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'TELL NO LIES, CLAIM NO EASY VICTORIES' A Brief Evaluation of South Africa's Truth and Reconciliation Commission[1]

Graeme Simpson

Introduction

It is impossible to understand and evaluate South Africa's Truth and Reconciliation Commission (TRC) properly, or to extract significant lessons from it for other societies in transition to democracy, without analysing the unique political circumstances that gave rise to it. For this reason, the point is frequently made that the history of the South African TRC was inextricably linked to the particular evolution of South Africa's negotiated settlement.[2] However, it is less often acknowledged that this politically fraught frame of reference fundamentally shaped the parameters of the complex truths about the past that were 'recovered' by the TRC.

It is argued in this paper that the TRC's primary mandate to document responsibility for politically motivated violations of human rights in the past and to build reconciliation at a formal political level, shaped and restricted the modes of truth that the TRC was able to extract from its engagement with the history of the apartheid era. A broad deference to historical political orthodoxy – significantly determined by the TRC's legislative mandate – had the effect of politically sanitising versions of the past which offered more complex and less predictable understandings of the magnitude and nature of violence and violation under apartheid. As a consequence, the role of the TRC in building reconciliation and preventing the re-emergence of human rights violations in post-apartheid South Africa has been significantly constrained by a representation of past conflict premised on politically defined cleavages, which are construed as neatly separable analytically from broader patterns of criminal and community violence

in South African society. In its extraction of *the* truth about South Africa's past the TRC's 'privileging' of narrowly defined political violence may therefore d more to mystify than to explain continuity and change in the patterns of violenc and violation which continue to pervade this society after apartheid.

The most important aspect of the country's transformation fron authoritarianism and racism into a constitutional democracy was that it happene not by revolution or force of arms, but through the compromises of dialogu and political negotiation.

This transition was fundamentally different to that undergone by Naz Germany after World War II, for example, where the conflict produced a clea victor and where the Allies were able to impose their version of justice on th Nazi regime at Nuremberg. The victors chose prosecution as the primary mod of dealing with the past, not only because they believed it was morally right but, crucially, because they were able to do so.

The South African transition is also different to that undergone by Chile When General Augusto Pinochet, the former head of the Chilean junta, agree to restore power to an elected civilian government, he still commanded sufficien power himself, especially within the politically interventionist military, to ensur that he remained in office as head of the armed forces. As a result of th continued influence of the military, the vulnerable new democratic governmen was effectively unable, save in a few exceptional circumstances, to brin charges against those responsible for assassinations, torture an disappearances under Pinochet's rule. Although the new government di establish a truth commission that officially investigated, recorded an acknowledged human rights abuses under military rule, those who wer responsible remained unpunished.

If post-war Germany represents one extreme of the justice policies pursue in transitional societies, namely prosecution, then Chile represents the other namely, blanket amnesty for those who committed gross violations of humar rights. South Africa, in establishing the TRC, took a position somewhere betwee these two extremes, in which amnesty was not unconditional, but was rather *quid pro quo* for full disclosure. At the heart of this hybrid approach was th reliance on a notion of 'truth recovery' as a restorative alternative to punitiv justice – through full disclosure by perpetrators (and their supposed shaming in exchange for amnesty, as well as through voluntary testimony about apartheid' gross human rights violations given by victims (and their supposed healing) Thus, although amnesty for perpetrators was a precondition for the success o the negotiated settlement from the outset, the TRC nonetheless resulted from last-minute compromise, struck so late in the negotiation process that it had t

be tacked onto the end of the interim Constitution, under the heading 'National Unity and Reconciliation', almost as an afterthought. The 'postscript' reads:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu*[3] but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, *amnesty shall be granted* in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.[4]

After the 1994 elections, the new minister of justice, Dullah Omar, immediately signalled his intention to establish a TRC. Omar was aware that the 'postscript' to the Constitution was binding,[5] and accepted responsibility for enacting legislation that would provide mechanisms and criteria for the granting of amnesty. But, along with a strong, vocal and well-organised human rights sector outside government, he was also concerned that amnesty was a process geared essentially to the interests of perpetrators. If South Africa was to come to

terms with its past, build national reconciliation and establish a society based on respect for human rights, the needs of victims would have to be given equal weight.

On this basis, it was argued that any amnesty process that was not accompanied by an attempt to disclose fully the nature of the crimes perpetrated, would have grave implications for the long-term prospects of sustainable democracy. In particular, amnesty would mean that the victims of abuse, on all sides of the political spectrum, would never have access to the information essential to their rehabilitation, let alone any prospect of redress under civil or criminal law. Without public acknowledgement or the possibility of restitution through the courts, there was the risk of widespread resentment and of private retribution – despite the existence of a new democratic dispensation.[6]

The TRC represented a creative response to these concerns. It was decided that the Commission would not only grant amnesty to perpetrators, but would also seek to establish the truth about past human rights violations, provide victims with some form of reparation, and make recommendations to the President about measures the government should take to prevent any future recurrence of abuse. By foregrounding the interests of victims, the TRC would attempt to restore the moral balance to an amnesty agreement born of political compromise. This fusion of amnesty with truth recovery and reparation was without precedent, and its objectives should be borne in mind during any evaluation of the TRC's work. In a sense, truth recovery was viewed not so much as a trade for justice, but as an alternative restorative (rather than punitive) approach to justice. In fact, conversations about the nature and quality of the historical truths recovered by the TRC go to the heart of the Commission's restorative justice aspirations, both in respect of the amnesty process for perpetrators and in respect of the testimonies by survivors.

On this basis, some argue that the focus on the interests of the victims was the TRC's main accomplishment. The newly elected government's only constitutional obligation was to grant amnesty. Instead of settling for this, it arguably transformed a process geared to the interests of perpetrators into one that aimed to restore the dignity of those who had suffered, thereby demonstrating its commitment to fundamental rights and accountability. It is suggested that the government developed a new model for reconciling the often competing and contradictory demands faced by societies in transition.

Of course, there was more to the negotiated settlement in South Africa than compromise on the question of amnesty. This delicate historical process also issued in a new government of national unity that remained dependent on many of the former regime's civil-service institutions and personnel. Of particular

significance here were those agencies of state security, including the police, the military and the criminal justice system, that were central to sustaining apartheid. Many of these institutions and personnel had been implicated directly in the torture, execution and disappearance of opponents of the system, or had helped to maintain the legal framework that allowed such abuses to occur. There was a culture of covert, unaccountable activity in government institutions. This had been fostered by a host of legislative measures that actively preserved secrecy and governmental privilege in the name of state security, and thus contributed to widespread corruption and abuse of power.[7] Now these same institutions and people were required to maintain law and order, and to act as guardians of a new Bill of Rights, in a society confronting a potential upward spiral of criminal violence. In addition, many of those who came to power in the new government had been actively involved in armed resistance to apartheid and this had also entailed the violation of human rights, within the country and beyond its borders.

The task of creating or restoring public confidence in state institutions and personnel, and in the rule of law, in a situation where mistrust of these institutions was deeply rooted, was a crucial one. The Parliamentary Committee of the General Council of the Bar of South Africa argued that the concern with political reconciliation should 'be balanced ... by a concern for the administration of justice ... It is apparent that a blurred pursuit of "reconciliation and peaceful solutions" without adequate regard for its impact on policing, the courts, and the control of crime, will do more to threaten social stability.'[8] While the reconstruction of state institutions clearly went well beyond the TRC's limited mandate, the TRC had the potential, in seeking to recover the truth about systematic human rights abuses in these institutions, to make a contribution to their transformation.

Once again, the notion that there was a 'recoverable' and integrated truth about the roles of these institutions (and that the TRC could 'deliver' it) lay at the heart of this more elaborate endeavour – even though institutional transformation was not framed as an explicit part of the TRC's legislative mandate. It could begin the process of promoting transparency in governance and entrenching a human rights culture in South Africa. One could argue that in evaluating the TRC's contribution to reconciliation through truth recovery, the stress should fall on a more critical scrutiny of its limited contributions to this 'forward-looking' agenda of transforming state institutions, rather than on its 'backward-looking' historical exploration of individual cases. Either way, uncontested assumptions about the nature of truth were central to framing all these aspects of the TRC's mandate.

