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by

Graeme Simpson

This paper was written prior to the publication of the TRC's Final Report (October 1998). It is due to be published.

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A BRIEF EVALUATION OF SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION: SOME LESSONS FOR SOCIETIES IN TRANSITION

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Introduction

It is impossible to properly understand and evaluate South Africa's Truth and Reconciliation Commission (TRC) - and to extract significant lessons from it for other societies in transition - without analyzing the unique prevailing political circumstances which gave rise to its establishment. The history of the TRC is inextricably linked to the evolution of South Africa's negotiated settlement[1]. The most important aspect of South Africa's transformation from authoritarianism and racism to a constitutional democracy, was that it happened, not by revolution or force of arms, but through dialogue and an eventual negotiated settlement. This transition is fundamentally different to that which, for example, Nazi Germany underwent after World War II - where the conflict produced a clear victor. After World War II, the Allies were able to take occupation of Germany and impose their version of justice on the Nazi regime at Nuremberg. In the case of post-war Germany, the approach to those who had committed gross violations of human rights could therefore be imposed in terms dictated by the victorious party. Not surprisingly, the victors chose prosecutions as the primary mode of dealing with the past, not only because they believed this to be morally right, but crucially, because they were able to do so.

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The South African transition must also be contrasted with the example of transition from military rule to democracy in Chile. When General Pinochet, the former head of the Chilean junta, agreed to restore power to an elected civilian government, he still commanded sufficient power - particularly within the politically interventionist military - to ensure that he remained in office as head of the armed forces. As a result of the continued influence and strength of the military, the new government was effectively unable, save in a few exceptional circumstances, to bring charges against those who had been responsible for assassinations,

torture and "disappearances" under Pinochet's rule[2]. Although the new government in Chile did establish a Truth Commission in order to officially investigate, record and acknowledge human rights abuse under military rule, those who were responsible for these abuses remained unpunished.

If post-war Germany represents one extreme in the transitional justice policy choices which confront societies during a transition from authoritarian to democratic rule (that of prosecution), then Chile represents the other end of the spectrum - blanket amnesties for those who committed gross violations of human rights. Although limitations of space do not permit a thorough analysis of the South African situation, at the outset of this paper it is critical to recognize that South Africa occupies a position somewhere between these two extremes. This position is represented by the TRC as a response to the last minute compromise struck so late in the negotiation process that it had to be included in a "post-amble" tacked on to the end of the constitution - almost as an after-thought[3]. The Post-amble reads as follows:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterized 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 color, 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 the legacy of hatred, fear, guilt and revenge.
> These can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not for retaliation, a need for *ubuntu*[4] but not victimization.
> In order to advance such reconciliation and reconstruction, *amnesty shall be granted* in respect of acts, omissions and offenses 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 is passed.
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country."[5]

After the 1994 elections, one of the first acts of the new Minister of Justice, Dullah Omar, was to signal his intention to establish a TRC. Omar was aware of the binding nature of the Post-amble to the Constitution and accepted responsibility for enacting legislation which would provide mechanisms and criteria for the granting of amnesty. But Omar, along with a strong, vocal and well organized non-governmental human rights sector, was also concerned that an amnesty process was essentially geared towards the interests of perpetrators and that if South

Africa were ever to come to terms with its past, build national reconciliation and establish a society based on the respect of human rights, then it would primarily have to cater for the needs of victims.

The argument here was that, despite the noble motivations for national reconciliation, any amnesty arrangement without a parallel obligation to disclose the systemic nature of the crimes perpetrated, in fact has potentially grave implications for the long-term prospects of sustainable democracy. In particular, for the victims of these abuses of power - on whichever side of the political spectrum they may reside - the implication would be that they would never have access to the information essential to their rehabilitation, let alone any prospect of redress at civil or criminal law. One possible consequence of this is that, in the absence of any public acknowledgment, coupled to the impossibility of restitution through the courts, widespread resentment could well manifest itself in informal retribution at both an individual and a collective level, resulting in escalating rather than de-escalating violence under the new democratic dispensation.[6]

The TRC represents a creative response to this very concern. It was therefore decided to combine the process of granting amnesty to perpetrators, with the processes of officially establishing the truth about past human rights abuse, providing victims with some form of reparation and making recommendations to the President as to measures the government should take to prevent any future recurrence of systematic violations of human rights. By attempting to foreground the needs and interests of victims, the TRC can be viewed as an attempt to restore the moral balance to an amnesty agreement, borne of negotiated political compromise, and which would otherwise engender a reconciliation-building enterprise in South Africa which exclusively ministered to the needs of former perpetrators. This fusion of an amnesty process with a truth recovery and reparative process, is without precedent among similar initiatives internationally. It also demands that any evaluation of the TRC must be undertaken in its own terms, that is, as a process designed to prioritize the needs and interests of victims of past gross human rights abuses.

