting through the Governor General) to order "any tribe or native" to proceed

> *forthwith to any designated place and not to leave it again without permission "whenever [the Minister deemed] it expedient in the general public interest." No specific reason for the banishment was needed; the "removal" of the individual was in the interest of "maintaining peace and good order in the tribe." Banished people were not charged in a court of law and had no opportunity to defend themselves.* [2: 165–66]

The Commission's Report acknowledges the 1927 Act, but only when it comes to the banishment of *individual* "natives." It notes that up to 97 persons—mostly chiefs and headmen who had opposed government policy—had been banished up to 1960, and that over 40 remained banished in 1986. It then goes on to give their circumstances of banishment [TRC 2: 166–67, ¶5–12]. What the Report does not do is link the provisions of the 1927 Native Administration Act to the forced removal of entire communities, defined ethnically and removed on those grounds, a practice that reached truly inhuman proportions in the period of its mandate, 1960 to 1994.

In 1959, the apartheid government passed the Promotion of Bantu Self-Government Act. The Act was to provide the legal umbrella for a far-reaching ethnic and racial cleansing of 87% of the land that was defined as "white" South Africa. The racial cleansing of areas declared "white" was followed by a reorganization of the majority black population into fragmented ethnic homelands—a result of a subsidiary ethnic cleansing. This twin process was at the heart of the contention that apartheid was indeed a "crime against humanity." At the same time, the distinction between the banishment of individuals and that of groups did not neatly coincide with a distinction between punishment and policy. Just like the forcible relocation of individuals (banishment)—which the Commission considered a gross violation of human rights—the forced relocation of communities (which the Commission did *not* consider a gross violation) could also be meted out as a punishment to resistant communities. It was, after all, characteristic of colonial power to punish entire communities for the actions of individual residents. To illustrate my point, I will cite below several instances of "forced removals"—all taken from the Commission Report, but all dismissed as not meeting the Commission's definition of a "gross" violation of rights.

Transkei and the Pondoland Revolt. Transkei was the first homeland to be granted independence, in 1963. This declaration was preceded by the Pondoland Revolt, a peasant revolt against homeland authorities, a development that took place in the Pondoland region of the Transkei in 1960–61—during the mandate of the Commission—and was memorialized by Govan Mbeki's book on the subject. The Revolt was also followed by the first phase of "forced removals." "The forced removal of hundreds of thousands of people from their homes," the Commission acknowledged, "generated a climate of fear which resulted in a period of relative quiescence in political resistance until the 1970s" [TRC 3: 36–37, ¶9]. Its findings stated:

> *The Commission finds that the state used several chiefs in the Transkei region to silence political opposition to the policy of apartheid, using methods including banishment, forced removal of political opponents and destruction of their property.* [TRC 3: 55, ¶84]

The focus of the ethnic cleansing of these "hundreds of thousands of peoples" was Eastern Cape; yet, the Commission acknowledged a paltry 324 cases of "severe ill-treatment" over this period in Eastern Cape.[2]

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2. TRC 3: 37, ¶10; also see, same page, figure B2B3–3: "Percentage of human rights violations in the region, by period: 1960–1975." The text gives 42% as the share of "cases of

Ciskei and Opposition to Home Rule. The Ciskei became self-governing in 1972. The Commission recorded "several occasions during the 1980s" when the government of Ciskei "targeted entire communities opposed to homeland rule." The punishment was "forced removals or incorporation into the homeland." In the mid-1980s, for example, "the Kuni community was evicted from Ciskei en masse and dumped at the roadside in South Africa, where they later found a home at Needs Camp outside East London." Even harsher treatment was meted out to another community that was tossed back and forth through the 1980s. At first "forcibly removed across the border into Ciskei" in the early 1980s, this "large group of residents fled at least twice from Potsdam outside Mdantsane following assaults by police and vigilantes." Each time, "South African security forces forcibly loaded the group onto trucks and drove them back to Potsdam." Finally, they were granted permanent residence at Eluxolweni in South Africa [TRC 2: 433–34, ¶126–29]. The Commission's report gives no figures of how large or small was this community, nor of gross violations for the period. Yet one thing is clear: the Commission did not acknowledge this community as a victim of "severe ill-treatment" by the apartheid state.

Bophuthatswana and Opposition to Home Rule. When they refused to accept the citizenship of the newly created Bophuthatswana homeland, the non-Tswana were forcibly evicted from the Kromdraai squatter area where they had hitherto lived. Their children were "barred from attending schools in Bophuthatswana." The Commission noted that "an estimated fifteen to twenty thousand non-Tswanas" were resettled on a farm called "Onverwacht." Here is the Commission's description of the farm:

> *The farm, later renamed Botshabelo, had been acquired by the South African government for the purpose of "relocating" people from white farms and from the deproclaimed townships of the Orange Free State. The terrain consisted of rocky, barren veld on which plots were marked out by tin toilets. Employment opportunities were few. Residents were forced to travel the ten kilometers to Thaba'Nchu or the sixty kilometers to Bloemfontein if they were lucky enough to have a job. Schooling and health facilities remained totally inadequate.* [TRC 3: 332–33, ¶15]

Botshebelo "became the largest single relocation area in the country" [TRC 3: 333, ¶16]. Though the Commission estimated that "fifteen to twenty thousand" non-Tswana were forcibly moved to this location between May 1979 and January 1980, it said "comparatively few statements were received from the Orange Free State" where Botshebelo was located, and it acknowledged less than 20 cases of "severe ill-treatment" for 1979–80 for the whole of Orange Free State.[3]

Western Cape. The region known as Western Cape comprises the provinces of Western Cape and Northern Cape. Marked by the physical elimination (genocide) of the indigenous Khoisan population, the large-scale kidnapping of Khoisan children into forced labor, and the importation of thousands of Indonesian, Indian, and East African slaves, the peculiar preapartheid history of this region was exaggerated by its declaration as a "colored labour preference area" which gradually turned it into a region with a majority branded as "Coloured."