It is imperative that we do not judge the TRC enterprise in isolation fro either the constraints imposed by the negotiated settlement or the full range vehicles designed to promote restorative justice and build national reconciliatio of which it was just one. That would notionally be to set the Commission up fail before it began its work. More than anything else, reconciliation post-apartheid South Africa resides in the redress of past inequities, in soci and economic justice, which goes far beyond justice in its more narrow legal punitive forms. The TRC was also confined to dealing with only a sm percentage of serious or 'gross' human rights abuses. Few of apartheid's evi can be undone, and not all of them could be addressed by the TRC. Full soci justice depends on the establishment and functioning of the Human Righ Commission, to deal with the full spectrum of human rights denials; the Gend Commission, to deal with the legacy of gender inequality; the Land Clain Court, to deal with the history of dispossession; the Youth Commission, deal with the ongoing marginalisation of young people, which the shift fro confrontation to negotiation arguably compounded, etc.

The TRC was set a near-impossible task from the outset. In a large count with many rural inhabitants, merely documenting a purely narrative history all the gross violations of human rights that occurred under apartheid, ar providing space for the victims to recount their stories, was impossible in ju two years. When we judge the TRC against its own ambitious mandate, as s out in the Promotion of National Unity and Reconciliation Act,[9] we are therefo measuring it against an ideal. However, it remains possible and is crucial important to evaluate the TRC critically in relation to some of its own state objectives, and particularly to scrutinise its operations and assess its processe through the eyes of victims themselves. This is all the more essential considerin that the South African TRC is widely – and often uncritically – regarded as model for other countries in transition.

'Home Truths': Political Compromise – A Double-Edged Sword

At the risk of stating the obvious, the fact that the TRC was established in th first place was a significant victory for the negotiation process. Instead c pursuing the convenient, politically expedient path of collective amnesia, th opposing parties were able to agree that public space should be made availabl to victims and survivors, and to the country as a whole, to look back on th past and recount the horrors of the apartheid system. The amnesty provisior in the TRC legislation, which set certain conditions for the granting of amnesty,[1]

have remained controversial. However, it could be argued that this was a creative way of ensuring that the amnesty clause previously inserted in the 'postscript' to the interim Constitution would at least remain conditional upon full disclosure – and that this better facilitated reconciliation, through balancing perpetrators' interests in amnesty against victims' interests in the recovery of the truth. In so doing, the TRC process placed truth recovery – with all the assumptions about the ability to balance forensic with other more contradictory versions of the truth – at the heart of a victim-centred reconciliation endeavour, which was framed as an elaborate exercise in restorative justice.

Nonetheless, the TRC clearly reflected elements of the compromise and expediency that were intrinsic to the negotiated settlement. The Commission was largely defined by the fact that it was a statutory product of this delicate political process, and was implemented during a period of social transition, when the embryonic South African democracy appeared extremely vulnerable. It has been argued that many of the concessions that were made, especially with regard to amnesty, were necessary not only to keep the negotiations moving forward, but also to sustain the tenuous commitment to democracy made by the inherited military and police establishments. In many ways, this very delicate political context continued to plague the TRC and to undermine its successes.

One significant aspect of this context was the brief and uncomfortable existence of the government of national unity, which contained representatives of the previously warring factions. Although the fortunes of the government of national unity were bound up with many other factors, it is nonetheless noteworthy that this political vehicle, having served the purpose of shaping the objectives and legislative framework of the TRC, disintegrated shortly after the Commissioners had been appointed and the Commission finally established. The circumstances in which the TRC had been defined and irrevocably set upon a path therefore changed dramatically shortly after its birth. This shift influenced the complicated nature of the TRC's activities in the following two years, as it sought to be a vehicle of reconciliation and healing within an increasingly robust and combative political environment. The result was a politically contested approach to versions of the past, which eventually played itself out most strikingly in the widespread political criticism of the TRC's interim report, released in October 1998 – but which also plagued the internal operations of the TRC throughout its investigations.

Consequently, the TRC was hardly free from political tension, both internally and in relation to the wider society. It was probably inevitable that the Commission would generate political conflict and be used as a political football by competing parties. Clearly the notion of *sufficient consensus,* which shaped the

agreements between political parties at the negotiation table, was no longer functional vehicle for generating a shared vision or a collective verdict on th past. Arguably, one of the TRC's greatest failures was its inevitable propensi for pandering to these hostile political groupings, in a bid to keep them committe to the process.

From the outset, the National Party and other right-wing groupings, clear concerned that they would be damaged by the Commission's investigation c past deeds, claimed that it was likely to be a witch-hunt rather than a forum fc reconciliation. The National Party, and the Inkatha Freedom Party, continuall accused the TRC of bias. Once the National Party left the government c national unity, and was no longer subject to the political constraints that ha played so great a role in shaping the TRC, it frequently went to court to inhib the Commission's work, and eventually refused angrily to cooperate at all. Th reason given was that the TRC was violating the terms of the Act, which require it to operate without bias in considering gross violations of human rights on a sides of the political conflict. The most telling episode in this saga came whe the National Party, having failed to make any substantial apology for its ow role in the creation and implementation of apartheid, actually demanded a apology from the TRC instead! This was a rather transparent political strok designed to shift the focus of public attention from the National Party complicity in gross violations of human rights to the alleged indiscretions c the TRC, and it would not have appeared nearly so masterly had the TRC acte more firmly in its dealings with the former government and other right-win interests during the preceding year.

When the Commission was being set up, steps were taken to assuage doubt about political bias and avert political manoeuvring. In addition to its legislativ mandate to investigate violations on all sides of the political conflicts of th past, the composition of the Commission itself was also meant to ensure ever handedness. But when the Commissioners were selected, rather than simpl considering the human rights track record of each candidate, an effort wa made to represent as broad a range of political interest groups as possible, in a attempt to demonstrate impartiality. While the importance of securing publi perceptions of objectivity cannot be dismissed glibly, and the Commissioner themselves clearly cannot be held responsible for this inclusive approach, ther is little doubt that the TRC subsequently grappled with its consequences, man of which its architects may not have foreseen. Political conflicts within th TRC, fuelled by the vastly different political backgrounds and beliefs of th Commissioners and their staff, unquestionably had a negative effect on th operational efficiency of some of its Committees. The tense political climat

was also one of the reasons why the Commission found it difficult to accept constructive intervention from outside or to incorporate non-governmental organisations (NGOs) and specialised historians into its operations.

The TRC was consequently under constant pressure to demonstrate its even-handedness, and this had an enduring impact on the ways in which it extracted its truths about the past, the profile given to particular cases and experiences, and its machinations in producing an aggregated version of past conflicts in its interim report. In its effort to appear impartial and build reconciliation, it was sometimes overly tentative. For instance, the Commission proved reluctant to make full use of its substantial powers of search, seizure and subpoena. Faced with vocal right-wing opposition, and eager to secure the support of right-wing political parties, the Commission resisted opportunities to acquire information assertively, and instead sought to win over its opponents more delicately. This undoubtedly impacted on the quality of information extracted by the Commission. In particular, the reliance on voluntary disclosure proved problematic both for the purposes of verifying information received, and for an amnesty process that was controversial precisely because of the understandable reluctance of perpetrators to come forward voluntarily.

A flood of applications for amnesty did occur towards the end of 1996, as the cut-off date of 15 December loomed (this was subsequently extended by the state president at the TRC's request). But it is arguable that the rush had less to do with the cut-off date than with the successful prosecution of Eugene de Kock, the notorious apartheid assassin (dubbed 'Prime Evil' by the media), who provided extensive information during his trial about other senior state operatives involved in gross human rights abuses. This suggests that the threat of prosecution, far from being incompatible with a truth-recovery process linked to a conditional amnesty, in fact contributed significantly to its eventual partial success.