However, the processes of negotiated transition in South Africa entailed more than just a political compromise on the question of amnesty. The delicate historical process of negotiated transition in the period after February 1990, also resulted in the new government of national unity inheriting a dependence on many of the former regime's civil service institutions and personnel. Of particular significance here, are the agencies of state security - including the policing and military institutions, as well as those of criminal justice - which were central to sustaining the Apartheid system deemed illegal at international law. Many of these institutions and personnel were allegedly directly involved in the clandestine torture, extra-judicial executions and enforced disappearances of those involved in resistance to the system (or in sustaining the legal framework which allowed such abuses to occur), yet the nature of the transition means that they also continue to be depended upon to sustain law and order and as guardians of a new Bill or Rights, within a society confronting a potential upward spiral of criminal violence. In addition, many of those who came to power within the new Government of National Unity, were themselves actively involved in the armed resistance to Apartheid which, it is claimed, also entailed the violation of human rights within the country and beyond its borders.

The building of reconciliation, therefore, is not simply about whether prosecutions take place, but rather what measures are possible to transform and rebuild public confidence in state institutions and personnel (as well as in the rule of law) which have been inherited through a negotiation process - along with an historically rooted legacy of public mistrust of these institutions? This is clearly a wider agenda which reaches well beyond the limited scope of the TRC's mandate. Nonetheless, it is arguable that the central test which must be applied in evaluating the TRC's contribution to reconciliation in South Africa, revolves around its "forward-looking" contribution to the transformation of such institutions of state, rather than its "backward-looking" exercise in historical evaluation. Indeed, this process is equally essential to the long term consolidation of hard-won democracy in South Africa. These perspectives were broadly hinted at by the Parliamentary Committee of the General Council of the Bar of South Africa, which argued that the general concern with political reconciliation must

> "... 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."[7]

Once again, the TRC arguably offers a potential (although perhaps imperfect) solution to the problem posed by this negotiated compromise. In the absence of full disclosure or a truth recovery process, these inherited institutions of the new government could well retain unchallenged their organizational culture of clandestine, unaccountable and covert activity. This institutional culture has historically been fostered by the myriad of legislative measures which have actively preserved secrecy and governmental privilege in the name of state security and which have thus contributed to widespread corruption and abuse of power[8]. The TRC enterprise is therefore as much about recovering the truth about systematic human rights abuse within state institutions (as part of an enterprise to transform these institutions), as it is about investigating individual victims' cases so as to facilitate their personal healing. It is a mechanism pregnant with the potential to begin the process of building transparency into governance and entrenching a human rights culture in South African society and within the institutions of state. As such, it has the potential to serve not only a backward-looking remedial role, but a pro-active role in consolidating democracy as well. In part, this evaluation is about whether the TRC in fact lives up to these expectations.

The South African TRC is also strongly motivated as ultimately having been in the best interests of victims of human rights abuse in South Africa. It is argued that the only obligation that the newly elected government had to fulfil was the granting of amnesty. It could have simply performed this task and no more. By transforming a process geared towards the interests of perpetrators into an initiative which aimed to restore the dignity of those who have suffered - thereby strengthening a commitment to fundamental rights and to governmental transparency and accountability - it is suggested that the government has developed a new model for reconciling the often competing and contradictory demands faced by similar societies in transition.

In this and in other respects, evaluating the successes and the failures of the South African

TRC is an infinitely complex task, precisely because the TRC ought essentially to be as much a forward-looking as a backward-looking process. The long term achievements and/or failures of the TRC in contributing to the building of a human rights culture, as well as to the re-establishment of the rule of law and the re-building of popular confidence in credible institutions of state in post-Apartheid South Africa, will only be properly evaluated in the years to come. These are goals which, by definition, currently remain intangible and difficult to measure.

Furthermore, to the extent that the TRC is viewed as an exercise in restorative justice based on an elaborate objective of building national reconciliation, it is all the more imperative that we do not judge the TRC enterprise in isolation from either the constraints imposed by the very nature of a negotiated settlement in South Africa, or from the full range of vehicles designed to service this objective of reconciliation. To judge the TRC outside of this context would inherently be to set it up to fail. In the final analysis, the TRC is just one of several mechanisms for retrospective justice and reconciliation in post-Apartheid South Africa. More than anything else, reconciliation resides in the substantial redress of past inequities under Apartheid - in social and economic justice which reaches well beyond the limited reach of legally-based punitive justice. The ambit of the TRC is limited to dealing with only a small percentage of (the most serious) human rights abuses. Full social justice is, therefore, as much dependent on the establishment and functioning of the Human Rights Commission (to engage with and redress the full spectrum of human rights denials), the Gender Commission (to deal with the legacy of gender inequality in South Africa), the Land Claims court (to deal with the history of dispossession), the Youth Commission (to deal with the sustained marginalisation of the youth sector which has even been compounded by the shift from the politics of confrontation to the politics of negotiation) etc., as it is about the TRC. Few of Apartheid's evils can be undone, nor can all of them even be engaged with by a TRC process which is only concerned with the most gross of human rights violations. In this context, perhaps the greatest moment in redressing systematic human rights abuses of the Apartheid era, was the very process of democratization itself - a process effectively guaranteed by the agreement which lay at the root of the formation of the TRC and by the harsh political realities of a negotiated amnesty based on full disclosure of the gross violations of human rights for which amnesty is sought.