The Commission found that "the Northern Cape has a long history of land dispossession and forced removals." Referring to the 1960s, the opening phase of its

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severe ill-treatment" for 1960–75, and the accompanying graph gives the total number of violations as 770. (42% of 770 is 323.4.)

3. TRC 3: 334–35, ¶23; also see figure C2–1: Number of Gross Human Rights Violations in the Orange Free State, by year.

own mandate, the Commission acknowledged that "Africans were removed mainly to Bophuthatswana, often making way for South African Defence Force (SADF) military camps." In the 1980s, forced removals led to the privatization of "independent communal farming settlements." But its Report gives no numbers for those forcibly removed from communities. When it comes to identifying victims of gross human rights violations in the region, the Commission records that 52% were victims of "severe ill-treatment" and notes: "The most common form of severe ill-treatment reported was beating, followed closely by incarceration and shooting injuries" [TRC 3: 391, 393, ¶8, 18]. There is no mention of "forced removals."

Transvaal. Transvaal is the industrial hub of South Africa. At its heart is Southwest Township (Soweto). During the 1960s, "the government worked systematically to reverse the flow of Africans to the urban areas and to restructure the industrial workforce into one composed primarily of migrant labor." The Commission cited estimates that "over a million labor tenants and farm squatters and 400,000 city dwellers were resettled in the homelands, the population of which increased by 70% in the 1960s" [TRC 3: 529–30, ¶8]. This single word—"resettlement"—summed up a series of actions, from bulldozing of homes to destruction of fixed property to relocation of movable property and persons, all involving the direct use of force and brutality in different degrees. It was a period of great repression, even if there was little overt resistance—it is therefore supremely ironic that the Commission recorded "the lowest number of violations (473) for this period," ascribing these low figures to "factors such as the distance of the events that have been overshadowed by more recent political conflict, the death of potential deponents and the fading memory of deponents" [TRC 3: 531, ¶15]. The one thing the Commission did not consider was its own responsibility: could it be that certain knowledge that the Commission did not consider "forced removals" as gross violations of human rights—rather than "the fading memory of deponents"—kept "deponents" from filing grievances with the Commission? Could it be that the Commission's decision to interpret narrowly its own terms blotted from the official record the most repressive practices affecting large numbers of ordinary people in South Africa?

Not only were black homeland residents who resisted independence—such as by refusing homeland citizenship—forcibly removed, but black residents in "white" South Africa who were defined as "black spots" were also targeted for forced removal. A widely distributed and cited investigation by The Surplus People Project estimated that 3.5 million people were forcibly moved by the South African state between 1960 and 1982 in support of the program of developing ethnic homelands. The Commission acknowledged that 3.5 million had indeed been moved forcibly [TRC 2: 409, ¶34] and that the process involved "collective expulsions, forced migration, bulldozing, gutting or seizure of homes, the mandatory carrying of passes, forced removals into rural ghettos and increased poverty and desperation" [TRC 1: 34, ¶45]. Not even a generation had passed since these brutalities had ended. Not surprisingly, both surviving victims and their advocates among community organizers and activists had assumed that forced removals would be the core focus of a Truth and Reconciliation Commission. But the Commission was not obliging: after noting that "forced removals" were "an assault on the rights and dignity of millions of South Africans," the Commission claimed it could not acknowledge them since these violations "may not have been 'gross' as defined by the Act" [TRC 1: 34, ¶43].

The phenomenon of "forced removals" puts in doubt all three binaries around which the Commission had constructed its extremely narrow interpretation of what constituted a "gross" violation: the distinction between "bodily integrity rights" and "subsistence rights," between individual and group rights, and between "political" and nonpolitical motives. Forced removals violated both person and property of those targeted. They

violated rights of both groups and individuals, in that order, since those targeted were first and foremost defined as groups—racialized in white South Africa as "black spots" and ethnicized in demarcated Homelands as "ethnic strangers"—and only then as individual members of these groups. Finally, though some were removed from Homelands for direct opposition to the project of apartheid, *all* forced removals were a direct result of state implementation of the political project that was grand apartheid, a project whose sum and substance was to racialize space and communities in white South Africa and ethnicize space and communities in black South Africa.

Pass Laws and Coerced Labor

Pass laws involved racial and ethnic monitoring of the black population and racial targeting of suspected political opponents. The year in which the mandate of the Commission began, 1960, was the year the National Party government extended pass laws to "native" women. The Sharpeville demonstrations of 21 March were the culmination of mass protests against this development.

After 1960, every "native" adult in South Africa, male or female, was required to carry a passbook. Correspondingly, the movement of every "native" in the country was monitored through administrative regulations enforced by the police. According to estimates made by the South African Institute of Race Relations, over a million people had been administratively ordered to leave urban areas by 1972 [TRC 3: 528, ¶3]. Besides monitoring the "native" population, pass laws were also put to a very specific political purpose. "From the early sixties," the Commission noted, "the pass laws were the primary instrument used by the state to arrest and charge its political opponents" [TRC 3: 163, ¶28].

Pass law offenders formed a large proportion of the prison population for as long as pass laws were in force—which they were for most of the Commission's mandate. Indeed, the Commission found that the proportion of pass law offenders was "as high as one in every four inmates during the 1960s and 1970s" [TRC 4: 200, ¶8]. Pass law offenders were sent to prison for only one reason: they did not meet the administrative requirement that the racialized and ethnicized black majority of the population carry a passbook and conform to administrative restrictions on their day-to-day movement. The Commission accepted that "the treatment of pass law offenders could well be interpreted as a human rights violation" but still refused to include the category of pass law prisoners in the institutional hearings on prisons. In spite of the fact that "a strong argument was made for the inclusion of this category of common law prisoners in the hearings," the Commission refused on the grounds that these were common law prisoners and not "political prisoners." Yet, the only "common law" these prisoners had violated was the pass law, the law that criminalized the exercise of a basic human right, the right of free movement. To consider those imprisoned for the transgression of *only* the pass law as common law prisoners—and explicitly to deny them the status of political prisoners—was to uphold the legal framework of apartheid. In the words of the Commission: "it was decided that the pass laws and their effects fell outside the Commission's mandate, especially given the requirement that every violation had to originate within a political context" [TRC 4: 200, ¶6–8, 10].

