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RAKATE

TRANSITIONAL JUSTICE IN SOUTH AFRICA AND THE FORMER YUGOSLAVIA –A CRITIQUE**

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"Out of the crooked timber of humanity no straight thing was ever made"

Emmanuel Kant[1]

INTRODUCTION

"Never again!" was the message that characterised the Nuremberg and Tokyo Military Tribunals responsible for prosecuting Nazi war criminals after the Second World War. Fifty years after Nuremberg, a bloody civil war broke out in the former Yugoslavia claiming the lives of thousands of ordinary civilians, especially women and children. In December 1995 the Dayton Peace Accord was signed by the warring parties in the Balkans purportedly with the message "never again will the horror of Bosnia be repeated." Three years later the horror of Bosnia is repeating itself in Kosovo. During the 1994 genocide in Rwanda it is estimated that between 500 and 1 Million or more people were killed in a period of three months. The genocide in Rwanda occurred after the failure of the 1993 Arusha Peace Accord.

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[1] Paraphrased by Isaiah Berlin "Two Concepts of Liberty" in *Four Essays on Liberty* (1969) 170.

HWS 347

When a country emerges from a period in which there have been human rights abuses one of the questions that arises is how to deal with the past. In this regard there are two broad approaches:

(i) First, an approach based on *retributive justice*, that is, to punish perpetrators of human rights abuses through criminal trials; or

(ii) Second, an approach based on *restorative justice*, that is, reconciliation and amnesty through a truth-telling process.

Which approach is adopted will depend on the nature of the transition. Nevertheless, this paper compare the United Nations *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) with the South African Truth and Reconciliation Commission (TRC), because the ICTY adopts the first approach (retributive justice) and the TRC the second approach (restorative justice). The question then is: which is the better approach? The underlying theme of the paper is to evaluate the prons and cons of truth-telling and prosecution as forms of transitional justice in South Africa and the Balkans and the lessons to be learned therefrom.

As we approach the end of the millennium, many societies are confronted with the challenge of transition to democratic rule. The consequences of South Africa's negotiated settlement was a peaceful transition from a minority to majority rule. Why a comparison of South Africa and the former Yugoslavia? Apartheid in South Africa and genocide in the Balkans constitute crimes against humanity. Moreover, attempts

to create international criminal tribunals for South Africa[2] and the former Yugoslavia[3] to prosecute for crimes committed in both countries did not succeed.

Although a considerable amount of comparative research about truth commissions has been conducted, little research has apparently been undertaken on the relationship between *domestic* truth commissions and the *international* criminal justice system.[4] However, this may be attributed to the fact that the Nuremberg and Tokyo Military Tribunals, unlike the ICTY, have been criticised for administering "victor's justice." It is estimated that since 1974 there have been nearly twenty truth commissions.[5] However, it is important to note that each truth commission is *situation specific*, and the South African Truth Commission is no exception.

On 29 October 1998 the South African Truth and Reconciliation Commission handed a *Final Report* to the President, Nelson Mandela, in which it found all the parties involved in the conflict responsible for gross human rights violations between

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[2] In 1980 the UN Commission on Human Rights appointed an *ad hoc* Working Group of Experts to investigate possible ways of implementing the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973). The *ad hoc* Committee of Experts was of the view that, since apartheid was a crime against humanity, the creation of an international criminal court was an appropriate mechanism to enforce the convention. In its report, the Committee of Experts attached a draft statute for the proposed criminal tribunal. However, the proposal was never endorsed by the UN Commission on Human Rights because of the Cold War. See Commission on Human Rights, Thirty-Seventh Session, UN Doc E/CN. 4/1426, 19 January 1981.

[3] After the assassination of Gavrilo Princip, in 1934, the Yugoslav authorities drafted a treaty to outlaw international terrorism and to create an international criminal court. Subsequently states lost an interest in this matter and only India signed the treaty. See John Dugard "Obstacles in a Way of an International Criminal Court" (56) *Cambridge Law Journal* (1997) 329.

[4] See e.g., Daan Bronkhorst *Truth and Reconciliation Obstacles and Opportunities for Human Rights, Amnesty International* (1990); Priscilla Hayner "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study" (16) *Human Rights Quarterly* (1994) 597, Priscilla Hayner "Commissioning the Truth: Further Research Questions" (17) *Third World Quarterly* (1996) 19.

[5] Priscilla Hayner is presently working on a book on twenty truth commissions. See Timothy Ash "The Truth About Dictatorship" *The New York Review*,19 February 1998) at 35.

1960 and 1994.[6] The Amnesty Committee of the TRC will continue to hear amnesty applications of perpetrators of gross human rights violations until 1999. The progress of the South African Truth Commission is probably one of the success stories of domestic truth commissions. Unlike truth commissions in Latin American countries, the TRC has the power to grant amnesty and to subpoena witnesses to appear before the Commission. Its victim-hearing process has been larger than that of any other truth commission and has benefited from the input from civil society through institutional hearings.[7] Although considerable progress has been made there is still room for improvement on the South African model for any society in transition which may opt for a truth commission in future. For example, in 1998 political parties in Guatemala decided to create a *Commission for Historical Clarifications* to deal with the legacy of the past after a civil war.[8] These developments have made some scholars suggest that the creation of a permanent international truth commission would be a good idea.[9]

I. The Meaning of Transition in South Africa and the Former Yugoslavia

Andrea Bonime-Blanc[10] defines "transition" as referring to "a period of reformist change between regimes - not to a change of government within the same constitutional framework nor to a revolutionary transformation." Each transition is unique and depends on the socio-political dynamics of each society; hence it would be

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[6] See *Truth and Reconciliation Commission of South Africa Report* (1998), Vol. 1, Ch. 1. para 24.

[7] *Ibid*, Vol. 1, para 24-30.

[8] *International Herald Tribune*, 25 July 1998 at p.1.

[9] Michael Scharf "The Case for a Permanent International Truth Commission" (7) *Duke Journal of Comparative & International Law* (1997) 375.

[10] Andrea Bonime-Blanc *Spain's Transition to Democracy* (1987) 8-9.

unscholarly to have a general theory of transition to democratic rule. In this paper it is argued that South Africa is in transition after the demise of *apartheid*, and the former Yugoslavia is in a transitional phase after the fall of *communism* in Eastern Europe. It may well be argued that Yugoslavia is not a society in transition, since there was no change of government after the disintegration of the federation in 1991. The Balkan crisis, in my view, is one example of a case where a society could not "manage" or "accommodate" its transition from communism to democratic rule. Despite the Dayton Peace Accord and the existence of the ICTY, the war between Serbian forces and the Kosovo Liberation Army (KLA) led by ethnic Albanians continues in the Serbian Province of Kosovo. Political leaders of the now independent republics of Yugoslavia, Slobodan Milosovic of Serbia-Montenegro, President Franjo Tudjman of Croatia and President Alija Izetbegovic of Bosnia-Herzegovina, are still leaders in their respective republics. It may be argued that this in itself would make it difficult to refer to the former Yugoslavia as a transitional society. However, I believe that to the extent that the existence of the ICTY is geared towards bringing peace and justice in a post-war era, the former Yugoslavia is in a transitional phase.