Furthermore, any assessment of the TRC must also take full cognizance of the fact that the body was set a near-impossible task from the very outset. In a large country with many rural inhabitants, to merely document all the gross violations of human rights that occurred under Apartheid and to simply provide the space to thousands of victims to recount the stories of their abuse, all within a time frame of just two years, would require a superhuman effort. Therefore, to evaluate the TRC against its own ambitious mandate as set-out in the National Unity and Reconciliation Act[9], is to measure the TRC against an almost impossible ideal. However, it remains possible and is fundamentally important, to critically evaluate the TRC in terms of some of its own stated objectives - and particularly to scrutinize its operations and assess its processes, through the eyes of victims and survivors themselves. This is all the more essential considering the extent to which the South African TRC is being widely and uncritically marketed as a model for other countries in transition. These are the broad objectives of the following pages of this paper.

Political Compromise: A Double Edged Sword

At the risk of stating the obvious, the fact that the TRC was established in the first place in South Africa - thereby resisting the purely politically expedient path of collective amnesia which may easily have resulted from such a negotiated transition - was itself a significant victory for the processes of political negotiation. The extent of the spirit of negotiated compromise is, in many respects, best symbolized by the fact that opposing political parties could agree that public space be made available to victims and survivors - and to the country as a whole - to look back at the past and recount the horrors of the Apartheid system. In this respect, considering the conditional nature of the amnesty provision in the TRC Act[iv], it is arguable that this controversial section in the TRC legislation, was no more than a creative vehicle for ensuring that the amnesty clause negotiated into the post-amble to the Interim Constitution was not unconditional, but was a *quid pro quo* for truth recovery through full disclosure. The TRC nonetheless clearly does reflect the ingredients of political expediency and compromise which are in many respects intrinsic to politically negotiated transition in South Africa.

It must therefore be recognized that - to a substantial extent - the South African TRC was defined by the fact that it was a legislative product of this delicate process of negotiation and was implemented during a process of social transition in which embryonic democracy appeared to be extremely vulnerable. It has been argued that many of the concessions made - particularly with regard to amnesty - were ultimately not only necessary to driving forward the process of political negotiation itself, but were also related to the need to sustain the tenuous commitment of inherited military and policing establishments to democracy. In many respects it has been this very delicate political context - including the temporary uncomfortable existence of a transitional Government of National Unity containing representatives of previously warring factions - that has plagued the TRC and which has most substantially undermined its potential political successes.

Although it would be simplistic to merely attribute the fortunes of the Government of National Unity to the exigencies of amnesty and the TRC processes, it is nonetheless valuable to recognize the extent to which this political vehicle, having served the purpose of shaping the legislative objectives and frame of reference of the TRC, disintegrated shortly after the Commissioners were appointed and the TRC was finally established. The TRC and its future operations were therefore given life, substantially shaped and irrevocably set upon a path, in a context which was to dramatically shift shortly after its birth. In some respects, this shaped the almost bi-polar nature of the TRC's activities in the subsequent two years of its existence: a "tip toe" vehicle of reconciliation, within an increasingly robust and combative political environment.

Needless to say, the TRC was consequently not free from political tension, both internally and in the wider social context. Indeed, it was inevitable that TRC would in fact generate political conflict and - in some instances - be used as a political football by competing parties. In essence, the National Party and more extreme right wing groupings were resistant to the potential further loss of political credibility through the process of investigating past deeds which the TRC was committed to overseeing. From the outset, therefore, these parties adopted

the stance that the TRC was likely to become an elaborate "witch-hunt", rather than a tool of reconciliation. The National Party, along with the Inkatha Freedom Party, have consequently continually accused the TRC of being biased - and have frequently taken to the courts in order to substantially inhibit the work of the Commission.

In some senses, the greatest political liability - and arguably failure - of the TRC, was its propensity to pander to these hostile political groupings in an apparently desperate bid to keep them committed to the process. However, once the National Party left the Government of National Unity, it was simply no longer subject to the political constraints which had played so great a role in shaping the paradigm, legislation and approach of the TRC itself. It is in this wider political context that one needs to understand the eventual angry refusal by the National Party to cooperate with the TRC, as well as the constant attempts to undermine its work through legal filibustering on the basis that the TRC was alleged to have failed to comply with the terms of the National Unity and Reconciliation Act - which required that the TRC operate in an unbiased manner in considering gross violations of human rights on all sides of the conflicts of the past. It is perhaps the greatest testimony to the TRC's ultimate failure to act in a sufficiently robust manner in its dealings with the former government and right wing groupings, that the National Party - in the absence of any substantial apology for its own role as architect of Apartheid as a crime against humanity - actually demanded that the TRC apologize to it! This was a rather transparent political stroke which sought to entirely shift the focus of public attention from the National Party's complicity in gross violations of human rights, to the alleged indiscretions of the TRC itself. Were it not for the TRC's own soft-shoe shuffle in dealing with right wing political interests during the preceding year, this manouevre would not have appeared nearly as masterful.