When a state brands its entire population racially, then tags every member of the racialized majority with documents that allow administrative officials to monitor their every movement—and utilizes the plethora of racially focused administrative regulations at its command to target suspected political opponents—from which point of view can it be said that the motive behind this set of practices was not political?

The category of pass law prisoners was not the only one excluded from the Commission's institutional hearings on prisons and denied acknowledgment as having suffered "gross violations of human rights" in the period 1960–94. At least two other important categories were also excluded.

The first of these was the category of *farm prisoners*. The notorious farm prisons system was directly connected to the pass law system. Failure by a black person to produce a pass resulted in an arrest. As the number of arrests grew, so did the financial burden on the state. The Department of Native Affairs proposed a solution to this problem in General Circular 23 of 1954:

> *It is common knowledge that large numbers of natives are daily being arrested for contraventions of a purely technical nature. These arrests cost the state large sums of money and serve no useful purpose. The Department of Justice, the South African Police and this Department have therefore held consultations on the problem and have evolved a scheme, the object of which is to induce unemployed natives roaming about the streets in the various urban areas to accept employment outside such urban areas.* [qtd. in TRC 4: 202, ¶16]

When "natives" henceforth failed to produce a pass, they "were not taken to court but to labor bureaux where they would be induced or forced to volunteer." In theory, they were to be told that if they "volunteered" for farm labor, charges against them would be dropped as an exchange. The result, the Commission noted, was that "arrests for failure to produce a pass became a rich source of labor for the farms," ensuring the farmers "a cheap supply of labor." The kind of abuse that could be visited on such a "volunteer" was brought to public knowledge by the affidavit of one such laborer, Robert Ncube, signed in the late 1950s:

> *After I had been there [on a farm] for about four months, I noticed one day a boss boy, Tumela, who was only about sixteen years old, beating one of the workers who was cutting firewood. After the assault I noticed this man's nose was bleeding a lot. The man sat down and his nose continued to bleed and he was left there until we were locked up at six o'clock. The following morning he was unable to get up and work. He was shivering all the time. He did not work for three days and on that Saturday morning he died. The boss boy, Philip, told four of the workers to carry him into the room where the dead are kept and the body was left there until Monday morning. On Monday afternoon about half past four, I and seven others, including Philip, carried the body and buried it on the farm. There were other graves where we buried him. I never saw a doctor or the police come to see the body before it was buried.* [qtd. in TRC 4: 203, ¶17]

The Commission took note of these facts, but the category of farm prisoners did not feature in the prison hearings. Why not? Because, said the Commission, "nobody came forward to give evidence" [TRC 4: 202, ¶16]. Nobody, in this instance, presumably refers to the victims of the farm labor system; it could not possibly refer to its institutional managers since the Commission had the legal right to subpoena reluctant or even unwilling witnesses—and had done so in other instances—but, obviously, not in this.

The second category of prisoners excluded from prison hearings was that of *prisoners detained without trial*. The number so detained between 1960 and 1990 was estimated at "some 80,000 South Africans" by the Human Rights Committee, whose reports were made available to the Commission. The Committee pointed out that detention was frequently accompanied by torture and, at times, by death. Indeed, individuals were often detained so they could be interrogated and intimidated with impunity. In the words of the Human Rights Committee, as cited by the Commission:

> *There can be little doubt that the security police regard their ability to torture detainees with total impunity as the cornerstone of the detention system. It put the detainee at complete mercy for the purpose of extracting information, statements and confessions, often regardless of whether true or not, in order to secure a successful prosecution and neutralization of yet another opponent of the apartheid system. Sometimes torture is used on detainees before they have ever been asked their first question to soften them up. Other times, torture is used late in the interrogation process when the detainee is being stubborn and difficult.*[4]

The most notorious instance of death in detention was that of Steve Biko. But the numbers of those detained, of those tortured, and even of those killed, were not small. The Commission cited without comment the estimates of the Human Rights Committee that some 80,000 had been detained between 1960 and 1990—and that "up to 80 per cent of whom were eventually released without charge and barely 4 per cent of whom were ever convicted of any crime" [TRC 4: 201, ¶12]. It then provided an estimate of those tortured—"As many as 20,000 detainees are thought to have been tortured in detention" [TRC 4: 201, ¶14]—without citing any source. As regards deaths in detention, the Commission noted 73 deaths of detainees held under security legislation but could not give estimates of how many held under common law may have died in detention [TRC 4: 201–02, ¶14].

The Commission gave no legal reasons for excluding the category of detainees from prison hearings. It said its reasons were practical rather than legal. It simply did not have the time: "There were practical rather than legal reasons for excluding detention from the prison hearings. The working group had to take into account the fact that only two days could be allocated to the hearing, putting immense strain on an already overloaded program" [TRC 4: 201, ¶11]. To consider the consequence for a Commission charged with "establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights" from 1960 to 1994, let us simply keep in mind the numbers involved: an estimated 80,000 detained, of whom 20,000 were said to have been tortured in detention, against some 20,000+ acknowledged by the Commission as victims of gross violations of human rights. If the Commission could acknowledge the detention, torture and death of Steve Biko as a gross violation of human rights, why could it not extend the same acknowledgment to others who met a similar fate?

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4. From a March 1983 paper by the Committee, cited in Human Rights Committee, A Crime against Humanity, *qtd. in TRC 4: 201, ¶13.*

Robert A. Williams has recently argued that "a distinctive feature of the West's colonizing discourses of conquest" has been a "central vision of a universal order established through law and lawgiving" [18–19]. Hannah Arendt, too, remarked on the Nazi claim that their rule was consonant with the rule of law [see *Origins of Totalitarianism*]. Similarly, anyone who has studied the apartheid state's discourse cannot but be struck by its claim to being a rule of law.