Some victims expressed legitimate frustrations at the fact that the amnesty process would prevent them from obtaining full justice, while it also could not guarantee that it would add any new information to what they already knew about the murder of their loved ones. A constitutional challenge to the amnesty process was brought by the Azanian People's Organisation (AZAPO), as well as the relatives of prominent murdered activists Steve Biko, Griffiths and Victoria Mxenge, and Dr Fabian Ribeiro. Rather than viewing these actions as legitimate and understandable, at the time some TRC Commissioners presented them as hostile to the Commission and its quest for reconciliation. Although most of these tensions were tackled more sensitively by the TRC in the last year of its operation, they did damage the Commission's image, especially considering the early failures of the process of voluntary disclosure before the Amnesty Committee.

The Human Rights Violations Committee was less subject to the controversi that plagued the amnesty process, despite the sometimes highly subjecti representations of the past proffered by victims who testified before tl Committee. The operations of this Committee, which needed to draw r moral or political distinctions between the experiences of victims from all sid of the conflict, proved to be the great strength of the TRC. The Committ gave little impression of overt or covert bias, and served the objective impartiality well. The result was a uniquely powerful process, in which a fi spectrum of people whose human rights had been violated in the past testifi before the Committee and the South African public. The social impact of tl public testimony was one of the greatest achievements of the TR (notwithstanding the reservations expressed by Simpson and Posel in tl introduction to this volume), and will undoubtedly continue to have a pervasi influence on South African society.

The political successes and failures of the TRC, as well as its ability to extra reliable information, must also be viewed more broadly in the context of t state institutions inherited by the new government as a consequence of t 'sunset clause', which was provided for in the politically negotiated settleme and protected the incumbency of state bureaucrats. It was obviously impossil to create credible, trustworthy institutions overnight, or to transform their cultu and capacity to deliver instantaneously. Established bureaucrats were oft reluctant to implement the programmes of the new political leadership, wh many of the new senior functionaries installed by the incoming governme lacked the technical expertise and experience to run state departments effective There was a consequent growing gap between the new government's visiona policies and its capacity to translate policy into practice. The TRC, as a produ of precisely this innovative policy-making approach, was affected directly. T Commission relied on institutions such as the South African Police Service a the Office of the Attorney-General to facilitate its work. The inefficiency a apparently wilful obstructionism of some state functionaries are, by their natu difficult to document, but they undoubtedly affected the Commission, its politi profile, and the credibility of the versions of the past that it sought to extra

These 'hidden liabilities' of South Africa's negotiated settlement illustra well that, for all its undisputed achievements, the political compromises bu into the CODESA negotiations were a double-edged sword. Nowhere w this more apparent than in the amnesty agreement and the associated suspensi of civil and criminal justice which underpinned much of the negotiations proc – particularly the assumption that amnesty could be made conditional on t requirement for truth recovery based on full disclosure by those who perpetrat gross violations of human rights under apartheid.

'The Whole Truth and Nothing but the Truth': Debating Criminal Law and Restorative Justice

In extracting lessons from the South African TRC that may be of value to other transitional societies, it is useful to consider some of the debates that have arisen over the requirement for truth recovery and its relationship to reconciliation and justice.

To start with, some have suggested that there is an inherent contradiction between truth recovery linked to amnesty on the one hand, and punitive criminal justice on the other. This has often been stated as a stark choice between reconciliation and justice, as if the two were inherently incompatible. By contrast, many frustrated victims of apartheid have argued simply that there can be no reconciliation without full justice. In practice, the Commission unintentionally demonstrated that truth recovery and prosecution can work effectively in tandem, and that a conditional amnesty based on full disclosure may be anything but incompatible with prosecution in some instances. As already suggested above, the threat of prosecution was probably more important than the prospect of amnesty in driving at least partial disclosure by perpetrators appearing before the Amnesty Committee.[11] Their revelations, along with the testimonies of victims before the Human Rights Violations Committee, provided a powerful and graphic cumulative picture of the dehumanising effects of apartheid. One might argue that, in the final analysis, some form of 'truth recovery' of the kind undertaken by truth commissions, however limited and whether accompanied by criminal prosecutions or not, is always better – and more likely to foster reconciliation in the long term – than collective amnesia about gross human rights violations.

Nonetheless, some of the most striking lessons to be learned from the South African TRC concern the fundamental clumsiness of criminal law as a means of doing substantive justice, of achieving reconciliation, and of meeting the needs of victims and survivors of human rights abuses for information and acknowledgement. This raises important questions about the punitive justice paradigm and the extent to which it supposedly offers better prospects of serving victims' needs, based as it is on a formal notion of truth necessary to secure a conviction and punish the perpetrator. In this regard, there is a more meaningful debate to be held on the differences between punitive and restorative systems of justice and the assumed roles of truth recovery within them, than on the supposed incompatibility of 'justice' and 'reconciliation' approaches in general. Nowhere was this debate more explicitly engaged than in the Constitutional Court of South Africa, the highest court in the land.

In one of its most far-reaching and earliest cases, the validity of the amnes provisions, which had been entrenched in South Africa's interim Constitutio was challenged before the newly established Constitutional Court. Th constitutional challenge to the Promotion of National Unity and Reconciliatic Act was brought by the Biko, Mxenge and Ribeiro families – and the prominen of the victims alone makes the case notable. It is not possible to consider aspects of the Constitutional Court's decision here, but a few key points will highlighted.

There is a certain irony in asking a court to rule on the validity of an agreeme without which the court itself would probably not exist. This is precisely wh the Constitutional Court was doing in evaluating the constitutionality of tl amnesty provisions in the Act. Constitutional courts are typically required safeguard both democracy and the fundamental rights of individuals. In th particular matter, the potential tension between these two imperatives was al thrown into sharp relief. In their papers before the Court in the matter of *AZAP and Others* vs. *The President of the Republic of South Africa and Others*, the applican argued that section 20(7) of the Promotion of National Unity and Reconciliatic Act was unconstitutional. The pertinent part of section 20(7) provides that:

> No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

The applicants' central contention was that this provision violated the right access to court enshrined in section 22 of the Bill of Rights, which provides th

> Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.[12]

The applicants argued that by extinguishing the criminal liability of perpetrat to whom amnesty has been granted and preventing victims from bringing ci claims against those who have abused them, section 20(7) violated an individu right of access to justice.

The Constitutional Court held that extinguishing criminal and civil liabil was constitutional in this case, and advanced two main reasons. First, it cited t 'postscript' to the interim Constitution. In the interests of a peaceful transiti

to democracy, and with due regard for the difficult balance that had to be struck between justice and reconciliation, the Court found that the interim Constitution had explicitly chosen reparation over retaliation, and *ubuntu* over victimisation. Further, the Court argued that 'amnesty' had no fixed meaning, and that the term could be defined broadly or narrowly, depending on the circumstances, to include the extinguishing of civil liability, or to exclude it. In the case of South Africa, the offer of amnesty would only act as a genuine incentive for perpetrators to make a full disclosure of their crimes, if it entailed extinguishing both civil and criminal liability. Few people would come forward if they knew this would expose them to damages claims in civil suits. If perpetrators did not come forward, the Court argued, victims would never know the truth and the process of reconciliation would be impeded. On this basis, the Court held that it was permissible to extinguish civil liability in respect of acts for which amnesty had been granted. A particular – and arguably naive – notion of *full disclosure* of the truth therefore lay at the heart of the Constitutional Court's rationale in upholding the conditional amnesty in the Act as constitutional.

Second, the Court held that in most instances the right to prosecute those who have committed gross violations of human rights is, in any event, an 'abstract right'.[13] This is because the evidence necessary to obtain convictions, or even to sustain civil claims, does not usually exist or has been deliberately destroyed.[14] In this context, the Court argued that one of the only ways in which victims could obtain the truth about past abuses was if perpetrators were provided with an incentive to come forward and make full disclosure, and the removal of criminal liability was precisely such an incentive. In addition, this would encourage perpetrators to confront their past and help society to understand its history. The Court held that these were important elements of reconciliation, to which the interim Constitution was committed, and implicitly this view was premised on assumptions about the nature and impact of such disclosure or truth recovery.