II. Responses Towards Human Rights Violations in Transitional Societies

An intractable problem common to societies in transition is how to reckon with the legacy of the past and pave the way for a new era. Dealing with past human rights violations is indeed a daunting and challenging exercise for any nascent democracy. This challenge is characterised by conflicting interests and considerations. Should perpetrators of gross human rights violations be subjected to prosecution, or given amnesty? What is the optimal way of achieving justice for victims of human rights violations, and due process for perpetrators? How does one

balance reconciliation and the reconstruction of society? How will this impact on stability and peace? Facing this challenge involves making hard choices between blanket and conditional amnesty, and between prosecution and reparations; choices recognising the need to create a culture of human rights as opposed to a culture of impunity. Choices must be made between vengeance and peaceful co-existence, between retribution and restorative justice, between fears and legitimate expectations, and often these decisions have a direct impact on competing needs, with limited resources available. These factors play a major role in fragile democracies.

Transition from an authoritarian to a democratic form of government is a difficult exercise for any society. The dilemmas of transitional justice are complex and vary from one country to another. In the words of Neil Kritz, "[t]hese issues of transitional justice are highly charged flashpoints in many countries emerging from repression, with societal wounds still open and in need of treatment."[11]

Is there an appropriate model for dealing with a bitter past? What is the optimal way of achieving justice within the context of transition? Why should a democratic government deal with past human rights violations? Luis Aquirre[12] says:

> "To answer these questions we need a social and political map, a factual history, and the answers to our "why?." It is, therefore, essential to know what happened, how people acted during this particular period in history,

[11] Neil Keitz (ed) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes (Country Studies)* (vol. 2) xxx.

[12]Luis Aquirre "The Consequences of Impunity in Society" International Meeting on Impunity of Perpetrators of Gross Human Rights Violations organised by the Common Nationale Consultative, Des Droits de L' Homme and the Internationale Commission of Jurists, held under the auspices of the United Nations, Geneva, Switzerland, 2-5 November 1992 at 107.

> how some tried to resist, how the people were subdued, how rights were violated, by whom, when, where and why, and to know how we managed essentially to escape the nightmare. In short, it is necessary to hold onto this sad but very important story so that we may learn a lesson, draw conclusions, be able to look into each other's eyes without shame, and move towards the future."

The end goals of transitional justice in general should be to prevent similar recurrence of human rights violations in future; to repair the damage caused through systematic patterns of human rights violations; to uphold the rule of law; to recognise the human dignity and worth of those who have been victimised by conflicts and to create a stable and governable political environment.[13]

In most cases, new governments have limited choices in dealing with past human rights violations - they may either punish those responsible for heinous crimes, or grant them amnesty.[14] Is there a single method for dealing with the past? There are two methods commonly adopted by societies in transition. First, there is an official mechanism in the form of a *Truth Commission.*[15] The main purpose of such a commission is to investigate the *truth,* within a limited space of time, about past human rights violations and to issue a comprehensive official report about its findings and recommendations.[16] The second is to prosecute those responsible for past human

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[13] See Aryel Neier in Alex Boraine, Janet Levy & Ranel Scheffer (eds) *Dealing with the Past: Truth and Reconciliation in South Africa* (1994)1; Jose Zalaquett in *Transitional Justice* (Vol.3), *supra.*

[14] See Luc Huyse "Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past" (1) *Law & Social Inquiry* (1995) 20.

Priscilla Hayner "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study" 16*Human Rights Quarterly* (1994) 657, 604 ("Most truth commissions are created at a point of political transition within a country, used either to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and to obtain or sustain political legitimacy").

[16]Priscilla Hayner, *Ibid* ("...[A] truth commission includes four primary elements. First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but

rights violations. Such an option could take the form of a domestic prosecution or an *ad hoc Criminal Tribunal.*[17] The main function of such a tribunal would be to prosecute those alleged to have committed gross human rights violations. It is important to distinguish modern criminal tribunals and truth commissions from some of the highly abusive post- transition tribunals in which their purpose was to kill and instil terror in the representatives of old regimes, such as *ad hoc* military tribunals.

Failure on the part of a new government to deal with past human rights violations often has drastic consequences for the birth of the new society. It is important for a society to reconcile itself with its past. A society which deliberately ignores its past human rights violations is sitting on a bomb which may go off at any time. The 1994 genocide in Rwanda is an example of what could happen to a society which ignores its past.[18] As Archbishop Desmond Tutu, chairperson of the South African Truth and Reconciliation Commission puts it:

> "[E]xperience worldwide shows that if you do not deal with a dark past such as ours, effectively look the beast in the eye, that beast is not going to lie down quietly, it is going as sure as anything, to come back and haunt you horrendously."[19]

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attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report").

[17]Examples of international criminal tribunals include the International MilitaryTribunal of Nuremberg and Tokyo and more recently the two UN *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

[18]Gerard Prunier *The Rwanda Crises: History of a Genocide* (1997) Ch. 5.

[19]Cited in Richard Goldstone "Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals" Hauser Lecture, New York University, 22 January 1997 (on file with the author).

In a similar vein, Jose Zolaquett is of the opinion that "... leaders should never forget that the lack of political pressure to [raise] these issues does not mean they are not boiling underground, waiting to erupt. They will always come back to haunt you. It would be political blindness to ignore the fact that examples of this abound world-wide." [20] In that sense, societies which deliberately ignore the legacy of past human rights violations such as Rwanda and the former Yugoslavia leave behind myths, half - truths, speculations, guilt and denials. These uncertainties create a "thick wall" between perpetrators and victims. Such a "thick wall" results in a shaky foundation for a new society because "the beast is not looked in the eye." In order to "look the beast in the eye" it is important to know the causes of the problem, so as to deal with the symptoms.[21]

III. Prosecutions vs Truth-Telling as Forms of Transitional Justice

There are differing views as to whether the process of national truth and reconciliation or the prosecution of past human rights violations, is a better form of justice.[22] On the one hand, opponents of prosecution argue that truth-telling is important because it restores the dignity and respect of victims and their families. It

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[20]Jose Zolaquett in Boraine *et al* (eds) *Dealing with the Past* (1995) 14-15.

[21]Kader Asmal "Victims, Survivors and Citizens - Human Rights, Reparations and Reconciliation" (8) *SAJHR* (1992) 491 at 494; Kader Asmal *et al Reconciliation Through Truth* (1995) 9: "The majority of people in South Africa lived and breathed the truths of apartheid. They suffered the indignities and humiliation of statutory inferiority. They suffered the pain of being forced out of homes and off their land; away from their loved ones. They were imprisoned and detained in thousands. They require not revelations, but acknowledgement from the perpetrators and the beneficiaries.They require a collective renunciation, by society as a whole, of apartheid's acts, systems and beliefs").