Let me illustrate the point with two examples. I have already discussed above the case of the farm labor system, whereby pass law offenders were given the choice between a jail term and "volunteering" to work on a farm. When the (earlier cited) affidavit which testified to death from beatings on one farm brought the abuse of conscripted labor to public attention, the state suspended the farm labor system and followed with a legal reform within weeks. The amended Prisons Act of 1959 plugged two loopholes: first, it introduced a procedure whereby "short-term offenders" could be quickly processed by the courts and dispatched to farms; second, it put any inquiry into farm life beyond the pale of freedom of the press, by providing both "that the farms be considered prisons and that it was a criminal offense to publish anything about prison conditions without the prior consent of the Commissioner of Prisons" [4: 201–03].

Another example from the same period further illuminates how the apartheid regime both fetishized and brandished legality. Before 1956, the courts sometimes ruled against the Department of Native Affairs when it summarily evicted and expelled "natives" from urban areas. To put a stop to the meddling of the courts, Verwoerd passed the Native Prohibition of Interdict Act through Parliament in 1956. The Act prohibited any court of law from interfering with removal orders against "natives" anywhere in the country. And the courts obliged, presumably because they upheld the rule of law. Verwoerd celebrated in parliament: "The courts have nothing more to do than to accept and explain the laws" [Evans 116]. Today, it would seem that Verwoerd's bill limited the agenda not only of apartheid's courts, but also of the postapartheid TRC.

If a crime against humanity was perpetrated under the cloak of a rule of law, then how are we to understand the very notion of a rule of law? As part of its mandate, the TRC was asked to "make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures which should be taken or introduced in order to prevent the commission of violations of human rights" [4(h), TRC 2: 57, ¶31]. To respond to this part of its mandate, the Commission organized institutional hearings on the judiciary. This is how David Dyzenhaus framed the debate in his opening submission to the hearings:

> *Does the law "primarily consist of rules which owe their existence to positive enactment by a legislature or explicit recognition by a court," or does it consist of "the principles which make sense of the idea of government under the rule of law, the idea that such government is subject to the constraint of principles such as fairness, reasonableness and equality of treatment"? He sketched two alternative interpretations of the rule of law: one, a wholly procedural and positivist "plain fact approach" that informed the apartheid legal project and the other "an anti-positivist theory of law" concerned with both procedure and substance of the law. In contrast to the plain fact approach which reduces the law to "the content of the commands of the powerful," and "requires judges to ignore in their interpretation of the law their substantive convictions about what the law should be," Dyzenhaus called for an understanding of law "as*

> *the expression of a relationship of reciprocity between ruler and ruled, one in which the rulers commit themselves not only to being accountable to law, but to making law before which all subjects are equal."* [Dyzenhaus 183, 152]

In the Dyzenhaus submission, adherence to the rule of law means both that the law sets a limit to the exercise of state power—so that rulers are "accountable to law"—and that the law treats all subjects as equals. But the Commission found itself in a dilemma. *If it repudiated "the plain fact" approach in favor of "an anti-positivist theory of law"*—if it indeed made a distinction between what was legal and what was legitimate, between law and right—it would have to broaden the terms of its own interpretation and acknowledge that whenever apartheid law treated subjects unequally, as when it created racially or ethnically discriminatory legislation, that piece of legislation could not be taken as the dividing line between what was legal and what was political. Thus, for example, the Commission would have to consider pass law offenders not just as common law prisoners but also as political prisoners. Similarly, "forced removals" would have to be considered not as an expression of rule of law—however immoral—but as an integral part of a racialized and ethnicized political project that was antithetical to a rule of law. *At the same time*, the Commission could not afford to uphold the legality of apartheid as a form or rule of law lest it be seen as embracing the legal fetishism of apartheid. The Commission resolved this dilemma by an embrace of the antipositivist theory of law in its *institutional* hearing but an adherence to the plain fact approach in its *victim* hearings. In the institutional hearings, it denied that apartheid represented a rule of law; but in its victim hearings, it continued to take apartheid law as providing the dividing line between what was legal and what was political—even where the law obviously treated its subjects unequally, as when it discriminated against the majority on racial and/or ethnic grounds.

The Dyzenhaus submission was deeply flawed. The legal machinery that it held up for analysis was limited to the set of laws, the court system, and the legal practices that governed the non-native population of South Africa. This, indeed, was the legal system that spoke the language of rights and claimed the mantle of a rule of law. When it came to the native population, the problem was not simply that they were excluded from the promise of a rights-based rule of law, thus compromising its formal claims. Natives were ruled by a different set of laws, system of courts, and practices which together made an entirely different claim to legitimacy, that it enforced "tradition" and "custom." This flaw was shared by the Commission. It is no accident that the "customary" regime remains almost invisible in the Commission's report. Anyone reading the five-volume report is unlikely to be particularly enlightened as to how apartheid ruled its native subjects.

This is why, when the Commission came to narrate the history of the legal regime in South Africa, its account was confined to the history of the "civil" regime that ruled non-natives; it had nothing to say of the process by which the multiple "customary" regimes that ruled natives came into place. This is how the Commission summed up the history of rule of law in its "findings in respect of the state and its allies" in the final volume of the Report:

> *At the beginning of the mandate period, the system of government in the country was undoubtedly an unjust and discriminatory one, but it was still essentially a system of laws, albeit unjust laws. In the course of the first two decades of the mandate period, the rule of law was steadily eroded and the system of public administration purged of its remaining democratic substance. By the time President Botha took power, the system was characterized by severe repression. It had not yet, however, adopted a policy of killing its opponents. .*

> *. . The period during which the South African state ventured into the realm of criminal misconduct stretches from P. W. Botha's accession to power in 1978 into the early 1990s, including a part of the period in which his successor held office.* [TRC 5: 213, emphasis mine]