The Court could have substantiated its argument that the right to prosecute is really 'an abstract' one by referring to the state of South Africa's criminal justice system. Even if the evidence to prosecute perpetrators existed, the criminal justice system would be incapable of processing a large number of prosecutions (of which there might be thousands) or of securing convictions. The initiative to rebuild public confidence in the legal system and the rule of law would be harmed immeasurably if such prosecutions failed, allowing perpetrators who had been acquitted to deny their involvement in human rights abuses. A culture of impunity would be perpetuated, eroding any residual faith in the rule of law, and possibly leading to even greater anger and cynicism on the part of victims and survivors. Indeed, it is arguable that these were the precise consequences of

the failed attempts to prosecute the former Minister of Defence, Gene Magnus Malan, as well as the more recent failed prosecution of the head apartheid South Africa's chemical weapons programme, Dr Wouter Basson

Even the newly established International Criminal Court (ICC) might r similar risks. If the 'strike rates' of the Bosnian and Rwandan War Crin Tribunals are anything to go by, there is limited point in pursuing punit justice if it is not effectively enforceable, whether nationally or internationa Significant, but largely symbolic trials (such as that of Serbia's Sloboc Milosevic) might play a vital role in restoring international legal principles a in demonstrating that even the most senior leaders of state are not above law, but arguably do little to foster the integrity of the rule of law at grass-ro level or bolster public confidence in institutions of criminal and civil justice ordinary victims who enjoy no remedy.

Furthermore, even when prosecutions do take place, the extent to wh they satisfy the needs and expectations of victims and survivors is debatable. South African jurisprudence, a criminal conviction does not automatically fou a civil claim for compensation on the part of the injured party. There are relativ few cases of gross human rights violations which hold out good prospects c successful prosecution owing to the lack of evidence; and, in most of the civil justice will also remain out of reach for the simple reason that it unaffordable. Until these jurisprudential anomalies are eliminated, or the Sou African justice system is substantially transformed, the Constitutional Court r be right: there is only an abstract right of access to justice for the majority the victims of apartheid's gross violations.

The punitive justice model is therefore all too easily misrepresented as be in the best interests of victims. Yet this discussion has revealed the clumsin of punitive criminal law as a means of securing some form of dir compensation or reparation for the victims. The discussion has also sounde warning about the danger of trying to speak on behalf of victims and surviv by presuming that they have an inherent interest in punitive justice, instead rendering their own complex voices and needs audible more directly. The ha reality is that the vast majority of apartheid's victims probably stood to g more from the opportunity to tell their stories (coupled with the mea reparations promised by the TRC) than from the criminal justice system. Thi not to deny the devastating loss that the compromise on amnesty entailed those few exceptions, such as the Biko and Mxenge families, who stood excellent chance of succeeding through the criminal and civil courts. Whil may be scant consolation to them, their sacrifice is the bitter pill that argua had to be swallowed for the general good.

The Constitutional Court's rulings in the case brought by AZAPO contain important comments on the relationship between national jurisdiction and international law, which may be significant for the future workings of the ICC. In evaluating South Africa's obligations under international law,[15] the Court made a cursory survey of three countries in South America, namely, Chile, Argentina and El Salvador, and concluded that all three had accepted the principle that amnesty should be granted to violators of human rights in order to consolidate emerging democracies. On this basis, it suggested that there is no single or uniform practice in international law regarding the granting of amnesty.

There are a number of problems with this stance. First, the Court failed to consider any of the instances where emerging democracies have chosen to punish rather than pardon those who have committed gross violations of human rights. In two of the most recent instances in Africa, both the Rwandan and the Ethiopian governments chose to prosecute offenders.[16] Second, the Court is on shaky ground when it asserts that there was a principled acceptance, in the three countries canvassed, of the need to grant amnesty in order to consolidate democracy. In both Chile and Argentina, the amnesties had much more to do with powerful, interventionist militaries, which either blocked the transition to democracy or threatened the new democracy with a coup unless their conditions were met.[17] It is unfortunate that the Court extracted a principle about consolidating democracy from circumstances in which certain forces insisted upon amnesty to escape the consequences of their criminal actions. The Court is correct, albeit for the wrong reasons, that there is no standard practice among states on the granting of amnesty. However, this assertion is not helpful in itself, and could just as well be used to support the contention that prosecutions are not obligatory, as to support the proposition that they are permissible and appropriate.

After the parochialism, chauvinism and outright hostility to international law shown by South African courts under apartheid, one would expect the new Constitutional Court to have devoted more time and rigorous thought to this topic. This neglect is all the more disappointing if one considers the various other judgements that the Court handed down in the period preceding the TRC case, almost all of which referred to international law and regarded it as persuasive. The strength of international law derives in part from the fact that it is accepted by the community of nations and applied in their courts. The struggle for democracy in South Africa (an ironic example, in this context) was given extra impetus by the fact that apartheid could be condemned, locally and internationally, as a violation of international law. By adopting such a narrow and uncreative approach to the status of international law within our domestic

legal system, concerning a matter that will be scrutinised by other countries a courts in similar situations, our Constitutional Court has eroded the moral a legal force of international law at home and abroad.

It would clearly have been preferable for the Court to have conducte thorough and rigorous survey of international law on the subject before comi to the conclusion that it did. Although there is considerable debate on the issu it is arguable that such a survey could still have supported the conclusion th the amnesty provisions articulated in the Act do not violate international la Space does not permit an exhaustive treatment of this issue,[18] but two br points should suffice to demonstrate that the argument could be made. Fir the amnesty in South Africa is not unconditional, nor was it granted by outgoing government to itself. It is activated only by the voluntary, full disclosu of perpetrators themselves, and should only be granted if the criteria defini a political crime are satisfied and if the means chosen to achieve the politi objective were proportionate. One might also stretch a point and say that the is a punitive element in the 'shaming' associated with public amnesty hearin and the publication of the names of those who are granted amnesty in t Government Gazette. Second, it is generally accepted in international law tha nation does not have to 'commit political suicide' in fulfilling its obligation punish those responsible for gross violations of human rights. Ev commentators who have gone to great lengths to demonstrate that there i duty to punish certain crimes under international law, concede that this obligati should be tempered by other considerations if fulfilling it would plunge a coun into violence or destroy an embryonic democracy.[19]

Cachalia adopts this position in considering South Africa. He argues th the 'moral imperative' does not always yield a conclusive answer as to whetl states are obliged to prosecute gross violations of human rights, and that oth needs and objectives may demand a different approach. In particular, he ref to the need for national reconciliation and the need to secure the compliance strategically located elites, which might otherwise threaten the process democratisation. Although international law imposes an obligation on states investigate and prosecute gross human rights violations, Cachalia argues th states have a discretion in the exercise of this obligation. However, it is gener agreed, he continues, that all governments have an obligation to establish *facts*, at least, so that *the truth* becomes publicly known and officially part of nation's history. This obligation remains even where 'clemency' is the best pol option in a particular state at a particular time.[20]

However, whether by reference to Cachalia's approach or to the mo constrained analysis of the Constitutional Court, vast assumptions are mad

in the name of legal principle – about the quality and quantity of truth likely to be delivered by the TRC. While constant reference is made to the notion of full disclosure as a requirement for amnesty-seeking perpetrators, at no point are criteria or standards set for the kind of adequate disclosure necessary to satisfy the requirement of *the truth*, which in turn (in Cachalia's terms) will provide for a cumulative and 'official' version of a nation's history.