[22]Regarding discussion on these arguments see generally Juan Mendez "Accountability for Past Abuses"(19) *Human Rights Quaterly* (1997) 255; Neil Kritz (ed) *Transitional Justice* (vol. 2) (various scholarly articles deal extensively with these arguments); Naomi Roht -Arriaza (ed) *Impunity and Human Rights in International Law and Practice* (1995) (various authors discuss the issue).

also promotes national unity and reconciliation. Most emerging democracies, so the argument goes, are still fragile, and any attempt to prosecute might jeopardise the chances of building a new democracy. In the case of South Africa, had the ANC insisted on prosecution it could have resulted in one of the bloodiest civil wars imaginable due to the threat posed by the security forces. Lack of tolerance led to a bloody civil war in the Balkans in 1991. Opponents of prosecution further argue that the truth revealed through trials is narrow compared to that exposed by a truth commission. This, however, will depend on the nature of the truth commission since truth commissions are situation specific. For example, in Uruguay, after a return to civilian rule, an agreement was reached by passing an amnesty law which provided that members of the military *junta* responsible for human rights violations would not be prosecuted.[23] In Brazil the military *junta* negotiated a pact with the new government that there would be no official inquiry into allegations of human rights abuses during military rule.[24] After a general election in Chile in 1983, President Raul Alfonsin appointed a National Commission on Disappeared Persons to investigate human rights abuses by the military *junta*. Although some of the members of the military *junta* were prosecuted for gross human rights violations, the commission could not reveal the truth of what had happened to those who had disappeared.[25] A common thread of truth commissions in Latin American countries such as Brazil, Uruguay and Chile is that although some of the members of the military were

[23] Neil Keitz, *supra*, Ch. 11.

[24] Neil Keitz, Ch. 12.

[25] Neil Keitz (ed) *Transitional Justice: How Ermeging Democracies Reckon with Former Regimes (Country Studies) (Vol. 2)*, Chs. 15 & 16.

prosecuted there was no truth revealed about what had happened to those who disappeared during the era of military rule.

Opponents of prosecution also contend that prosecution is selective in the sense that not all perpetrators stand trial. This could be, the argument goes, due to a lack of sufficient evidence to warrant prosecution. A truth commission may also be selective because it does not cover all events, but only a certain period in the history of the conflict.[26] Similarly, it is impossible for a prosecutor to indict a suspected criminal without substantive evidence against him or her. Opponents of prosecution argue that to make the official report of the truth commission widely available could go a long way towards healing the nation, because people would know what had happened. However, if the government does not implement the recommendations of the commission, such a report could became an "exercise in tokenism."[27]

Opponents of prosecution believe that a truth-telling mechanism produces a more powerful message to victims of what happened in the past than criminal prosecution:

> "...Collective memory will enable us to see history, to learn from it, and to bring light and bear witness where darkness and silence reign.....But by forgetting, a people loses its character, its spirit , and its most genuine traditions - all the subtle qualities that make it what it is, and not something else ....We must have the courage not to relegate that experience to the collective unconscious. We must remember it in order to avoid falling into the same trap."[28]

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[26]The South African Truth and Reconciliation Commission (TRC) covers a period of three decades - from 1960 to 1993, even though apartheid started before 1948.

[27] Mendez, *supra* at 269.

[28] Luis Aquirre, *supra* at 111-112.

Lawrence Weschler in his book *A Miracle, A Universe: Setting Accounts with Torturers* says:

> "[T]he broadcasting of the truth to a certain extent redeems the suffering of the former victims."[29]

Proponents of prosecution, on the other hand, proceed from the premise that impunity undermines the rule of law and that it is an affront to justice. Prosecution, unlike truth-seeking mechanisms, restores the rule of law. It sends a clear message that nobody is above the law.[30] However, there is also the debate concerning the issue of prosecuting the "small fish" versus the "big fish."[31] For example, General Mladic and Dr. Rodovan Karadzic, Bosnian Serb leaders believed to be responsible for war crimes in Bosnia-Herzegovina, are the only "big fishes" out of 75 war criminals indicted by the Yugoslav War Crimes Tribunal since 1993 when the court was established by the United Nations. They contend that failure to prosecute might result in a lack of confidence and cynicism towards the new democracy, thus undermining policies of the new government. Failure to prosecute opens the door for the military to demand immunity thus undermining policies of the new government. Arguably this is not true, as the experiences of Argentina, Brazil and Uruguay prove that it is the demand for immunity that leads to non-prosecution. In South Africa, members of the security forces demanded that amnesty be included in the constitution to protect them from prosecution after a newly democratic government took over in 1994.

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[29] (1990) 245.

[30] See Luc Huste "Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past" (1) *Law & Society Inquiry* (1995) 20.

[31] Payam Akhavan "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal" (20) *Human Rights Quarterly* (1998) 49.

Opponents of non-prosecution also base their argument on the theory of deterrence - i.e., that punishment deters potential human rights violators. There seems to be little evidence which supports the proposition that deterrence is effective in preventing subsequent human rights violations.[32] For example, evidence to prove that the death penalty deters potential murderers is lacking. Deterrence as a justification for the imposition of the death penalty was rejected by the Constitutional Court of South Africa in its landmark decision of *S v Makwanyane.*[33] The statutes of the two *ad hoc* Tribunals for the former Yugoslavia and Rwanda forbid the imposition of the death penalty.

Proponents of prosecution argue that trials single out perpetrators and thus avoid *collective guilt* of crimes committed by individuals and not nations. They remove the stigma that a certain group in society is responsible for human rights violations, as is the case in holding Germans responsible for the Holocaust, Serbs for atrocities committed in Bosnia or Turks for the Armenian genocide. The separation of *collective guilt* from *individual guilt* argument is not unique in the case of prosecution. Such an argument applies equally in the case of a truth commission. By "naming names" of those responsible for past human rights violations a truth commission separates individual guilt from collective guilt. The South African Truth Commission in its final report found political leaders of both the apartheid government such as former

[32] See Aryeh Neier "What Should be done about the Guilt?" *The New York Review of Books,* 1 February 1997, 32: 35 ("I do not claim that acknowledging and disclosing the truth about past abuses, or punishing those responsible for abuses, will necessarily deter future abuses. I doubt there is decisive evidence for this proposition").

[33] 1995 (6) BCLR 665 (CC).