Though the lines of demarcation between the periods are blurred, the Commission identified three developments as key to eroding the rule of law. The first was the restructuring of the judiciary with the support of a parliamentary majority, a development the Commission considered as "equivalent to a constitutional fraud." The chapter on institutional hearings on "the legal community" speaks of the beginning of "superficial adherence of 'rule of law' by the National Party" from the mid-1950s with "the restructuring of judicial personnel and the Appellate Division," when "the white electorate lent its support to the constitutional fraud resorted to by the Government to circumvent the entrenched clauses of the South Africa Act" [TRC 4: 101, ¶32]. The second development that led to the erosion of the rule of law was the use of methods of torture against political opponents and detainees. The chapter on "the State inside South Africa between 1960 and 1990" cites no less an authority than Joe Slovo that "up to 1960/61, the underground struggle was fought on a gentlemanly terrain" and that "there was still a rule of law" with "a fair trial in their courts;" he then added: "Up to 1963, I know of no incident of any political prisoner being tortured." The Commission went on to qualify Slovo's statement: "While torture does not appear to have been used on urban-based, ANC political detainees until 1963, the Commission received information about the extensive use of *all* forms of torture on rural insurgents involved in the Pondoland Revolt in 1960 and against members and supporters of the *Poqo* movement of the PAC." This shift in the use of torture from criminal to political cases also coincided with the availability of foreign assistance in the technology of torture: "It was widely believed by many political activists of the time that, in the early 1960s, a special squad of security policemen received special training in torture techniques in France and Algeria and that this accounted for a sudden and dramatic increase in torture" [TRC 2: 195, ¶121–23]. The third development the Commission identified as key to undermining the rule of law was the shift of "real rule-making power . . . from Parliament and the cabinet to a non-elected administrative body, the State Security Council (SSC) which operated beyond public scrutiny." With this shift in the 1980s, "it became clear that the rule of law had run its course." Initially, the SSC "targeted members of 'terrorist' groups operating outside of South Africa." Then, "from the mid-1980s, it began focusing on opponents inside South Africa" [TRC 1: 42–43, ¶76, 79].

It is this narrative of the breakdown of rule of law in South Africa, beginning with the circumventing of the South Africa Act in the mid-1950s and culminating in "state-sanctioned murder" in the mid-1980s, that makes sense of why the Commission interpreted its otherwise broad mandate so narrowly—why it focused wholly on the removal of constitutional limits to the exercise of state power, and not at all on the creation of a judicial structure that racialized and ethnicized the population into fundamentally *unequal* population groups. Whereas the former development was internal to the history of apartheid, it is the latter development that defined apartheid as a legal form of the state, providing the real benchmark for its legal birth and illuminating the contours of its legal personality.

A Racialized/Ethnicized Legal Structure

Apartheid did not spring full-blown, like Athena from the head of Zeus, in 1951. The prehistory of apartheid as a form of the state is marked by four legal enactments: the

Natal Code of Native Law in 1891, the South Africa Act of 1910, the Native Administration Act of 1927, and the Bantu Authorities Act of 1951.[5] None of these were enacted during the mandate of the Commission, but together they provide the legal context in which "gross violations of human rights" unfolded in the mandate period. To make better sense of the violations the Commission did acknowledge, and to grasp fully the significance of those it chose to ignore, it is useful to begin with a brief summary of these four pieces of legislation.

Even by the standards of its times, the Natal Code of Native Law (1891) was a draconian piece of legislation. For the first time in the history of South Africa, it employed the law as an instrument of despotism. The 1891 law aimed to reorganize not only relations between the state and natives, but also relations within native society. The law employed the language of native tradition to enforce a wholly new tradition, that of colonial despotism. It recognized "the officer for the time being administering the Government of the Colony of Natal" as "Supreme Chief" [S. 5]. The powers of the Supreme Chief far exceeded those of any precolonial despot: he could fix "the least number of houses which shall compose a kraal" [S. 42], forcibly move "any tribe, portion thereof," to any part of the colony [S. 37], "amalgamate or divide any tribe(s)" [S. 33], "appoint all chiefs" [S. 33], or remove any for "political offence, or for incompetency, or other just cause" [S. 34]. He had "absolute power" to call upon all "natives" to "supply armed men or levies" to defend the colony from external aggression or internal rebellion [S. 35] and "to supply labor for public works and the general needs of the colony" [S. 36].

In addition to providing the legal basis for absolute authority over natives, the 1891 law also laid out the legal basis for patriarchal control over all minors and women in each kraal. As a "general rule," it decreed, "all the inmates of a kraal are minors in law," the exception being married males or widowers, or "adult males not related to the kraal head" [S. 72]. The section on "personal status" ordained that unless exempted by the High Court, "females are always considered minors and without independent power" [S. 94]. They can "neither inherit nor bequeath" [S. 143]. All income may be controlled by the head of the kraal [S. 138], who was recognized as "the absolute owner of all property belonging to his kraal" [S. 68] and who was given powers to disinherit any son who may disobey him [S. 140]. It was his duty "to settle all disputes within the kraal" [S. 68]. In addition, kraal heads were to "rank as constables within the precincts of their own kraals and are authorized to arrest summarily any person therein" [S. 74]. They were also given powers to "inflict corporal punishment upon inmates of their kraals" for "any just cause" [S. 74].

The Supreme Chief possessed not only rule-making but also judicial powers. Effectively, he stood above the law. He ruled by decree, without judicial or parliamentary restraint: "The Supreme Chief is not subject to the Supreme Court or to any other court of law" for any action "done either personally or in Council" [S. 40]. This bit of absolutism was reproduced in the South Africa Act when South Africa was unified and declared a democracy for whites. S. 147 of the South Africa Act vested control and administration of native affairs throughout the union in the Governor-General who was to act with the advice of the Executive Council, not Parliament. This union of English and Afrikaners that followed the Boer War was forged around one single agreement: democracy for whites and rule by decree over natives.