In practice, the TRC's Amnesty Committees constantly grappled with how the full disclosure requirement was to be met, perfectly illustrating the competing notions of what constituted truth recovery.[21] Indeed, it may be argued that from one amnesty decision to another, there was such pervasive inconsistency in the interpretation of what was expected for full disclosure as to suggest that the requirement was never consistently satisfied. This is best illustrated by the finding reached in one amnesty judgement in which amnesty was granted, but where it was concluded not that the applicant had dispensed with the requirement of full disclosure, but that *it could not be said that he hadn't done so.*

Debates continue to rage about the extent to which well-orchestrated and coordinated versions of events were presented by groups of applicants to ensure consistency in their individual amnesty applications. There was also inconsistency on whether information about other participants or chains of command should be demanded to satisfy the requirement of full disclosure, or whether individuals' versions of their own actions could be deemed enough. These differences were most powerfully illustrated in the case of the Boipatong massacre, where only seventeen applicants sought and were granted amnesty, although no further information was provided about the nearly three hundred other perpetrators involved in this brutal event, other than those who had subsequently died. Similarly, substantial evidence of police complicity in the event was simply never confirmed or denied. In other cases, the strong suggestion that police informers were involved could never be properly tested. In one such case, involving the murder of youth activist Sicelo Dlomo by his comrades on the suspicion that he was an informer (but where it was suggested that one of the murderers seeking amnesty may himself have been a police spy), a TRC investigator concluded that although it was known who killed Dlomo, the motive could not be established clearly. Elsewhere in this volume, Pigou makes the point that given the inadequate investigative capacity of the TRC, the quality of information gleaned in any particular case largely depended on the presence or calibre of the legal counsel for victims affected by particular amnesty applications. Furthermore, competing versions of whether specific acts were criminally or politically motivated, whether they were undertaken for personal reasons, such as revenge or pecuniary gain, or in the name of a known political

organisation, were seldom conclusively or consistently adjudicated by tl Amnesty Committees.

These are just a few among many examples of the practical failure of tl amnesty process to recover the uncontested truth about the past, in the w imagined by the Constitutional Court. It can be concluded that while the criteri of full disclosure may work to justify a conditional amnesty as a matter of leg principle, in practice it was virtually meaningless, as there was no consiste notion of what full disclosure constituted in any particular case. Rather th resolving the question, as mooted by the Constitutional Court, the operatio of the Amnesty Committees simply generated more debate on what mig constitute an adequate quality or quantity of truth to justify the granting amnesty. At best, full disclosure as a *quid pro quo* for amnesty, based as it was c the moral imperative of truth recovery that lay at the heart of the Constitutior Court's decision in the AZAPO case, is rendered as ill-defined in legal princip as it ultimately was in the investigative practices of the Amnesty Committees the TRC itself.

'Beyond a Reasonable Doubt': Legal Truth or Psychosocial Truth?

Despite the extent and significance of the debates on legal and constitutior principles described above, the major legal challenges to the TRC did not cor from frustrated victims but from threatened perpetrators. It is one of the riche ironies of the establishment of constitutional democracy in South Africa th the very people who formerly perpetrated gross violations of human rigl proved to be most adept at resorting to their constitutional entitlements protect themselves against exposure. The National Party's attempts to undermi the work of the TRC through the courts, on the grounds that it was biase have already been mentioned. Alleged perpetrators used a wide range procedural points in a similar way, threatening defamation suits, demandi prior notice if they were to be implicated, insisting on amnesty hearings bei held in camera, and so on. Ultimately, it was those who had most to hide w astutely sought constitutional protection, almost crippling the TRC by wrappi it up in costly and time-consuming litigation.

However, most of the legal and jurisprudential dilemmas faced by the TI were actually rooted in its own dual role as a fact-finding, quasi-judicial enterpr obsessed with forensic truth and verifiable information on the one hand, anc psychologically sensitive mechanism for victim storytelling and 'healing' on t other. This duality was manifest in the different approaches and roles of various committees. The Amnesty Committee operated more along quasi-judic

lines, constrained substantially by the demands of due process. By contrast, the Human Rights Violations Committee, in its public hearings, grappled constantly with two competing needs, namely, to give victims space to tell their stories in an uncensored manner, and to verify information. The results were mixed: sometimes the fact-finding objective was sacrificed totally in the name of psychological sensitivity towards the testifying victim; at other times, sharp cross-examination by Commissioners seemed to negate the 'storytelling' objective completely.

At the procedural level, most of the legal challenges to the Commission revolved around prior notification of those mentioned in the testimonies of others, and centred on the argument that those named or implicated as perpetrators should be given due notice and enjoy the constitutionally enshrined right to defend themselves. This exacerbated tensions in the Human Rights Violations Committee, by thrusting it on the path towards adversarial and procedure-bound fact-finding, or by encouraging self-censorship on the part of victims, who were concerned about potential defamation suits. These legal challenges clearly had a negative effect on the 'culture' of the hearings. They also raised the spectre of the earlier Goldstone Commission of Inquiry, which had become bogged down procedurally for over three years, investigating just eleven incidents of public violence. Needless to say, the Human Rights Violations Committee simply could not afford such a legally-oriented approach, especially considering its obligation to hear in public or take statements from over 20 000 victims. The very objective of the truth-recovery process – to produce public knowledge – would have been compromised.

It may be that the two processes – quasi-judicial fact-finding versus victim-centred storytelling – were fundamentally irreconcilable, and for a simple reason: different kinds of truth were at stake. The 'formal' truth sought through legal process is a testimony constrained by the legal rights of others, subject to strict criteria of verification, and often deliberately shaped by an agreed universe of facts or information (for example, in plea-bargaining exercises or where defence and prosecution teams jointly establish an 'agreed statement of facts'). Such formal truth recovery for the purposes of establishing criminal liability is ostensibly based on objective criteria ('beyond a reasonable doubt'), and excludes any contextual information that cannot be demonstrated to have had a direct impact on the experience or activities of the individual testifying or being tried. The substantive truth associated with sociological, psychological or historical investigation, however, while it may contain or be reduced to empirical information, also engages with and accommodates contradiction, recognises the validity of the subjective, and exists only in the wider universe of experience

which contextualises the actions and motivations of the protagonists. Where legal examination presumes that competing interpretations may be 'judged' b an objective standard and definitively resolved, historical or psychologic investigation presumes no such resolution, but rather recognises that there is n single, easily integrated truth, only competing versions. If the processes of soci and psychological healing can take place at all through the recounting of pa abuses and trauma, then they certainly cannot take their proper course if constant subject to the constraints of formal judicial process.

Any attempt to recover a suppressed and unwritten history shaped by pa conflicts (which in many respects endure at a local and personal level throughou the lengthy process of transition to democracy, rather than simply evaporatin in the course of the national negotiations), will inevitably have to engage wit these tensions and contradictions. Creative attempts to provide previousl silenced victims with a voice and to acknowledge their suffering publicly w often seem to be at odds with another fundamental objective of the transitio which is to restore the popular credibility of procedural justice. For this reaso it is imperative that victims and survivors are well organised and that the voices are rendered audible directly, rather than allowing politicians and polic makers to speak on their behalf and to cultivate collective truths abou forgiveness, reconciliation, reparation and retribution, which are actually qui remote from victims' realities, and frequently not even present in their testimonie

One of the most important lessons to be learned from the TRC is that grave disservice is done to victims by those who thus claim to speak on the behalf, whether in the name of punitive justice or in the name of reconciliatio In the process, the victims themselves are effectively silenced.

Much has already been said about the failure of punitive justice to serv victims as well as is often presumed. It should not be assumed that a tru commission could necessarily achieve more through 'reconciliation' (itself contested term). In both instances, the needs of victims are at risk of bei treated as uniform and static. By generalising and conveniently summarisi the expectations of victims, their complex, inconsistent human identities a diminished, and the extent to which needs vary from victim to victim ar change over time is ignored. Generalised claims that victims are willing to forgi perpetrators who confess, or that they are merely seeking acknowledgeme and symbolic reparation, are no more reliable than similarly broad claims th victims need or demand punitive justice.[22]

The discourse of 'forgiveness' embroidered much of the Commissio work, informing the predominantly Christian religious character of i proceedings and permeating media reports on the public hearings. The onero

expectation was consequently created that reconciliation depended on the victims' ability to forgive. In truth, the TRC was no more about forgiveness on the part of victims than it was about contrition on the part of perpetrators seeking amnesty. If the Commission did offer an opportunity for dealing with the wounds of the past and for healing, then expressions of anger and the desire for revenge (rather than forgiveness) might in fact have done more to effect the sort of recovery that enables 'victims' to redefine themselves as 'survivors'. It is equally arguable that true reconciliation in South Africa will more likely be achieved by integrating the anger, sorrow, unresolved trauma and other complex feelings of victims, rather than by subtly suppressing them.