Yet from the very outset, the government (and subsequently the TRC itself) had sought to do everything possible to avoid these sorts of political conflicts. In an attempt to counteract precisely such political manoeuvring, the Commissioners themselves were ostensibly selected in such a manner as best ensured even-handedness - yet which ultimately sought to achieve this by ensuring representation of all the major political interest groups within the country on the TRC. The composition of the TRC was meant to assuage doubts from political parties that the TRC would be politically biased - and this was done, not by considering the human rights track record of all the candidates, but by prioritizing the broadest possible base of political representation.

In fairness, the importance of securing public perceptions of objectivity in this manner cannot be too glibly dismissed. Nor for that matter can the TRC itself be held responsible for the consequences of such an inclusive approach - in view of the fact that the TRC Commissioners did not appoint themselves. Nonetheless, there is little doubt that the TRC subsequently grappled with the consequences of this approach. It is, however, arguable that such impartiality could have been best achieved through the TRC's hearings and its Human Rights Violations and Amnesty Committees. In truth, these Committees generally sought to hear representatives from all sides of conflict and in evaluating the TRC on this basis, it most certainly has not been overtly or covertly politically biased. Nonetheless, the quest to ensure impartiality and even-handedness in the composition of the Commission itself did lead to complications that may not have been foreseen by its architects. Political conflicts within the

TRC, fueled by the vastly different political backgrounds and beliefs of Commissioners and staff, unquestionably negatively affected its operational efficiency in some of its Committees. This tense political climate within the TRC has also contributed to difficulties with the Commission accepting constructive outside intervention and for allowing the incorporation of non-governmental organizations (NGOs) in its ongoing operations.

Of course the political dilemmas which confronted the TRC did not merely manifest in respect of internal dynamics or in relation to NGOs. Because of its delicate political task to examine human rights violations on all sides of the South African conflict, the TRC proved to be subject to substantial pressure to constantly demonstrate its even-handedness. It is arguable that - in some instances - this has resulted in an overly tentative process and approach to building reconciliation, in which the Commission proved reluctant to fully utilize its substantial powers of search, seizure and subpoena. The domination of right wing opposition to the TRC and extensive attempts to secure the support of right wing political parties, meant that the TRC resisted any "assertive" opportunities to acquire information, but instead sought to delicately win over voluntary right wing support for the Commission as a social enterprise in building reconciliation. Unfortunately, as a result, few perpetrators voluntarily came forward to seek amnesty during the early period of the TRC's operations (with the exception of many who had already been convicted or jailed for their past activities), putting considerable pressure on the TRC's amnesty process.

Indeed, it is arguable that the flood of applications for amnesty which did occur towards the end of 1996, was less the result of a looming cut-off date for amnesty applications (this date was originally scheduled for 15 December 1996, but was extended by the State President in response to a request from the TRC), than it was the result of the successful prosecution of Eugene De Kock - a notorious Apartheid assassin who, during his trial, provided extensive information about other senior state operatives who were involved in gross human rights abuses[11]. In some respects, this is illustrative of the fact that far from being totally incompatible with it, the threat of successful prosecution in fact remains directly functional to the successful process of truth recovery linked to a conditional amnesty option.

The politically delicate task of the TRC also affected its relations with those victims who expressed legitimate frustrations at the fact that they could not expect full justice - the prosecution of those who were known to be responsible for the murder of their loved ones. In particular, constitutional challenges to the amnesty process which were brought by the Azanian Peoples' Organization (AZAPO), as well as relatives of Steve Biko, murdered ANC activists Dr Griffiths and Victoria Mxenge and the relatives of slain Dr Fabian Ribeiro, rather than being viewed as legitimate and understandable demands of Apartheid's survivors, were presented by some Commissioners as being oppositional to the Commission and its quest for reconciliation. Although most of these tensions were more sensitively tackled by the TRC in the last year of its operation, this did do some damage to the image of the Commission - especially considering the early failures of the processes of voluntary disclosure before the Amnesty Committee.

However, whilst the TRC's Amnesty Committee was plagued by controversy and popular misunderstanding, its Human Rights Violations Committee remained largely immune from

such politically-rooted problems. Consequently, the great strength of the TRC resided in the operations of this Committee - which needed to make no moral or political distinctions between the experiences of victims from all sides of the conflict. The result was a uniquely powerful process whereby a full spectrum of those who suffered gross violations of their human rights within the conflicts of the past, testified before the Committee and before the South African public. The social impact of this process of public testimony has been the greatest achievement of the TRC - and will undoubtedly have a pervasive influence on South African society in the years to come.