State President, PW Botha and liberation movements such as Winnie Madikizela-Mandela responsible for violations of human rights.[34]

Factors such as the length of operation, powers and the availability of resources, contribute towards the success or failure of either a truth commission or prosecution as mechanisms used to achieve peace and justice in transitional societies. The advantage of a truth commission, though, is that it has a limited lifespan and its mandate is specific, unlike trials, which take a relatively long time. Information is gathered from a wide variety of sources. The first trial of the ICTY, against Dusko Tadic, the Bosnian Serb guard at the notorious Ormaska concentration camp in Bosnia-Herzegovina, has not been completed yet, having begun in 1994.[35]

Both a truth-telling mechanism and prosecution have strengths and weaknesses. However, the advantage of a truth commission is that it may be "therapeutic or "cathartic" in nature, unlike prosecution, which regards the victim as a witness only.[36] The victim is thus not treated with dignity and respect. Depending on a particular legal system, evidence assembled by the prosecutor or the court is often subject to strict rules of evidence. In certain instances cases are thrown out of court because of technical legal errors, perhaps relating to the admissibility of a particular piece of evidence. The case of General Magnus Malan and ten other security officers charged in connection with a massacre committed in 1987 in Kwa-Makhutha,

[34]*Truth and Reconciliation Commission of South Africa Report*, Vol. 5, Ch. 6.

[35]Prosecutor's Appeal Brief, dated 15 February 1998.

[36]Lirieka Meintjies-Van der Walt " Towards Victims' Empowerment Strategies in the Criminal Justice Process" (11) *SACJ* (1998) 157.

Kwazulu-Natal (*"the Kwa-Makhutha trial"*) is an example of the failure of criminal prosecution. After many months of leading evidence against them, the case was dismissed because the judge found no grounds to pass a sentence of guilt. The case yielded very little, if anything, for the prosecution and victims. However, there are instances where prosecution can yield better results, such as the trial of Vlakplaas Commander, Eugene De Kock, charged with more than two hundred counts of murder, arson and other criminal activities.[37] It is one of the success stories of criminal prosecution, where evidence properly examined gave rise to an incontestable verdict.

The success and value of either a truth commission or prosecution will depend on the historical circumstances of each case. Where a truth commission is utilised, victims and perpetrators shed light on what has happened within a short space of time, which many criminal prosecutions do not seem to do. A truth commission like the TRC can publicly expose the truth, and may bring acknowledgement on the part of the victim. In that context, restorative justice in the form of a truth commission offers more advantages than prosecution. I now turn to evaluate these arguments in light of the work of the TRC and the ICTY.

IV. The TRC and ICTY Compared

The decision to prosecute war criminals and perpetrators of gross human rights violations or grant them amnesty in return for the truth has confronted many societies

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[37] *S v De Kock* 1995(3) BCLR 385 (T); *Cf.* Eugene De Kock *A Long Night's Damage: Working for the Apartheid State* (1998) (as told by Jeremy Gordin).

since World War Two.[38] However, history and circumstances differ. In South Africa, when the National Party took over power in 1948, they began a system of social engineering by creating ethnic homelands falsely based on the idea of self-determination. Ethnic homelands were not based on distinct nations and nationalities, but on the concept of "divide and rule." Yugoslavia on the other hand was based on the ideas of "divide and quiet" and "brotherhood and unity."[39] The "divide and quiet" principle together with the principle of "national unity and brotherhood" were the characteristic features of the 1974 Yugoslav constitution which gave autonomy to the Serbian provinces of Kosovo and Vojvodina. The "divide and quiet" principle repeated itself in the Vance-Owen Plan which sought to create cantons for each ethnic minority in Bosnia-Herzegovina. These ideals appeared to have been *cosmetic* or elitist rather than *real*, either because of political expediency or gradual erosion over time. Ethnic hatred has bedevilled the Balkan nations for more than six hundred years. Petra Ramet in her study on the Yugoslav conflict remarked:

> "The past has never been laid to rest in Yugoslavia....historical memory is quite short, peoples in the Balkans still talk about events in 1389, 1459, 1921, 1941, 1948, 1970 -1971, as if they were fresh. The wounds of the past have never healed. In a recent illustration of the way the past haunts the present, tens of thousands of anti-Communist demonstrators assembled on 27 March 1991, to mark the fiftieth anniversary of the military coup that overthrew a pro-Nazi Serbian and to draw a parallel with the present Serbian regime, which many accuse of 'fascism'...For Yugoslavs, World War Two seems never to have ended...These different memories, set atop unhealed wounds, provided the seedbed for deep bitterness, resentments, and recurrent desires for revenge"[40]

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[38]Cited in Richard Goldstone "Justice as a Tool for Peacemaking: Truth Commissions and International Criminal Tribunals" Hauser Lecture, New York University, 22 January 1997 (on file with the author).

[39]Zoran Pajic "Bosnia-Herzegovina: From Multi-Ethnic Co-Existence to 'Apartheid' ..and Back" in Akhavan Payam & Robert Howse (eds) *Yugoslavia the Former and Future: Reflections by Scholars from the Region* (1995) 156.

[40] Petra Ramet *Balkan Rebel* (1996) 40-41.

In contrast, the homelands system of "divide and rule" was based on a false idea of "balkanisation." It is *oppression* and not "ethnic hatred" which characterised the South African society, resulting in enormous economic disparity between whites and people of colour.[41]

Negotiators of the TRC and drafters of the ICTY were looking over their shoulders at previous truth commissions and international criminal tribunals. In the case of South Africa, negotiators in Kempton Park did not opt for a Nuremberg style of justice. First, there was no victor and vanquished. Second, negotiators were acutely aware of the potential danger posed by the security forces, who demanded blanket amnesty for human rights violations committed during the apartheid era, a problem which faced many of the Latin American countries where the military made similar demands for atrocities committed during the military era. Thirdly, after several commissions of inquiries such as the Goldstone and Harms commissions of inquiry and the Malan trial, it became clear that seeking the truth through the criminal justice system was not the best option. There was a realisation that without the truth, acknowledgement, reconciliation and the "reconstruction of society," the new South Africa would "hobble" rather than "walk" into the future.[42] It was due to these considerations that amnesty had to be counterbalanced with reparations and the truth. Amnesty was therefore a price to be paid for a peaceful transition.

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[41] See for example, *Commission for the Socio-Economic Development of the Bantu Areas Within the Union of South Africa (Tomlinson Commission)* 1955; Francis Wilson & Mamphela Ramphela *Uprooting Poverty: The Second Carnegie Enquiry into Poverty and Development in Southern Africa* (1989), and ---- *Key Indicators of Poverty in South Africa*- An Analysis Prepared for the Office of the Reconstruction and Development (RDP) by the World Bank on the living standard in South Africa, October 1995. According to the survey 95% of South Africa's poor are Africans, 5% Coloured, 1% Indians and Whites.

In the former Yugoslavia, political leaders advocated *ethnic nationalism* and there was no attempt by the political elite to "bridge the gap" of the past. As a result of selfish political ends, characterised by mistrust, ethnic hatred and propaganda, the "divide" became wider and wider. The failure on the part of the political elite to face their past led the international community to impose an external form of transitional justice. The creation of the ICTY was a decision of the Security Council purporting to be acting in terms of Chapter VII of the UN Charter to maintain peace and stability. However, the international community did not want to repeat the mistakes of the Nuremberg and Tokyo Military Tribunals. For example, the Tribunal strives to be representative of the international community in terms of the composition of its staff members and judges drawn from Africa, Asia, England and the USA.