A proper evaluation of the TRC reveals that the victims' needs were complex, in keeping with the complex human identity, and shaped by the enduring and complicated impact of trauma. What some craved more than anything else was the basic information about disappeared relatives, while others sought widespread acknowledgement of their torture. Some sought direct confrontation or a mediated encounter with the perpetrators responsible for their suffering, while others only wanted to know about the systems and the chain of command that led to the abuse. Some rejected the TRC enterprise entirely and demanded full justice, others were magnanimous in their ability to forgive the perpetrators and move on. The needs of some were intensely personal and private, whereas others needed to be acknowledged by their community or vindicated politically.

The needs of individual victims also changed over time. When they first testified, many sought no more than acknowledgement and symbolic reparation, but once a perpetrator had confessed to killing their loved ones, or sometimes merely through the passage of time, some of these needs understandably changed. Similarly, as the prospects of material reparations became more real, so some victims began to demand monetary compensation. In many other instances, when the TRC failed to uncover the facts, make proper investigations, or add new knowledge to what was already known, some victims became embittered and disillusioned. All of these needs are legitimate, necessary and integral – rather than contrary – to building reconciliation in a historically traumatised society.

One central lesson from all this concerns the importance of support structures for victims and organisations to speak on their behalf, especially as the architects of the commission and the commission itself may be too willing to make political compromises. In Argentina and Chile, survivors only found an organisational voice once the findings of their truth commissions had left them dissatisfied and angry. In South Africa, by contrast, some support groups and other civil organs were organised early on, and so were able to articulate the

needs and demands of victims during the life of the Commission and shape the process as it unfolded.

These support structures played a critical role in complementing the TRC's own initiatives to provide direct emotional support for victims who relived their traumas through their testimony. While the Commission's psychological support to victims may have been limited, the mere recognition of the need for an integrated victim aid and empowerment component was significant.[23]

However, there is a trite and convenient truth proffered by many observers of the TRC about the relationship between victim testimony and healing, which also demands greater critical scrutiny. It should be acknowledged that simply testifying or telling the story does not necessarily entail psychological healing or reconciliation.[24] The frequent assumptions that publicly shed tears – usually framed by the television cameras that take in the backdrop of the TRC's banner stating that 'Healing is Revealing' – are necessarily accompanied by some sort of *catharsis* on the part of testifying victims, also need to be debunked. Survivor testimony was frequently associated with high expectations, which reached beyond merely seeking the acknowledgement of an official truth-finding body. Many survivors came before the TRC expecting to gain additional information or have their own versions and understandings of events actively confirmed. The three survivor stories of Duma Khumalo, Thandi Shezi and Sylvia Dlomo-Jele recounted in this volume all illustrate the potentially devastating impact of the failure to deliver on these expectations – whether through half-truths recovered contrary versions uncovered, or the subjective reality simply being covered up. The unresolved trauma brought out in this process may in fact lead to destructive and damaging responses rather than cathartic healing, making it all the more important that sustained psychological services are offered to victims who testify once they are out of the glare of the television cameras and beyond the reach of popular voyeurism.

The TRC's provisions for reparations were particularly important as far as victims' expectations were concerned. The question of what survivors wanted and needed was hotly debated, although the views of the victims themselves were not often heard. Not surprisingly, victims' needs and expectations in this regard were particularly complex and often contradictory, rather than neat and consistent, as was often suggested. Some victims simply expressed a desire for symbolic reparations, such as a tombstone to commemorate the death of a loved one, while others demanded financial assistance to compensate for the loss of a breadwinner. Some sought scholarships for the dependants of those who were killed or had disappeared, but others rejected any form of reparation as an inadequate substitute for punishment of the perpetrators.

In whatever form, the idea of state-sponsored reparation was implicitly and explicitly central to the constitutional status of the TRC. Notionally, the constitutionality of the Commission's amnesty provisions rested on the idea that the state would provide reparation to survivors in lieu of the compensation or damages they could otherwise have been entitled to claim from perpetrators, but which the granting of amnesty had denied them. This was also explicit in the judgement of Justice Didcott in the AZAPO case. The TRC was committed to providing reparations, although these would obviously fall far short of the potential monetary compensation payable from any successful civil claims. However, unlike the Amnesty Committee, whose decisions were subject to review by a court of law only, the Reparation and Rehabilitation Committee was only empowered to make recommendations or set policy guidelines, which remained dependent on the political will and financial capacity of government to implement. In theory, reparations would not just take the form of monetary compensation for individual victims, but would focus primarily on collective and often symbolic measures. Another priority would be services and counselling for those who testified.

Given the magnitude of historical oppression in South Africa, the new democratic state could easily be bankrupted if it tried to meet these obligations in respect of all victims of abuses perpetrated in the name of its apartheid predecessor. However, an exclusive focus on monetary compensation for the 22 000 victims who appeared before the TRC would equally present serious moral and political dilemmas, based upon a selective engagement with the past. That aside, the state of the social welfare services illustrates the grave difficulties the new government faces in translating any creative or visionary reparations policy into meaningful services and benefits. The limited 'reach' of the state suggests a vital need to transform inherited governmental welfare services along with the institutions of the criminal justice system, as already discussed. Government is highly unlikely to satisfy the recommendations of the TRC in respect of reparative measures for victims, and to date has failed to produce even a policy on the implementation of reparative measures – ostensibly because the TRC has not finished its final report.

Government's inertia on this matter undoubtedly raises questions about the soundness of the Constitutional Court's perspective. Not only can questions be asked about whether or not the criterion of full disclosure has been satisfied in the course of the TRC process, but when this is set alongside the failure of any governmental delivery mechanisms for reparations, then the two main grounds upon which the Constitutional Court held the amnesty provisions to be constitutional appear to be very shaky. There is reason to be apprehensive. In response to a request from some victims for urgent assistance, the Reparation

Committee tabled a draft policy on urgent interim reparations as early as March 1997. Only eighteen months later, just weeks before the publication of the TRC's interim report, did government finally deliver some limited forma assistance of this sort to a relatively small group of victims.

It must be said that the question of reparation is extremely complex, especially in a country like South Africa, which has competing developmental concerns and severely limited financial resources. It is also an intractable problem considering that the TRC relies on government to implement any proposals it makes on reparation. There is an unresolved tension between individual needs and demands on the TRC on the one hand, and the economic and political rationale that underpins communal reparation on the other. To put it another way, there is tension between reparation for individual victims of gross violations of human rights as defined in the Act, and the new government's concern to redress historically entrenched inequities more generally. In this regard, the TRC has also been criticised for not confronting the economic beneficiaries of apartheid adequately, at least partially as a consequence of the Commission's mandate and preoccupation with establishing political responsibility for past violations, and despite the fact that the TRC did hold special hearings on the role of the business community under apartheid.

The issue of material compensation or reparation for victims raises countless difficulties that are also embedded in the subjective experiences and expectations of various survivors. Some victims resent the fact that they need to prove they qualify for reparation at all, or that their suffering may be quantified monetarily. Yet different victims may require different reparation packages. The complex questions of how to differentiate between them without compromising the even-handedness of the Commission, or of how to compensate thousands of people with different needs, most of whom are impoverished, but without placing an untenable burden on the state, have not been answered by the TRC. Victims' needs for reparation are expressed individually, but the more individualised the process becomes, the more difficult the debates to which it gives rise and the more complex the task of implementation. However, strictly collective or symbolic reparations, such as monuments or memorials, do not adequately address many individual needs.

The TRC tended to underestimate the expectations of victims for monetary compensation, often because of the selective representation of victims as willing to 'forgive' or to accept purely symbolic reparation. In fact, the TRC did not adequately monitor the changing needs and expectations of many victims, who will certainly not be satisfied with symbols, and are extremely sceptical of the government's commitment to providing direct compensation.