Nonetheless, the accusations and strategy adopted by the National Party is illustrative of the fact that tensions between political parties and the TRC have persisted - despite any efforts to represent all victims of the conflict at hearings and through the composition of the TRC. By the same token, the failure of the Commission to deal with this abuse of the platform it provides, can be seen as a failure on its part to guide and command the process it was overseeing right from the start. This had the effect of partially undermining the legitimacy of the TRC and hence its usefulness as a tool for reconciliation and nation building.

In broad terms, many of the political successes and failures of the TRC must also be viewed in [illegible] of the inheritance of state institutions by the new government through the negotiation process - and which continued to suffer a legacy of historically-rooted public mistrust. The impossibility of instantly transforming the credibility, institutional culture and delivery capacity of these state institutions, was often compounded by the reluctance of established bureaucrats to accept and implement the programmes of a new political leadership in government. By the same token, many of the new senior state functionaries put in place by the new government, lacked the technical expertise and experience to effectively run some of these state departments. The cumulative consequence of these processes was a significant disjuncture and a growing gap between the new government's visionary policy making capacity and its capacity to translate such policy into implementation or delivery. These problems of government in transition directly affected the TRC. Firstly, because the TRC itself was really the product of precisely this sort of creative and innovative policy-making approach. However, even more fundamental was the fact that the Commission, like the government, had to rely on many of these institutions, including the South African Police Service, the Office of the Attorney General, etc., to facilitate the very process of truth recovery and reconciliation. The inefficiencies and apparent wilful blocking action of some of these state functionaries is - by its very nature - difficult to document, but these dynamics unquestionably impacted on the Commission and its political profile. These dynamics were also further complicated by the complex relationship of TRC - as an independent statutory body - to government, and this undoubtedly contributed to some of the problems and indeed failures of the TRC.

It is, however, a truism that TRCs never operate in a vacuum and that therefore every commission works under political constraints or contextual challenges which cannot necessarily be avoided. The South African TRC should be evaluated with this in mind and, despite the many political problems elaborated on above, it is important to re-iterated that the very existence of the TRC in a country going through such a transition process, is a significant political success in itself. However, there are also more diffuse setbacks related to these political dynamics which will be considered below. Perhaps the most important of these have

been the compromises endured in respect of victims' rights which were effectively negotiated away by politicians at the negotiation table. This in turn has been closely related to suggestions of compromise to the constitutional and legal rights framework, as well as to the integrity of post-Apartheid criminal justice jurisprudence.

Lessons in Criminal Law and Restorative Justice

In seeking to extract lessons from the South African TRC which may be of value to other societies involved in the transition to democracy, it is useful to engage with some of the central debates which have arisen over the relationship between reconciliation and justice in South Africa. The first such debate has suggested that there is an inherent contradiction between the competing claims of truth recovery linked to amnesty on one hand, as opposed to punitive justice models on the other. This has often been crudely characterized as a stark choice between reconciliation and justice models - as if the two approaches are inherently incompatible. However, the simple argument has been made by many frustrated victims of Apartheid, that there can be no reconciliation without justice. By the same token, an examination of the South African TRC demonstrates in practice the functionality of parallel processes of truth recovery and prosecutions and suggests that a conditional (rather than unconditional) amnesty is anything but incompatible with prosecution in some instances. Indeed, it has already been suggested that more than the *carrot* of amnesty, it was the threat of prosecutions which eventually drove many perpetrators into the confessional of the TRC's Amnesty Committee[12]. Their revelations, along with those of the victims' testimonies which were elicited by the TRC's Human Rights Violations Committee, provided a powerful, graphic, and at times cathartic, picture of the various experiences of Apartheid's dehumanization. In the final analysis therefore, rather than being construed as an alternative to criminal prosecutions, the argument in favor of the TRC enterprise must be that some form of "truth recovery" is always better - and more functional to long term prospects of reconciliation - than collective amnesia about gross human rights violations... whether this accompanies prosecutions or not.[13]

A considerably more substantial debate revolves around the suggestion that the South African TRC represents a failure to comply with international law obligations to punish such gross violations of human rights. Here it has been argued that the TRC falls foul of international law, precisely on the basis that, far from meeting the needs of victims, it in fact sacrifices their interests in the name of political expediency by providing for an amnesty for perpetrators of crimes against humanity. Indeed, although motivated in the name of victims, this approach implicitly rests more firmly on an interpretation of international law which suggests that certain crimes - such as crimes against humanity and acts of genocide - rise to the level of *jus cogens* and constitute *obligatio erga omnes*, and are therefore inderogable[14]. In other words, it is anathema to suggest that amnesty could be granted in respect of such crimes[15].