During the next four decades, a debate raged over the form of rule by decree over natives. Three questions were at issue: the unit of rule, its mediating authority, and its

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5. For an elaboration of the argument in this section, see Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism.

legal form. Should the unit of the rule be territorial or ethnic, the village or the tribe? Should the mediating authority be the village headman supervised by white officials under a High Commissioner (the Cape model) or a full-fledged—even if subordinate—state apparatus organized around the institution of chiefship and supervised by the Supreme Chief (the Natal model)? Finally, should the legal form be of modern Western law, stressing the *exclusion* of natives from civil rights on racial grounds, or should it be one of "customary" law, calling for the *incorporation* of natives by different tribal authorities, administering multiple ethnically specific despotisms as so many exercises in enforcing custom on members of different tribes? The choice between the Cape and the Natal model was between two radically different forms of colonial despotism, the former territorial, the latter ethnic.

The choice was made in two steps, the first in 1927, then in 1951. The Native Administration Act of 1927 generalized the Natal model whereby the Governor ruled as the Supreme Chief through native chiefs administering a "customary" law, but with one exception, the Cape, where white commissioners supervised native headmen, and were in turn supervised by the Governor as the High Commissioner. The Bantu Authorities Act of 1951 brought this exception to an end, for the first time generalizing the Natal model over the entire country.

The rule of apartheid was bifurcated: the law simultaneously racialized and ethnicized the population. *Races* were defined as those not native, not indigenous; whether they were accorded full civil rights (whites) or only residual rights (Coloreds, Indians), races were governed through civil law. In contrast, *tribes* were defined as those indigenous, those native to the land; set apart ethnically, each tribe was ruled through its own patriarchal authority claiming to enforce its version of colonially sanctioned patriarchy as "customary law." The bifurcated nature of the law and of the law-enforcing authority was the main—but not the only—reason every effort to impose law and order in the face of resistance more often than not pitted black perpetrators against black victims, why both the violence of apartheid and the repression that it unleashed primarily took the form that the press dubbed "black-on-black" violence. Where the black population was fragmented into so many ethnicized native authorities, "black-on-black violence" included both the violence of the native authority on its ethnic subjects and the resistance of these same subjects. Ethnicity was forged as a political identity through contradictory but related processes that included both top-down forms of rule and bottom-up forms of resistance.

The Commission's Report had little to say about either "customary law" or the authority that enforced it. The section titled "courts of chiefs and headmen" is a half page long and begins with the following illuminating observation: "Many civil legal matters in South Africa are decided by bodies outside the formal court structure, namely tribunals administered by chiefs in the former homeland areas, under laws dating from the colonial period" [TRC 5: 327, ¶59].

The Commission made no recommendation affecting the bifurcated nature of the legal system. Its focus was on ensuring the legal accountability of rulers, not the legal equality of the ruled. Even if all recommendations made by the Commission are to be implemented, it will leave in place the bifurcated division between civil and customary law. Its reforms will help *deracialize* civil law and civil power, but will not really promote a process tending to *deethnicize* customary law and customary authority. This is why we must ask: if the legal project of apartheid was to link racial exclusion to ethnic incorporation through fragmentation, through a bifurcated legal structure that comprised both civil and customary courts, then will not a legal reform that focuses on civil law but leaves customary law and customary legal authority in place tend to reproduce that same bifurcated legal structure, albeit in a deracialized form? Will not the outcome of such a partial reform be a nonracial apartheid?

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Amnesty—but no Reparations—for a "Crime against Humanity"

An appendix to the mandate chapter of the Commission's Report is titled "A Crime against Humanity." In the first paragraph, the Commission "affirms its judgment that apartheid, as a system of enforced racial discrimination and separation, was a crime against humanity." It then adds: "The recognition of apartheid as a crime against humanity remains a fundamental starting point for reconciliation in South Africa" [TRC 1: 94, ¶1; see also 5: 222, ¶101].

To locate the specific way in which apartheid constituted "a crime against humanity," the Report cites the 1996 Draft Code of Crimes against the Peace and Security of Mankind, a code that lists a set of acts, any of which may specifically constitute a crime against humanity. According to Article 18(f), these include "institutionalized discrimination on racial, ethnic, or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population" [TRC 1: 96, ¶13]. The irony was that, whereas the Commission recognized this "system of enforced racial discrimination and separation" as a crime against humanity, it did not acknowledge any victims of this crime. As a consequence, it also recognized no perpetrators. We thus have a crime against humanity without either victims or perpetrators.

In the second paragraph, the Commission addresses the foreign audience likely to take seriously the finding of a "crime against humanity": "This sharing of the international community's basic moral and legal position on apartheid should not be understood as a call for international criminal prosecution of those who formulated and implemented apartheid policies. Indeed, such a course would militate against the very principles on which this Commission was established" [TRC 1: 94, ¶1; see also 5: 349, ¶114]. At another point, the Commission says the culpability for this crime is more moral than legal [TRC 1: 132, ¶104]. Let us recall that the principles on which the Commission was established not only ruled out a blanket amnesty, they also involved an exchange: *amnesty* for perpetrators, *truth* for the society (and not just for victims), and *reparations* for victims.

The core victims of the crime against humanity, of this "system of enforced racial discrimination and separation," could not have been individuals; they had to be *entire communities* marked out on grounds of race and ethnicity. Their injuries included forced relocation, forced disruption of community and family life, coerced labor through administrative and statutory regulation of movement and location, and so forth. To address their grievances required reparations for communities, not for individuals. From this point of view, one can see the extreme inadequacy of the Commission's main recommendation that victims receive "individual reparation grants in the form of money" since a monetary package "gives freedom of choice to the recipient" [TRC 5: 179, ¶45, 43].[6]

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6. The full recommendation reads: "It is recommended that the recipients of urgent interim reparation and individual reparation grants should be victims as found by the Commission, as well as their relatives and dependents who are found to be in urgent need, after the consideration of a completed prescribed application form, according to the proposed urgency criteria" [TRC 5: 176, ¶33].

There were many debates inside the Commission, but only one led to a formal expression of dissent appended as a minority view to the Commission's report. This was penned under the name of Commissioner Wynand Malan. The minority position highlighted three issues: an inconsistent interpretation of the Act, an absolutist approach to historical questions, and, as a consequence, an inadequate ethics of responsibility and reconciliation. I would like to elaborate on each before concluding the paper.