The TRC is a *domestic* tribunal with no power to prosecute. The TRC was created by *domestic political actors* as part of an orderly transition. Although the TRC is *sui generis*, it continues to work in *parallel* with the domestic criminal court systems. The ICTY, on the other hand, is an *international criminal* tribunal with power to prosecute. The ICTY is an *external* body created by *foreign political* powers after the collapse of Yugoslavia. Although the ICTY enjoys *concurrent* jurisdiction with national courts it enjoys *primacy* over the latter. The ICTY can at any time during the proceedings request national courts in the former Yugoslavia to defer to the jurisdiction to the ICTY. Although the TRC has some degree of domestic *legitimacy*,[43]

[42] See *AZAPO and Others v The President of South Africa and Others* 1996 (6) BCLR 1015 (CC).
[43] Richard Wilson "Manufacturing Legitimacy- The Truth and Reconciliation Commission and the Rule of Law" (13) *Indicator South Africa* (1995) 41.

the ICTY has a *low* degree of domestic *legitimacy* amongst the people of the Balkans, but high international legitimacy.[44]

(i) Purpose and Object

The primary objective of the TRC is to bring *national truth* and *reconciliation* in a "deeply divided society" by allowing perpetrators to give a *full account* of what happened during the dark days of apartheid.[45] The primary objective of the ICTY , on the other hand is "to put an end to...*crimes"* by taking "*effective measures* to bring to *justice*" persons *individually* responsible for committing crimes against humanity, with the hope of contributing to the "restoration and maintenance of *peace*" and to *deter* potential criminals in future.[46]

The ICTY has the power to prosecute individual war criminals, and states are under an obligation to co-operate with the Tribunal. The primacy of the ICTY ensures that there is impartiality and a fair trial for those accused of committing war crimes.

Unlike the TRC, the ICTY has the power to indict, prosecute and issue binding orders against recalcitrant states refusing to co-operate with the Tribunal. The ICTY ensures that there is impartiality and a fair trial for those accused of committing war crimes thus it has indicted Croats, Serbs and Muslims alleged to be responsible for

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[44] Akhavan Payam " Justice in the Hague, Peace in the Former Yugoslavia: A Commentary on the United Nations War Crimes Tribunal" (20) *Human Rights Quarterly* (1998) 49.

[45]Promotion of National Unity and Reconciliation Act 35 of 1995 (as amended) Section 1.

[46]UN Security Council Resolutions 808 & 827 reprinted in the *United Nations International Criminal Tribunal for the Former Yugoslavia Basic Documents* (1995) (emphasis added).

war crimes in the former Yugoslavia. In 1997 about 10 Croats accused of war crimes handed themselves over to the Tribunal. This is indeed a positive sign, because the accused believe they can receive a fair trial, rather than going through a criminal justice system suffering from legitimacy crises. [47] Although the ICTY has no police force to enforce its decisions, the President of the ICTY has the power to report a recalcitrant state to the Security Council, which may take appropriate action such as imposing sanctions against such a state. Sanctions have been imposed against the Federal Republic of Yugoslavia (Serbia-Montenegro) and the Bosnian-Serb administration in Pale for failing to co-operate with the Tribunal. Investigators have been sent by the ICTY in countries such as Canada, Germany, Australia to carry out investigations. This is possible because the tribunal has resources to conduct such investigations, something most national courts cannot do due to lack of resources. However, investigators continue to experience problems of non-co-operation from national authorities especially in Croatia and Serbia and this affects the work of the ICTY.

The domestic nature of the TRC ensures that ordinary people "own the process" because it is locally-based and commissioners undertake visits, and dissemination of information about the existence of the TRC has been widely disseminated to the general public through the mass media.[48] The advantage of the TRC is that, despite the fact that is has been staffed by South African nationals, commissioners are expected to be "politically neutral" because political partisanship will damage the credibility of the

[47]Address by the President of the ICTY, Gabrielle Kirk Mcdonald, to the United Nations General Assembly, 2 October 1998. htpp:www. un.org.icty.

[48] *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Ch.. 2.

commission in the eyes of the South African public. The ICTY, on the other hand, is an elite institution far removed from the people it is intended to serve (*forum delict commissi*) and thus not convenient for the people in the Balkans (*forum conveniences*).[49] Even if ordinary people know about its existence, they may tend to be sceptical because of its foreign nature. In November 1998 the President of the ICTY, Judge Gabrielle Kirk McDonald initiated an outreach project in Bosnia-Herzegovina and the Republic of Croatia in an attempt to build a relationship between the Tribunal and the people of the former Yugoslavia.[50]

V. *Justice, Peace and Reconciliation*: Are they Mutually Exclusive?

(i) The Deterrence Theory

One of the justifications for the creation of the ICTY is to deter potential future war criminals and to send an unequivocal message that their actions will never go unpunished.[51] After the Nuremberg and Tokyo proceedings, war broke out in Vietnam, Korea, Afghanistan and the Persian Gulf. A litany of crimes committed in these regions went unpunished. However, as Bernard Meltzer, says "[t]hese incidents ... have been high enough to raise questions about Nuremberg's deterrent effect."[52]

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[49] The same applies to the Rwanda tribunal were the seat of the court is in Arusha, Tanzania, the Office of the public Prosecutor is in Kigali and the Appeal's Chamber is in the Hague, Netherlands. Antonio Cassese, *supra*.

[50] Remarks by Judge Gabrielle Kirk McDonald on the Occasion of Receiving the ABA CEELI Leadership Award, United States Supreme Court, Washington D.C., Monday, 5 April 1999. Http://www.un.org.icty.

[51] UN Resolution 808 & 827.

[52] Bernard Meltzer "Nuremberg and the Yugoslav War Crimes Tribunal" (30) *Valpraiso University Law Review* (1996) 904.

Meltzer is quick to acknowledge that "Nuremberg may, of course, have helped to keep the level of war crimes down, but [it] did not completely deter violations of war crimes."[53] Despite the setting up of the ICTY in 1993, war continued unabated in the Balkan region. The then President of the ICTY, Antonio Cassese, explained to the UN General Assembly that the Dayton Peace Accord "remained a dead letter."[54] In recent months, the international community has witnessed increased conflict between ethnic Albanians and Serbian forces in the Serbian Province of Kosovo. It is estimated that more than 250 people have already been killed in the confrontation between the Kosovo Liberation Army (KLA) and the Serbian forces. In 1998 Richard Holbrooke, US envoy, predicted that the situation "could escalate into something worse than Bosnia before Dayton."[55] It is estimated that more than 15 000 Albanians have left Kosovo.[56] The Serbian leader, Slobodan Milosevic, having sparked the conflict in Yugoslavia, continues to engage in acts of genocide against the ethnic Albanians. These incidents place a question mark over the effectiveness of the ICTY's deterrent influence.