In this respect, the TRC raises some critical points of debate for the newly established International Criminal Court (ICC) which, although it does not have retrospective jurisdiction over the South African situation, motivates for strict criminal liability for crimes such as those capable of receiving amnesty through the South African TRC. Of particular interest here, is

the fact that the ICC approach, like the TRC, is strongly motivated as being in the best interests of victims of such crimes and gross human rights abuses. Not least amongst the questions which the South African TRC therefore poses (but does not resolve), is that of the relationship between ICC prosecutions and domestic TRC options in countries undergoing a negotiated transition to democracy. The answers to these questions are very difficult to anticipate, even if one does suggest that victim-based truth telling and judicial process concerned with perpetrators are - notionally at least - mutually compatible.

However, some of the most striking lessons to be learned from the South African TRC in fact relate to the fundamental clumsiness of criminal law, both as a tool for achieving reconciliation, and for best servicing the needs of victims and survivors of human rights abuses. This raises some fundamental questions for the punitive justice paradigm inherent in most motivations for the establishment of a permanent ICC. Indeed, if there is a more meaningful debate intrinsic to the TRC process, then it is most appropriately framed as a debate between restorative and punitive systems of justice, rather than between incompatible "justice" and "reconciliation" models. What is most striking about these debates is that virtually all the protagonists motivate their approaches as being in the best interests of victims and survivors of human rights abuse - and it is therefore a critical objective of this article to evaluate these claims.

Considering that the obligation to grant amnesty was entrenched in South Africa's Interim Constitution, it is no surprise that some of these debates were actually waged before the newly established Constitutional Court. Furthermore, this constitutional challenge to the TRC Act was brought by the survivors of some of Apartheid's most notorious victims. For these reasons, it is worthwhile to briefly consider the constitutional challenge which was launched against the amnesty provisions of the TRC Act. It is not possible in the space available to consider all aspects of this Constitutional Court decision, so this article will focus on just some of the key relevant concerns.

There is a certain irony in asking a court to rule on the validity of an agreement without which it would probably not exist. Yet in evaluating the constitutionality of the amnesty provisions and their implications in the TRC Act, this is precisely what the South African Constitutional Court was doing. Constitutional courts are typically required to safeguard both democracy and the fundamental rights of individuals. In this particular matter, the potential tension between these two imperatives was also thrown into sharp relief. In their papers before the Constitutional Court in the matter of *AZAPO and Others v The President of the Republic of South Africa and Others*, the applicants argued that section 20(7) of the TRC 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 organization or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence."

The central contention of the applicants was that section 20(7) of the TRC Act violated the right of access to court enshrined in section 22 of the Bill of Rights, which provides that:

"Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum."[16]

It was argued by the applicants that by extinguishing the criminal liability of perpetrators to whom amnesty has been granted and by preventing victims from bringing civil claims against those who had violated their rights, section 20(7) violates individuals' rights of access to justice.

The Constitutional Court held that once amnesty is granted, this does indeed result in the removal of criminal liability and the civil liability of individuals or of the state, as well as the vicarious liability of individuals or organizations. The Court advanced two central reasons for holding that extinguishing criminal liability was constitutional in this case. Firstly, citing the post-amble to the Interim Constitution, the Court argued that, in the name of the peaceful transition to democracy and with due regard for the agonizing balancing act between the need for justice and the need for reconciliation, the Interim Constitution explicitly made a choice in favor of reparation over retaliation and *ubuntu* over victimization. Furthermore, the Court went on to hold that whether or not amnesty should be interpreted to include extinguishing civil liability hinged on whether one adopts a narrow or a broad definition of the term. It held that amnesty has no inherent or fixed meaning and that its definition must depend on the circumstances in which it applies. On this basis the Court held that if the offer of amnesty were to be a genuine incentive to encourage perpetrators to come forward and make full disclosure of their crimes, then it should entail extinguishing both criminal and civil liability. Very few people would come forward if they knew that in doing so, they would expose themselves to damages claims in civil suits. If such people did not come forward then 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 has been granted.

In this context, a little more attention will now be given to the second reason offered by the Court for holding the amnesty from criminal prosecution to be constitutional. Here it held that in the majority of instances the right to prosecute those who have committed gross violations of human rights is, in any event, an 'abstract right'[17]. This is because in most cases the evidence necessary to obtain convictions - or even to sustain civil claims - does not exist or has been deliberately destroyed.[18] It is in this context that the Court argued that one of the only ways in which victims could obtain the truth about human rights abuse was if perpetrators were provided with an incentive to come forward and make full disclosure as to the crimes that they committed[19]. The removal of criminal liability was regarded as precisely such an incentive. In addition the Court held that the process of encouraging perpetrators to reveal their crimes would make them confront their past and help society understand its history. It further added that these are important parts of the process of reconciliation to which the Interim Constitution was explicitly committed[20].