Conclusions

If the South African TRC may be viewed as an innovative exercise in restorative justice that sought to place victims at the heart of the negotiated transition, then it did so on the basis of a perspective on the past that effectively selected a specific category of victims and perpetrators of violence who were deemed to be political. Indeed, the controversy that continues to rage about reparations revolves around the concern that this category of victims may be 'privileged' relative to the wider communities that suffered the structural violence, the denial of opportunity, and the daily violations and displaced violence of apartheid.

It is striking how the amnesty process, because of its exclusive concern with violent acts committed for a political motive, confronted the blurred dividing line between 'political' and other forms of violence under apartheid, in seeking to determine who was eligible for amnesty and who was not. The Human Rights Violations Committee did briefly confront the sponsored involvement of criminal gangs in political assassinations, and thus the blurring of the boundary between political and criminal violence. Yet the Amnesty Committee daily took decisions that sought to sustain this boundary as a clear demarcation bisecting South Africa's orthodox political history.

Thus, in the case of the Boipatong massacre, an Inkatha Freedom Party member was granted amnesty for the killing of an eight-month-old baby along with its mother. In answering questions about this during the hearing, the applicant proffered by way of explanation the argument that 'a snake gives birth to a snake', suggesting that if the mother was a political enemy, then so too was the baby. There are even more significant illustrations of the dilemmas that confronted the Amnesty Committees in their adjudication of which acts were deemed to be political and which not. In some cases involving 'necklace' murders and mob violence, amnesty was granted on the basis of the 'implied authority' of political parties; yet in others, such as the assassination of ANC and SACP leader Chris Hani by two white right-wingers, no political authority was found to exist, and so amnesty was refused. In some cases, amnesty was refused on the grounds that money had been paid to the assassins of political opponents, suggesting financial motives that were personal, whereas in other cases it was held that financial bonuses paid to state agents for their acts of violence did not supersede their political motives.

Perhaps the most important contradiction that played itself out in the findings of the Amnesty Committees concerned the question of race or racism as a political motive for gross violations of human rights. In some instances, racial motivation was deemed to be 'political' or held in the name of a known political

organisation, while in others it was not, with the result that some were granted amnesty for such actions whereas others were denied it. The issue here is not whether the individual findings were 'fair' or not, but rather to point out that by 'privileging' acts of political violence, the ironic effect was to denigrate and mask such factors as race, class or gender as relevant and *self-explanatory* categories in understanding the dominant patterns and experiences of gross violence under apartheid.

At best, these amnesty decisions were unpredictable and arbitrary. At worst they entailed an unconscious selection process that sanitised the apartheid past of its uncomfortable lack of political orthodoxy. Historical patterns of conflict were represented in a way that effectively denied the presence of violent social movements that would never find a comfortable place in the orthodox lexicons. These were movements that were chillingly antisocial, yet were equally the product of the damage done by apartheid's seismic dislocation, dispossession and industrialisation. Perhaps the most disturbing of these movements were those that adopted the discourses and practices of social banditry – precisely because they migrated so easily across the boundaries of crime and politics, between aspirations to social equality and antisocial violence.[25]

The simple political narrative that remains is striking in the way it cleanses both liberation politics and state violence – associated as they were with the fortunes of particular political parties and movements – of the criminal pathologies of South Africa's particular social dislocation. The prevalent violence of everyday social life finds little complex expression in this version of the past, which simply ignores the extent to which the apartheid system that criminalised politics simultaneously politicised crime.

In this context, it is simplistic to describe South Africa as a 'post-conflict' society in the wake of the TRC. Instead, the real challenge lies in grappling with and monitoring continuity and change in the patterns of social conflict that continue to dominate the democratic South Africa, and the easy slide between political and criminal violence that has always complicated analysis of South African life, but which may have been shrouded rather than exposed by the TRC. In seeking to meet this challenge, this paper points to some of the (perhaps inevitable) limitations of the TRC as a *restorative justice* mechanism in the true sense of the term, because of its historical imperative and its explicit mandate to deal with the issues of violence and reconciliation exclusively by reference to political responsibility, narrowly defined.

Proper evaluation of the efficacy of *transitional justice* mechanisms such as the TRC must therefore be situated within the specific context of transmuting patterns of violence. This perspective demands a shift in the debates on transitional

justice, from an exclusively retrospective scrutiny of past injustices, important as this is, to a strategic and proactive engagement with the challenges that face justice institutions in newly emerging democracies, where patterns of violence and social conflict change, rather than simply being brought to an end by political settlements, and where the lines of social cleavage at the heart of such historical violence are redefined rather than simply staying the same. Such an approach demands an engagement both with the past and with the future, and insists not only on a scrutiny of justice in transition, but of violence in transition as well.

This analysis has profound implications for how we understand the roles and challenges of transitional justice interventions, including the South African TRC. In particular, it suggests the need for a less simplistic or theoretical understanding of the dangers of impunity in society, as opposed to one simply premised on the need for compliance with the principles of public international law (vital though this is).

In the final analysis, it remains difficult to draw clear-cut conclusions about the TRC, although evidently it has not made quite the contribution to reconciliation claimed by its most ardent supporters and assumed by international audiences from a distance. Certainly, it would be a grave mistake to judge the whole TRC by the obvious shortcomings of its final report, which simply cannot hope (and does not pretend) to reflect the full complexity of thirty-five years of history. The great value of the TRC lay in the process rather than the published end product.

We should also guard against a 'sanitised public transcript' which suggests that anger, vengeance, or violent conflict are absent from post-apartheid South Africa. There is a grave risk that out of the testimonies and confessions of a few, a truth will be constructed that disguises the way in which black South Africans, who were systematically oppressed and exploited under apartheid, continue to be excluded and marginalised in the present. The sustained or growing levels of violent crime and antisocial violence, which appear to be new phenomena associated with the transition to democracy, are in fact rooted in the very same experiences of social marginalisation, political exclusion and economic exploitation that previously gave rise to the more 'functional' violence of resistance politics. The fundamentals of social and economic justice were untouched by the TRC.

One of the stated aims of the TRC was to ensure that gross violations of human rights do not occur again in South Africa. In evaluating its achievements in this regard, we must not assume that social conflict will play itself out along the same political and racial lines as in the past. On the contrary, it might express itself through new forms of violence.

Indeed, there is a real possibility that the TRC, by granting amnesty t confessed killers, may actually have contributed to the sense of impunity tha fuels the burgeoning rate of violent crime.[26] This phenomenon is not unique t South Africa: violent crime has flared in many countries after the transition t democracy, and in many newly deregulated and emerging economies onc 'political' violence has decreased. In fact, this phenomenon might contain th most fundamental lessons we can learn about the nature of societies in transitio from autocracy to democracy.

Indirectly, violent crime now poses the gravest threat to an embryonic huma rights culture in South Africa. Understandable popular hysteria and moral pani about the levels of violence have begun to generate a backlash against huma rights, which are perceived as serving the perpetrators at the expense of th victims. The possibility that this backlash might thwart efforts to change th institutional culture of the criminal justice system is nowhere clearer than in th sustained levels of police brutality, torture and deaths in police custody – form of violence that reflect unfortunate continuities amidst all the changes takin place in South Africa.[27]

There are undoubtedly times when countries may have to sacrifice lega principles in the name of political pragmatism, in order to end war or achiev peace. However, when amnesty is granted with scant regard for its impact o the credibility of the criminal justice system and its processes, we breathe lif into the sense of impunity at the heart of criminal behaviour. At some poin someone will have to bear the moral responsibility, not only for the 'political violence of the past, but for the 'criminal' violence of the present. Ultimately, i the rhetoric of reconciliation is to be translated into reality in South Africa, w will have to go beyond formal political and constitutional change to tackle th deep-seated social imbalances that underlie the culture of violence at the mos fundamental, structural level.