How will the TRC ensure that human rights abuses do not occur in future? It cannot be argued with certainty that telling the truth will deter future abuses, but

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[53] *Ibid.*

[54] Address by Antonio Cassese, President of the International Criminal Tribunal of the Former Yugoslavia to the General Assembly of the United Nations, 19 November 1996 at p. 2.

[55] "Milosevic and Kosovo Leader to Meet" *International Herald Tribune*, 13 May 1998 p. 6.

[56] Chris Hedges "Nationalism Begins to Divide Macedonia ,Too" *International Herald Tribune*, 12 May 1998, p. 8.

rather that to some extent it redeems the suffering of victims.[57] The experience of the TRC, through its public proceedings, showed the international community and the South African public the potency of the shame of apartheid and its ruthless brutality. Those involved in the atrocities of apartheid voluntarily applied for amnesty, without coercive measures, and appeared before the Commission and confessed their brutal actions. The granting of amnesty was not automatic as they were expected to make full disclosure for actions for which amnesty was being sought. Although the Commission did not recommend lustration law or purging of perpetrators of gross human rights violations those who did not apply for amnesty will be prosecuted by the National Director of Public Prosecution.[58] The Commission has also recommended that there is a need to transform institutions such as the judiciary, health sector and police service, which have been tainted as partisan and biased in the past, to ensure stability and peace.[59] It is through the transformation of such structures that abuses of human rights can be prevented in future.

VI. The Minimum Standard for Transitional Justice

(i) The Link Between Peace and Justice

Peace and justice are inextricably linked. However, an obsession with justice may equally undermine peace and stability, especially in a society in transition. Justice is not prescriptive. It can also be achieved through other means - such as a truth commission. The importance of a truth-telling mechanism is that it can expose the

[57] *Truth and Reconciliation Commission of South Africa Report*, Vol. 5, Ch. 6.

[58] *Ibid*, Vol. 5, Ch. 8, para 14.

[59] *Ibid*.

truth and brings acknowledgement on the part of victims, depending, of course, on the specific truth commission.[60]

The means used to achieve justice and peace must also enjoy credibility and legitimacy.[61] For example, some critics have questioned the Dayton Peace Accord as a basis for peace and justice in the Balkans.[62] According to these critics, how could political leaders such as Slobodan Milosovic of Serbia and Franjo Tudjman of Croatia be part of an agreement when they had a direct hand in the Yugoslav conflict? How does one expect them to co-operate with the ICTY, which may in future indict them for war crimes? Indeed, it is not possible for them to act as players (warlords) and referees (peacemakers) at the same time.

The Security Council, in creating the ICTY in terms of Chapter VII of the UN Charter, made a link between peace and justice. In his opening statement, Grant Niemann, Deputy Prosecutor in the *Tadic* trial, said:

> "This Tribunal has been created not only to administer justice in respect of the accused that stands before you, but there is an expectation that in so doing you will *contribute to a lasting peace* in the country that was once Yugoslavia." [63]

Although the Security Council saw the ICTY as an important ingredient to "contribute to a lasting peace" in the Balkans, the ICTY was created at a time when

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[60] It is important to note that this will depend on the specific truth commission because some truth commission s such as those in Latin America arguably got justice and not the truth. See generally discussions in Neil Keitz (ed) *Transitional Justice: How Ermerging Democracies Reckon with Former Regimes (Country Studies)* (Vol. 2).

[61] Hendrik van der Merwe *Pursuing Justice and Peace in South Africa* (1989) 115.

[62] Anthony D'Amato "Peace vs Accountability in Bosnia" (88) *American Journal of International Law* (1994) 500.

[63] *Opening Statement by Deputy Prosecutor, Grant Niemann*, 7 May 1996 (emphasis added).

war was still continuing in Yugoslavia. After the ICTY was set up, it encountered serious problems such as the failure of Serbia and Bosnian Serbs to co-operate and execute warrant of arrests issued by the tribunal. How can the Tribunal "contribute to a lasting peace" in the Balkans under such circumstances? As the then ICTY President Antonio Cassese said in his address to the UN General Assembly, "the Dayton Peace Accord is a dead letter."[64] The failure of the Dayton Peace Accord can be attributed to the fact that it was not founded on the nexus betweeen peace and justice. External political powers with their "fumbling diplomacy" were eager to do too many things at the same time, namely, to bring peace *and* punish war criminals - a kind of a "potpourri solution."

In South Africa, political leaders played a constructive role in the process and had the political will to bring about a peaceful solution in the country. However, the benefits of peace founded on justice in order to ensure stability, respect for the rule of law and democracy have yet to be tested.

(ii) Individual Criminal Responsibility

One of the purposes of punishment for crimes against humanity lies in the stigmatisation not only to the criminal conduct of the individual perpetrator, but also to a given society.[65] The concept of stigmatisation of individual criminal responsibility is intended to avoid guilt being ascribed to the whole nation. In that context the international community expresses its indignation over heinous crimes through public

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[64] *Supra*.

[65] *The International Criminal Tribunal for the former Yugoslavia Yearbook* (1996) 90.

reprobation and the stigmatisation of such offences. In that way it absolves the nation and denounces the individual perpetrator for his actions.

Justice Richard Goldstone, former Prosecutor of the ICTY, drew a parallel between the International Military Tribunal at Nuremberg and the ICTY regarding the "personalised" rather than the "collective" guilt approach:

> "...When one looks at the emotive photographs of the accused in the dock at Nuremberg one sees a group of criminals. One does not see a group representative of the Germans - the people who produced Goethe or Heine or Beethoven. The Nuremberg Trials were a meaningful instrument for avoiding the guilt of the Nazi's being ascribed to the whole German people." [66]

Indeed, it is not the Germans, but Hitler's *Ustasha* regime which was responsible for the Holocaust. Similarly is not the Serbs who are responsible for atrocities committed against Bosnian Muslims and Croats, but warlords such as General Mladic and Dr. Rodavan Karadzic who should be held individually responsible for war crimes committed against Croats and Muslims in Bosnia-Herzegovina. In the same way, too, it is not all White South African who are responsible for apartheid, but political leaders named in the TRC report. As Michael Ignatief puts it, "war crime trials...unburden a people of the fiction of collective guilt, by helping them to transform guilt into shame."[67]

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[66]Richard Goldstone " 50 Years after Nuremburg: A New International Criminal Tribunal for Human Rights" in John Christopher (ed) *Contemporary Genocides: Causes, Cases, Consequences* (1996) 215-216.

[67] *Ibid* at 117.