The Court could have further substantiated its argument that the right to prosecute is really an 'abstract right' by making reference to the state of South Africa's criminal justice system. Even if the evidence to prosecute perpetrators of human rights abuse did exist, the criminal justice system was simply not practically capable of processing thousands and thousands of

such prosecutions. Although it was not framed as such by the Constitutional Court, in the absence of the evidence necessary to achieve effective prosecutions, coupled with the absence of a functional criminal justice system capable of securing such convictions, this raised the specter of the one scenario which clearly would do more damage to the forward looking agenda of re-building public confidence in the legal system and the rule of law in South Africa than the apparent impunity associated with amnesty: that is, impunity based upon a failed prosecutions process. Were this to happen, the few perpetrators who were tried and acquitted would then be able to deny their involvement in human rights abuse, thus perpetuating a culture of impunity, eroding any residual faith in the rule of law, and potentially leading to even greater anger and cynicism on the part of victims and survivors.

Similar risks will arguably plague the proposed ICC. If the "strike rate" of the Bosnian and Rwandan War Crimes Tribunals are anything to go by, there is little point in such a punitive justice model if it is not enforceable - whether at a national level or by the international community. At best the prospect is of "symbolic show trials" which may play a vital role in restoring international legal principle, but without restoring the integrity of the rule of law at a public or grass-roots level and without ever restoring public confidence in institutions of criminal and civil justice.

Furthermore, even where such prosecutions do take place, it is highly debatable whether this satisfies the needs and expectations of victims and survivors to the extent that is often assumed. Certainly in the South African case, criminal convictions do not jurisprudentially found any automatic civil claim for compensation on the part of the injured party[21]. The consequence of this is that the few South Africans who enjoy the prospect of successful prosecution of those who killed their loved ones - and who are poverty stricken and marginalised by virtue of their very victimization - will in most instances still face a lack of access to civil justice on the simple basis that it remains unaffordable. Until these jurisprudential anomalies are eliminated, or the South African justice system is substantially transformed, the Constitutional Court may be right... there is only an abstract right of access to justice for victims of Apartheid.

Yet this punitive justice model, which is perhaps least functional in servicing victims' needs for some form of direct compensation or reparation, is all too easily motivated as being in their best interests. In fact, this discussion demonstrates two clear lessons: the first is the revealing clumsiness of punitive criminal law as an appropriate tool for meeting the reparative needs of victims and survivors. The second related lesson (which will be elaborated on slightly in the pages below), is the grave danger which resides in seeking to speak on behalf of victims and survivors, instead of more directly rendering their own complex voices and needs audible. The harsh reality is that for the vast majority of South African victims of gross human rights violations, they probably stood to gain more from the opportunity to tell their stories (coupled with the very meager reparations which the TRC promised), than they were likely to gain from the punitive criminal justice route. None of this should be taken to deny the devastating impact (both individually and in legal principle) of the ultimate compromise which this entails for those few exceptions - such as the Biko and Mxenge families - who stood an excellent chance of succeeding through the criminal and civil courts. It also offers scant consolation to suggest that their sacrifice represents the bitter pill which has to be swallowed in the name of the general good - and as part of a difficult transition to democracy in South Africa.

There are also some anomalies in the Court's arguments regarding civil liability and the vicarious liability of the State which warrant mentioning. If a perpetrator applies for and receives amnesty for murder, torture or another politically motivated violent crime, then on the basis of the Court's finding, the victim will effectively be denied the ability to bring a civil claim or press criminal charges against the perpetrator. However, because of the limited definition of "gross human rights abuse", the victim of any lesser offense which did not fall within the definition - and for which, therefore, amnesty could not be sought - would not be denied rights of access to full civil or criminal justice (assuming such a victim could prove his or her case). The irony is that rather than victims of gross human rights abuses being privileged relative to the wide range of other victims of Apartheid's evils, it is they who - in principle at least - may be prejudiced. By the same token, the granting of amnesty to those who murdered and tortured in the name of a political cause, is not a luxury to which those rendered poverty stricken by Apartheid - and who were jailed for stealing - have any access. The caricature is that whilst the murderer may get off, the chicken thief certainly will not! It seems that these are still further contradictions with which we have to learn to live in such difficult transitions.

"Dispensing" with International Law Obligations[22]

The vision of the Constitutional Court contains some important lessons (which may also be significant for the future workings of the ICC) in respect of the extent to which national jurisdiction relates to international law. In evaluating South Africa's obligations under international law and after a cursory survey of three countries in South America (Chile, Argentina and El Salvador), the Constitutional Court came to the conclusion that in all of these countries, the principle was accepted that amnesty should be granted to violators of human rights abuse 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 approach. Firstly, 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 fact, in two of the most recent instances in Africa, both the Rwandan[23] and the Ethiopian[24] governments have chosen to prosecute offenders. Secondly, the Court is on extremely questionable ground when it asserts that in the three countries it did canvass, there was a principled acceptance that amnesties should be granted in order to consolidate democracy. In both Chile and Argentina, amnesties were much more the result of powerful and interventionist militaries, who either refused to allow a transition to democracy, or who threatened new democracies with coups, unless their conditions were met.[25] It is unfortunate to extract a principle in relation to amnesties, from circumstances where these amnesties were in large part a product of coercion by forces much more concerned with escaping the consequences of their past criminal actions, than with "consolidating democracy". The Court is nevertheless correct (albeit for the wrong reasons) in its assertion that there is no standard practice among states regarding the granting of amnesty. However, this approach does not seem to take the matter much further and could be used as strongly to support the contention that prosecutions are not obligatory, as it could to argue in support of the proposition that they are permissible and appropriate.