Interpretation. Commissioner Malan was keenly aware of the internal tension in the Commission's Report: on the one hand, a bold but formal rejection of the claim that apartheid's legality represented legitimacy (a rule of law) alongside a formal acknowledgment of apartheid as a crime against humanity; on the other hand, a refusal to follow through on all the implications of this bold first move, instead interpreting its mandate narrowly and conservatively. Malan called for a consistent point of view that would set aside the question of apartheid and its legitimacy and legality. This is how he put his "main reservation": "The Act does not put apartheid on trial. It accepts that apartheid has been convicted by the negotiations at Kempton Park and executed by the adoption of our new Constitution. The Act charges the Commission to deal with gross human rights violations, with crimes both *under apartheid law and present law*" [TRC 5: 440, ¶18, emphasis mine]. At the same time, Malan was clear that the Commission stay away from any reference to international law: "international law does not provide for the granting of amnesty for a crime against humanity" [TRC 5: 449, ¶63].

Malan was right that the Commission was inconsistent and contradictory in interpreting its own mandate. But was the Commission's mandate really to hold accountable those state officials who had committed crimes under apartheid law but were let go by apartheid courts? Or was it to go beyond the question of power—a question settled at Kempton Park—to address the question of how apartheid power had impacted society?

Moral/Ethical vs. Historical Approach. Why would the Commission acknowledge apartheid as "a crime against humanity" but not take full responsibility for such a finding? For Malan, this highlighted a broader tendency in the Commission to view its subject matter through the lenses of a morality play, whose "dogmatic and absolutist" text was drawn from "religious thought" for "the juxtaposition of forces of light and forces of darkness, good and evil is inherent to religious thought" [TRC 5: 440, ¶17]. Instead of this "moral-ethical approach," Malan called for "a real historical evaluation of roles played by various actors," so as to "reframe and shift from good versus evil to good versus bad, where clearly even good has different meanings" [TRC 5: 440–41, ¶21, 22]. Instead of the "religious conversion model of confession, repentance and forgiveness" which "is by the very dogma of religion at the level of the very personal, of the individual against his or her God or offended neighbor," he called for a focus on communities [TRC 5: 442–43, ¶30].

Whereas Malan was concerned to reclaim the agency of Afrikaners as that of an oppressed people—and thereby redefine Afrikaner Nationalism as "a reactive phenomenon" against the larger canvass of British imperialism [TRC 5: 445, ¶40]—my concern is that the Commission tended to dehistoricize the phenomenon of apartheid by seeing it as just another version of a political dictatorship that carried out gross violations of human rights. In trying to locate South African history on a universal plane of rights violations, it dislocated both apartheid and its victims from a larger history of colonialism and its victims. This dislocation was established through an analogy with particular Latin American dictatorships, such as the Chilean and the Argentinian. The analogy was enthusiastically embraced in two conferences organized by Alex Borraine—who later

became the Vice Chair of the Commission—through two NGOs: the Institute for a Democratic Alternative in South Africa (IDASA) and Justice in Transition. Had it been made with full regard to the difference in historical contexts, the analogy would have illuminated much. But the analogy was established on the basis of a series of resemblances: didn't both situations give rise to a context where political adversaries tended to get mutually exhausted in a protracted, endless struggle? Didn't the adversaries in both cases attain a kind of political wisdom in the absence of outright victory, a mutual recognition that the waste of life and resources need not continue? Weren't both situations constrained by a global context that simultaneously underlined the need for compromise and facilitated it? Didn't both societies have to face a common question: how would past perpetrators and their victims live together in a new society?

The TRC pursued the analogy without regard to what was distinctive about the context of apartheid. In its eagerness to assert the general and universal relevance of the South African experience —not as much of apartheid as of the reconciliation that followed—the Commission rewrote the history of apartheid as one of a drama played out within a fractured political elite: state agents against political activists. The particular Latin analogy obscured what was distinctive about apartheid. It obscured the fact that the violence of apartheid was aimed mainly at entire communities and not individuals, and, as a consequence, reconciliation too would need to be between communities and not just individuals. Finally, it obscured the fact that, unlike political dictatorships that could look back to a time in history when today's adversaries were members of a single political community—and could thus speak of reconciling and thereby restoring that political community—South Africa was confronted with a unique challenge: how to bring erstwhile colonizers and colonized into a single political community *for the first time ever in history*. For the simple fact was that whereas white South Africans had lived under a rule of law, the people of South Africa—white and black—had yet to live under a single rule of law, the basis of a single political community.

Reconciliation and Responsibility. Malan called for a double shift, from the plane of morality to that of history, and from a focus on the personal and the individual to one on community. But if morality evolves historically, how does this affect responsibility? In Malan's words: "Slavery is a crime against humanity. Yet Paul, in his letters to the Ephesians and Colossians, is uncritical of the institution and discusses the duties of slaves and their masters. Given a different international balance of power, colonialism too might have been found a crime against humanity" [TRC 5: 448, ¶58]. In other words, the consciousness of right and wrong, of good and bad, does not predate history; it is a part of history. The point is to go beyond recognizing "perpetrators and victims of gross human rights violations." This is how Malan summed up his point: "If we can reframe our history to include both perpetrators and victims as victims of the ultimate perpetrator—namely the conflict of the past, we will have fully achieved unity and reconciliation and an awareness of the real threat to our future—which is a dogmatic or ideological division that polarizes the nation instead of promoting genuine political activity" [TRC 5: 443, ¶34].[7] From this perspective, the ultimate perpetrator is history. Rephrased, recognizing victims and perpetrators of apartheid can only be the first step to reconciliation. The next step is to recognize both as *survivors* who must together shape a *common* future.