(iii) Reconciliation cannot be founded on lies

National unity and reconciliation is a long term process. As the postamble of the interim constitution reminds us, reconciliation is the beginning of "a new chapter in the history of our country." Although the South African Truth and Reconciliation Commission found the reconciliation process a complex issue, it emphasised that it was a crucial element of a restorative model of justice.[68] In order for reconciliation to become a reality in South Africa the Commission recommended that the President call a *National Summit of Reconciliation* to facilitate the reconciliation process.[69] It is my view that there is still a need for some form of a **truth commission for the Balkans**, to reduce the lies about the Balkan war and to open a new chapter in the history of Yugoslavia.[70] A pre-condition for the success of such a truth commission is that it must be spearheaded by the Balkan people. The ICTY, despite its effort and vision for reconciliation in the Balkans, cannot fulfil the "therapeutic catharsis" of a truth commission. Rather, its work could be the basis for the establishment of such a truth commission.

Moral truth has a more powerful message than factual truth and thus brings acknowledgement on the part of victims.[71] Prosecutions are not the only form in which justice can be realised. A truth commission can go a long way towards laying

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[68] *South African Truth and Reconciliation Commission Report* Vol. 1, Ch. 5 paras 80-100.

[69] *Ibid*, Vol. 5, Ch. 8.

[70] Richard Goldstone "Crisis in the Balkans nneed its own Version of the TRC" *Sunday Times*, 4 April 1999 p. 17.

[71] Richard Goldstone "Exposing Human Rights Abuses - A Help or Hindrance to Reconciliation?" (22) *Hastings Constitutional Law Quarterly* (1995)607 at 615.

the foundation for reconciliation amongst communities in the Balkans.[72] The purpose and function of a truth commission in general is to *reduce lies* about past atrocities in order to avoid subsequent denials. In the words of Michael Ignatief, the past is not a "sacred text which has been vandalised by evil men and which can be recovered and returned to a well-lit glass," rather, "the function of truth commissions, like the function of honest historians, is simplify to purify the argument, to narrow the range of permissible lies."[73] Therefore, a truth commission not only helps "to narrow the range of permissible lies" about the nature and extent of past atrocities, but also in so doing narrow the range of the truth revealed.

In the Balkans there is no single version of the truth about atrocities committed in 1991. There are still "claims and counter claims" regarding the true facts of what happened. In the Balkans, the truth is a victim, rather than a means to unpack the past. This is well illustrated by President Franjo Tudjman of Croatia who in 1986 wrote a book, *Myths of Historical Realities*, in which he argued that the number of Jews, Serbs and Gypsies who died in the notorious concentration camp, Jasenovac, is exaggerated. Likewise, failure on the part of apartheid leaders to take moral responsibility for atrocities committed during that era does not augur well for reconciliation in this country.

The advantage of the TRC, though, is that it is a win-win situation for both victims and perpetrators because it "puts everybody on the map." Neither the TRC nor the

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[72] ---------- "Can Bosnia Learn from Chile and South Africa" *Democracy Forum* (1996) 44 - 51.

[73] Michael Ignatief "Articles of Faith" (5) *Index on Censorship* (1996) 111 at 113.

ICTY are perfect institutions, but have profited from the experiences of previous similar institutions.

(iv) Recording history so as to avoid subsequent denials

The exhumations in Bosnia-Herzegovina by the War Crimes Tribunal are a clear testimony to war crimes committed by Serbian leaders. The chairperson of the TRC, Archbishop Desmond Tutu, when asked whether his Commission has uncovered the truth about apartheid's dark past was apt to respond "[a]fter many post-mortems, judicial inquiries, inquests, etc, which failed spectacularly to solve the riddles, we now know through our amnesty process what precisely happened to Steve Biko, to the Cradock Four, to Stanza Bopape, to the Pebco Three and others, because the perpetrators told us."[74]

(v) Compensation

Another important component of restorative justice is that the offender pays reparation to "redress" the wrong committed against the victim. Many human rights conventions provide for the right of victims to claim "redress" without providing a reasonably clear mechanism of how such a "redress" is to be achieved.[75] Conventions, unlike treaties, are not binding on state parties and therefore not enforceable. For

[74] Desmond Tutu " The TRC has Helped lay Foundations for True Reconciliation" *Cape Times*, 4 August 1998 at p. 4.

[75]For example, UN Declaration of Human Rights (Article 8); International Covenant on Civil and Political Rights (Article 2 (3); Declaration on the Protection of all Persons from Enforced Disappearance (Article 19); ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Article 15 (2); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14); African Charter on Human and People's Rights (Article 7(1); American Convention on Human Rights (Article 25(1) *Cf. The Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freeedoms* E/CN. 4sub.2 1993/8 at 131-136.

example, it was only this century, after a lobby by victims movements around the world, that the United Nations passed the Declaration of Basic Principles of Crime and Abuse of Power in 1985, specifically to recognise victims' rights to claim compensation.[76] The Declaration states that:

> "Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilised where appropriate to facilitate...redress for victims."[77]

Shortly after the adoption of this convention by the UN General Assembly, the Council of Europe adopted Council of Europe Resolution No. R(84) in which the Council recognised that "...it must be a fundamental function of a [national] criminal justice system to meet the needs of and to safeguard the victim" by ensuring payment of reparations.[78] The statute of the Permanent International Criminal Court (PICC) provides for the creation of a **trust fund** in order to pay reparations to victims of war crimes.[79]

The Promotion of National Unity and Reconciliation Act[80] does not provide a *quid pro quo* mechanism for the expungement of victims' rights to institute civil and criminal action against perpetrators. Moreover, the President has wide powers to "determine the basis and conditions upon which reparations shall be granted"[81] ,thus

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[76]GA 40/ 34, November 1995.

[77] Article 7.

[78] Ekkehart Muller-Rappard " Perspectives on the Council of Europe's Approach to the Issue of Basic Principles of Justice for Victims of Crime" (12) *Human Rights Quarterly* (1990) 231.

[79]Articles 74 & 79 of the Rome Statute.

[80] Act 34 of 1995.

[81]Section 27(3) (a)(i).

giving the executive wide discretionary powers to terminate the reparation scheme whenever it deems fit this places victims ignorant of the law in a vulnerable situation. The offender gets amnesty and is not expected to contribute to the reparation of the victim. However, to require perpetrators to contribute to the compensation scheme may create problems especially for those offenders who are indigent. This leaves the state with the only alternative to oversee the reparation process itself.[82] Similarly, the ICTY Rule 106 (B), providing that after the accused has been found guilty, victims can claim damages through "relevant national legislation" by bringing a civil action in a national court, places victims in a difficult, if not an impossible position.[83] Under such circumstances, the likelihood is that victims would be reluctant to claim compensation. Benjamin Frencz says:

> "[e]xperience has shown that criminal sanctions, particularly if deemed inadequate, offer little solace and no assistance to the survivors. If justice is to be done a more constructive alternative must be found. The payment of pecuniary damages by the offender is possible but not practicable. If the offender acted as the apparent agent of his government and with no malice of his own, it ought to be the duty of the State to redress the injury inflicted....therefore.. an organised program to compensate those who have been the victims of war crimes or crimes against humanity is worthy of serious consideration."[84]

In 1991, after the Persian Gulf War, the Security Council passed Resolution 687 in which it ordered the Iraqi government to establish a Compensation Commission for war victims in Kuwait. Unfortunately, such a commission was never created by the Iraqi government.[85] The International Conference for the Protection of War Victims,

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[82]Lirieka Meintjies-Van der Walt " Towards Victims' Empowerment Strategies in the Criminal Justice Process" (11) *SACJ* (1998) 157 at 162.