Notes

1. This paper is based on an earlier version written in October 1998, immediatel prior to the publication of the TRC's interim report.
2. See A. Boraine, 'Reining in Impunity for International Crimes', in C.C. Joyne and M. Cherif Bassiouni (eds), *Reining in Impunity for International Crimes an Serious Violations of Fundamental Human Rights: Proceedings of the Siracus Conference, 17-21 September 1998* (Siracusa, 1998), pp. 221-4; G. Simpson 'Proposed Legislation on Amnesty/Indemnity and the Establishment of Truth and Reconciliation Commission', Submission to the Minister of Justic for South Africa (Johannesburg, 1994); G. Simpson and P. van Zyl, 'Sout

Africa's Truth and Reconciliation Commission', *Temps Moderne*, 585 (1995); G. Simpson and P. van Zyl, 'Witch-hunt or Whitewash? Problems of Justice in Transition in South Africa', Centre for the Study of Violence and Reconciliation (CSVR) Occasional Paper (Johannesburg, 1997).

3. *Ubuntu* is the mainspring of the African humanist world-view, an attitude of tolerance and empathy grounded in the interdependence of the individual and the collective. It is conveyed in the expression: *'Motho ke motho ka batho babang'* – 'A person is a person through other people.'
4. My emphasis. Section 251, Constitution of the Republic of South Africa Act, No. 200 of 1993.
5. Section 232(4) of the Act makes the 'postscript' a binding part of the interim Constitution.
6. See G. Simpson, 'Blanket Amnesty Poses a Threat to Reconciliation', *Business Day*, 22 December 1993.
7. For a brief discussion of the broadly based definitions of 'state security' in South African legislation under apartheid, and for a partial description of the range of this legislation, see S. Africa, 'An Assessment of National Security Legislation in South Africa', Military Research Group (unpublished, 1992). Also see R. Williams, 'Covert Action and Democracy: General Considerations and Concepts', Military Research Group (unpublished, 1991).
8. Memorandum by the Parliamentary Committee of the General Council of the Bar of South Africa, October 1992, pp. 1-2.
9. No. 34 of 1995.
10. To qualify for amnesty a person had to satisfy two basic requirements. In terms of section 20(1)(c) of the Promotion of National Unity and Reconciliation Act, the person had to fully disclose all acts for which amnesty was being sought. Full disclosure might entail providing evidence on the activities of co-conspirators or those who gave the orders for the offences in question. Further, the offence had to meet the criteria prescribed in the Act. Sections 20(2)(a)-(f) specified four broad categories of person who could apply for amnesty:
    1. A member of a publicly known political organisation or liberation movement who waged a struggle against the state or any former state (referring specifically to former 'homelands' or 'Bantustans') or another publicly known political organisation or liberation movement.
    2. An employee or member of the 'security forces' of the state, or any former state, who attempted to counter or resist a struggle being waged by a member of a publicly known political organisation or liberation movement.

3. An employee or member of the security forces of the state who engage in a political struggle against a former state or vice versa.
4. Any person involved in a *coup d'état* or attempted *coup d'état* against former state.

In terms of section 20(3), the Amnesty Committee had to consider all c the following criteria in order to make its determination:

1. The motive of the person who committed the act.
2. The context in which it occurred.
3. The legal and factual nature of the offence, including its gravity.
4. Whether the person was following orders.
5. The relationship between the act and the objective pursued.
6. The proportionality of the act to the objective pursued.

Anyone who acted for personal gain (section 20(3)(i)) or out of persona malice, ill will or spite (section 20(3)(ii)) would not be granted amnesty.

11. Since contrition was not a requirement for receiving amnesty, on commentator noted dryly that most perpetrators came forward not becaus they had 'seen the light' but because they 'felt the heat'.
12. Constitution of the Republic of South Africa Act, No. 200 of 1993.
13. By 'abstract', the Court did not imply that the rights were purely theoretic or could not be claimed against the state, but rather that they were largel impossible to exercise in practice. The same might be said of civil claim which may be severely impaired in practice because South African rules c prescription dictate that such claims prescribe after three years.
14. In South Africa, the four-year negotiation period allowed for the systemati destruction of incriminating documents. Evidence suggests that the Nation Intelligence Service was still destroying files in 1996, two years after th first democratic elections. See G. Simpson, 'Truth Recovery or McCarthyisr Revisited? An Evaluation of the Stasi Records Act of 1991 with Referenc to the South African Experience', CSVR Occasional Paper (Johannesbur 1994).
15. The following paragraphs draw extensively on Simpson and Van Zyl, 'Witch hunt or Whitewash?'
16. See L. Huyse, 'To Punish or Pardon: A Devil's Choice', in Joyner an Bassiouni (eds), *Reining in Impunity*, pp. 79-90; and G. Wakjira, 'Nationa Prosecution: The Ethiopian Experience', in Joyner and Bassiouni (eds), *Reinin in Impunity*, pp. 189-92.
17. The case in which a Spanish court sought to extradite Pinochet from Britai demonstrates the failure of blanket amnesties, and once again reveal

limitations in the Constitutional Court's assessment of the importance of international law in relation to domestic amnesty arrangements.

18. For greater insight into the debates in international law, see D. Orentlicker, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, C (1991), pp. 2537-615; and N. Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Gross Human Rights Violations in International Law', *California Law Review*, 78:2 (1990), pp. 449-513. For an examination of the debate in the South African context, see F. Cachalia, 'Human Rights in Transitional Situations: Towards a Policy Framework', Centre for Applied Legal Studies, unpublished paper (Johannesburg, 1992); and contrast this with 'South Africa: Accounting for the Past: Lessons from Latin America', *Africa Watch*, IV (1992).
19. See Orentlicker, 'Settling Accounts'.
20. Cachalia, 'Human Rights in Transitional Situations', pp. 1-2.
21. It is a matter of considerable debate as to how (or whether) the Amnesty Committee applied the criterion of 'full disclosure'. Saino has argued that it was inconsistently applied, at best, and occasionally quite arbitrarily defined. See M. Saino, ' "Gone Fishing": An Initial Evaluation of the South African TRC's Amnesty Process', CSVR Occasional Paper (Johannesburg, 1998). Also see the TRC website at www.truth.org.za/amnesty for details of amnesty decisions.
22. On this and the perspectives that follow, see Centre for the Study of Violence and Reconciliation and Khulumani Support Group, *Submission to the TRC: Survivors' Perceptions of the TRC and Suggestions for the Final Report* (1998). This report is based on eleven reconciliation and rehabilitation workshops undertaken by the CSVR between 7 August 1997 and 1 February 1998. The CSVR also produced two documentary videos, detailing victims' expectations of the TRC at the beginning of the process and re-evaluating them one year later. See H. Han and L. Segal, *Khulumani – Speak Out!*, CSVR video (Johannesburg, 1995); and L. Segal, B. Hamber and H. Han, *SisaKhuluma: We Are Still Speaking*, CSVR video (Johannesburg, 1997).
23. B. Hamber, 'The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African TRC', *American Image*, LV (1997).
24. See B. Hamber, 'Dealing with the Past and the Psychology of Reconciliation: The TRC – A Psychological Perspective', paper presented to the 4th International Symposium on 'The Contributions of Psychology to Peace', Cape Town, 1995; B. Hamber, 'Do Sleeping Dogs Lie? The Psychological Implications of the TRC in South Africa', CSVR Occasional Paper

(Johannesburg, 1997); B. Hamber and S. Lewis, 'An Overview of th Consequences of Violence and Trauma in South Africa', CSVR Occasion Paper (Johannesburg, 1997).

25. See G. Simpson, 'Shock Troops and Bandits: Youth Crime and Politics', i J. Steinberg (ed.), *Crime Wave* (Johannesburg, Wits University Press, 2001
26. See G. Simpson, 'A Culture of Impunity', *Star*, 24 January 1998.
27. There were 737 reported deaths in police custody or as a result of polic action during the twelve-month period from April 1997 to March 1998. A total of 429 deaths were reported in the six months from January to Jun 1998. D. Bruce, I. Liebenberg and R. Atkins, 'Towards a Strategy fc Prevention: The Occurrence of Deaths in Police Custody or as a Result c Police Action', Report for the Independent Complaints Directorate (1998