From this point of view, reconciliation cannot be between victims and perpetrators; it can only be between survivors. Restorative justice is the precondition for integrating

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7. It is for survivors to "succeed in integrating, through political engagement, all our histories, in order to discontinue the battles of the past."

perpetrators and victims in a single community, a community of survivors. To do so, restorative justice needs to reach out *both* to the perpetrator *and* to the victim in a double move. The first requires disassociating the perpetrator from his/her action in Gandhian fashion: "seeing both the deed and the doer and severing them from each other." The second "involves the state acknowledging violations against victims" [TRC 5: 443–44, ¶35–36]. The shift of focus from the agency of the perpetrator to the nature of the act and of the harm done does not lead to a focus away from the victim, provided the state steps in between the victim and the perpetrator, and takes over responsibility for both acknowledging and redressing all violations.

Malan was skeptical of the Commission's boast that, unlike previous offers of a blanket amnesty, it had offered an amnesty with a difference: individual perpetrators received amnesty only in return for telling the truth about crimes they had committed under apartheid. How complete was this truth, Malan asked, when "all too often deceased individuals were implicated" [TRC 5: 441, ¶25]. Could it be that in making truth the prerequisite for an amnesty that had been agreed upon as part of a prior political compromise, the Commission really turned truth into a casualty?

The Commission did not have to tailor the truth for political objectives. The Act that set up the Commission had already distinguished between the Amnesty Committee and the rest of the Commission in terms of both its appointment and in its powers. Whereas the rest of the Commission was appointed through a transparent process, the Amnesty Committee was not. Also, whereas decisions of the rest of the Commission were as recommendations to government, those of the Amnesty Committee were final. They were subject neither to the overall Commission majority nor to a governmental veto. Ironically, this difference gave the Commission (which I speak of as excluding the Amnesty Committee) considerable freedom in pursuing its overall objective: national unity and reconciliation.

That freedom, and that responsibility, lay in exploring the link between the political reconciliation at Kempton Park and a larger social reconciliation that was the Commission's core mandate. It lay in seeing truth not as an alternative but as a prerequisite to justice. Rather than exploring alternatives to justice, the Commission's challenge lay in exploring alternative forms of justice. For the state to integrate both victims and perpetrators—as survivors—into a single postapartheid political community, it would have to acknowledge the majority as victims and take responsibility for reparations.

The Act defined the overall objective of the Commission as promoting national unity and reconciliation. In limiting the definition of victims to political activists whose rights had been grossly violated, the Commission narrowed its overall objective to promoting unity and reconciliation within South Africa's fractured political elite. From the quest of social reconciliation, it narrowed its mandate to that of a political reconciliation. In an attempt to reinforce the political compromise achieved at Kempton Park, it crafted a moral and intellectual compromise. Whereas the morality of the political compromise may be defended, that of the moral and intellectual compromise—the diminished truth as told by the Commission—is difficult to defend.

Conclusion

From the outset, there was a strong tendency in the TRC not only to *dehistoricize* and *decontextualize* the story of apartheid but also to individualize the wrongs done by apartheid. Wynand Malan's minority report blamed this tendency on the religious messianism of the leadership in the Commission. This religious mode of thought received

powerful international support from secular quarters. If the religious discourse was located in the churches that provided the leadership of the TRC, a parallel secular discourse was characteristic of the human rights community that provided the bulk of the technical assistance for the TRC, both as preparatory support before its constitution and as research and organizational support during its operation.

If the leadership of the TRC was eager to make the story of apartheid—especially the lessons of reconciliation—universally available, its ambitions were easy to reconcile with equally universalist aspirations of those in the human rights community who looked forward to framing the problem of apartheid as one of a violation of individual rights, albeit on a wide scale. Both shared the tendency to dehistoricize and decontextualize social processes, and to individualize their outcomes. For this reason, the confluence of two modes of thought—one religious, the other secular—around the project of the TRC should be of more than just historical interest. It is also of theoretical interest.

The Commission's Report did not just downplay apartheid, the "crime against humanity." It also showed little understanding of the legal machinery through which this crime against humanity was perpetrated in the guise of a rule of law. The Commission's limitations were reflected not only in its prognosis of the past, the story of apartheid, but also in its prescriptions of the—particularly legal—reform that is needed to dismantle the institutional legacy of apartheid in the legal domain.

I have argued that apartheid promoted two related political identities through its legal project: race and ethnicity. These bifurcations presume and reinforce two related presumptions: that race was about a hierarchy of civilization, and ethnicity about its absence, that is, barbarism. This presumption is reproduced in the Report of the Commission in two related ways. First, the Commission appears blind to the legal and administrative apparatus that apartheid created to govern the domain of barbarism, that is, the native population classified into so-called tribes. Through this apparatus, which it called "customary," apartheid regulated the day-to-day lives of most of its victims. Second, the Commission took its stand on the domain of civilization. It had eyes only for the apparatus of civil law that governed white civil society and excluded black society, and that was at the heart of the claim that apartheid was indeed a rule of law. This identification seems to have been so unacknowledged that the Commission was often prone to think of the South African legal system as part of a larger entity it called "the Western world." In the chapter on the "institutional hearings: the legal community," the Commission indicted the judiciary "which willingly participated in producing the highest capital punishment rate *in the 'Western' world* by the mid-1980s . . ." [TRC 4: 103, ¶34(i), emphasis mine]. The same phrase is repeated in the final volume, in the findings on the judiciary, which indict "the participation of judges in producing the highest capital punishment rate *in the 'western' world*" [TRC 5: 254, ¶158(d)]. From whose point of view, one may ask, is South Africa a part of the "Western" world?

If the Commission did not focus on the bifurcated nature of South African law and legal authority, it could only be because the Commission paid little attention to gross violations suffered by the vast majority of the South African population, violations that took the form of pass laws, forced removals, convict labor for farms, detentions without trial, and so forth. Any systematic examination of these violations would have brought the Commission face to face with the entire phalanx of laws and authorities—which used the language of custom rather than rights—and without which there would have been no apartheid (separate development) in South Africa. At the same time, an understanding of Native Authorities as integral to apartheid would have given the Commission an insight into how "black-on-black violence" was integral to the state-organized violence that fueled apartheid as a crime against humanity.

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