[83]The ICTY has not made any ruling on this issue.

[84] Benjamin Ferencz "Compensating Victims of the Crimes of War" (12) *Virginia Journal of International Law* (1992) 343-344.

[85]S/ Res/687 (1991).

held under the auspices of the International Red Cross in Geneva in September 1993, identified the following problems with regard to the claiming of reparations by victims:

> "(i) Application for reparations or compensation via the state often makes the process and its outcome uncertain.
> (ii) The distinction between damages arising from violation of the right to engage in warfare (*jus ad bellum*) and those breaches of international humanitarian law (*jus in bello*) dilutes the responsibility to make reparation.
> (iii) The obligation to pay reparation only arises where there is an international armed conflict, and where the conflict is internal it is usually national courts which should enable victims to claim compensation, but often fail to fulfil that obligation."[86]

What is the workable or feasible solution in dealing with compensation in light of the defects highlighted? It is suggested that an independent claims commission for victims of war in the former Yugoslavia would be an appropriate forum to deal with claims for compensation by war victims in the Balkans. It should be a temporary body attached to the criminal justice system. Such an independent body would adjudicate claims of victims commencing from 1991 onwards, similar to the ICTY jurisdiction.[87] An independent claims commission for the Balkans would be appropriate in the circumstances because it would be seen as impartial by victims of all ethnic groups. In the case of the TRC it is not clear how reparation will be dealt with by the government. In my view, perpetrators should be required to contribute towards the reparations funds recommended in the TRC final report. Independent structures of democracy such as the Human Rights Commission could be utilised to assist the government in dealing with compensation of victims. It is also important to

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[86] *International Conference of War Victims* , Geneva, 30 August - 1 September 1993, organised by the International Committee of the Red Cross at p. 438.

[87] Erik Siesby "An International Court of Civil Claims from Criminal Act Committed during the War in the Former Yugoslavia" *Helsinki Monitor* No. 1 (1995) 56.

have representation from NGO's and victims' organisations. Legal aid and educational programmes should be carefully utilised to ensure that victims, most of whom are ignorant of their rights, would be able to claim compensation.[88]

VII. Lessons Learned

Based on the work of the ICTY and TRC, which have learnt from other domestic truth commissions and international criminal tribunals, certain minimum standards for transitional justice can be identified. Firstly, although justice is not prescriptive, a peace process which is not founded on justice is likely to fail such as the Arusha and Dayton Peace Accords. Although there was disagreement regarding the policy adopted by the Security Council in creating the ICTY, peace and justice were regarded by the Council as complimentary to one another. The decision by negotiators in Kempton Park were largely influenced by the nexus between peace and justice. Secondly, the truth (whether moral or factual) is an important pre-condition for inter-racial or inter-ethnic reconciliation, especially in societies polarised by ethnic or racial conflict. Like in South Africa, the truth helps to vindicate "collective guilt" of a particular group and thereby "individualise" criminal responsibility and thus set the historical record straight to avoid subsequent denials. Amnesty is one of the issues which confronts negotiators in transitional societies. The granting of amnesty to perpetrators of human rights promotes a culture of impunity.[89] In South Africa negotiators managed to balance amnesty in exchange for the truth. Thirdly, reparation

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[88] Theo van Boven, Cees Flinterman *et al* (eds) *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Maastricht, 11-15 March 1992.

[89] *United Nations Commission on Human Rights: Report on the Consequences of Impunity* UN Doc. E/CN. 4/ 1990/13.

is an important element of transitional justice. The perpetrator should not only be granted amnesty, but must also contribute towards the rebuilding of society - not as a punishment, but as an acknowledgement for their wrongful actions. Although legal enforcement of such a duty may prove to be impossible there is a moral responsibility on the part of perpetrators to assist in the "reconstruction of society." These minimum standards which a transitional society cannot ignore are compatible with restorative justice, which seeks to restore relationships between the victim, the offender and the community.

X. Conclusions

The manner of dealing with past human rights violations depends on the socio-political dynamics of each society. Nevertheless, it is generally assumed that dealing with past human rights violations serves many purposes, *inter alia*, the prevention of recurrence of human rights abuses. Granting amnesties or pardons is often seen as a necessary requirement for bringing about national unity and reconciliation so that people of all political persuasions can support a new democratic order; for repairing the damage caused by a legacy of past human rights violations and for compensating victims of human rights violations.

As I have tried to show in this paper, that truth revealed through trials is often *narrow*. Moreover, due to the adversarial nature of a trial there is a greater chance of denials and acquittals. Unlike the ICTY, the TRC contributes to reconciliation in a number of ways. The TRC "un-silences" the past by advancing national truth and

reconciliation. The TRC , in my view, did not deal with the core of apartheid (such as security laws, pass laws, Group Areas Act), but attempted to reduce the number of lies, by establishing an accepted version of atrocities committed in the past.

In the final analysis, it is or still too soon to judge the work of the ICTY and the TRC. History will judge the ICTY and the TRC, not only by what they do to achieve peace and justice, but also by their contribution towards healing wounded nations and nationalities. As Anthony Dworkin says, "[t]he challenge for the [ICTY] is to prove that international justice can contribute to the creation of lasting peace in the aftermath of social breakdown. This is important, because there will always be societies that cannot undertake the process of justice and reconciliation on their own."[90] Judge Antonio Cassese, then President of the ICTY, said "... despite what has been achieved in the last four years, it would be entirely premature, inappropriate and even risky for us to speak at this stage of having done justice to the victims of violence in the former Yugoslavia. The enormity of what we are dealing with is, of course, not atoned for simply by holding a few trials; we have much more to do before history can fairly assess whether we have adequately rendered justice in The Hague."[91]Archbishop Desmond Tutu, chairperson of the TRC also said "[I]n the long term, the success of the Truth and Reconciliation Commission process may well be judged by what Parliament legislates for victims."[92] To conclude, I wish to emphasise the importance

[90]Anthony Dworkin "The World in Judgement: Do International War Crimes Tribunals Help or Hinder National Reconciliation?" (5) *Index of Censorship* (1996) 137 at 138.

[91] Address by Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly of the United Nations, 4 November 1997 at p. 3.

[92] Desmond Tutu " Healing our Land Through Truth" *Sunday Times* 5 December 1996 at p.10.

of heeding George Santayana's words that "**those who forget history are bound to repeat it.**"