The Court then turned to consider an argument by the applicants concerning the applicability of the 1949 Geneva Conventions and the obligation contained therein to provide for effective penal sanctions for persons who order or commit grave breaches of these Conventions. It was in this context that the Court considered the status of international law under the South African Constitution. Here the Court held:

> "The issue which falls to be determined in this Court is whether section 20(7) of the [TRC] Act is inconsistent with the Constitution. *If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination.*" (Authors' emphasis).

Van Zyl and Simpson argue that this statement is puzzling, contradictory and potentially dangerous. The Court is quite correct in stating that the central issue to be determined is whether the provision which permits amnesty is consistent with the Constitution. However, Section 35(1) of the Constitution reads as follows:

> "... in interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in the Chapter..."

It is therefore impossible to discern whether an impugned law is, or is not, consistent with the Constitution without having regard to international law. In fact, the use of the word "shall" in section 35(1) indicates that, in interpreting the constitution, it is obligatory to have regard to such law. The Court is therefore completely wrong, as a matter of pure logic, when it states "whether or not international law prescribes a different duty is irrelevant" to the process of determining constitutionality. International law may not be binding, particularly in instances where it conflicts directly with a constitutional provision, but it seems clear that the court should attempt as far as possible to interpret broad or ambiguous constitutional provisions in such a way that they conform with international law[26].

This prompts Van Zyl and Simpson to conclude that:

> "The Court seems to believe, quite erroneously in our opinion, that there is a 'two stage' approach to considering the applicability of international law. First, one comes to a 'proper interpretation' of what is authorized by the Constitution and then secondly, one considers the rules of international law. If there is a conflict between the first meaning and the second then the former must prevail. This is a deeply unfortunate approach because by applying international law, *post hoc*, to a meaning which has already been divined, one reduces its impact on the process of constitutional interpretation, such that it is only ever used to buttress a conclusion that has already been reached - but never to influence the conclusion itself."[27]

The fact that the Court came to the conclusion that extinguishing criminal liability for gross violations of human rights was constitutional, before it even turned to consider international law, is indicative of the importance it attaches to this corpus of law. International law is treated

almost as an after-thought rather than a body of rules which governs the activities of civilized nations. Van Zyl and Simpson lament the fact that after so much parochialism, chauvinism and outright hostility to international law by South African Courts under Apartheid, one would think that the new Constitutional Court would devote more time and intellectual rigor to considering the topic. This neglect is all the more disappointing if one considers the various other judgements that the Court had handed down in the period preceding the TRC case. In almost all instances international law was referred to, and regarded as persuasive. Van Zyl and Simpson go on to point out the irony that the struggle for democracy in South Africa was given extra impetus by the fact that, both domestically and abroad, Apartheid could be condemned as a violation of international law. The strength of international law derives in part from the fact that it is accepted by the world community of nations and is applied in their courts. By adopting such a narrow and uncreative approach to the status of international law within our domestic legal system, particularly concerning a matter which will be scrutinized by other countries and courts who find themselves in similar situations, our Constitutional Court has eroded the moral and legal force of international law at home and abroad.

It would clearly have been preferable for the Court to have conducted a thorough and rigorous survey of international law on the subject before coming to the conclusion that it did. Although there is considerable debate on the issue, it is arguable that the amnesty provisions articulated in the TRC Act could still have been held not to violate international law. Space does not permit an exhaustive treatment of this issue[28] but two brief points should suffice to demonstrate that the argument could be made. Firstly, the amnesty in South Africa is not unconditional nor was it granted by an outgoing government to itself. It is only activated by the voluntary full disclosure of the perpetrator him/herself, should only be granted if the criteria defining a political crime are satisfied and is only permissible if the means chosen to achieve the political objective are proportionate to the objective itself. Furthermore, it is arguable (although it may be stretching the point) that there is in fact a punitive element intrinsic to the "shaming" associated with the public nature of the amnesty hearings and the publication of the names of those who are granted amnesty in the Government Gazette. Secondly, it is generally accepted in international law that "a nation does not have to commit political suicide" in fulfilling its obligation to punish those responsible for gross violations of human rights. Even commentators who have gone to great lengths to attempt to demonstrate that there is a duty to punish certain crimes under international law have conceded that if such a course of action would plunge a country into violence or destroy an embryonic transition to democracy, then this obligation should be tempered by other considerations[29].

In considering the South African context, Cachalia adopts this position. He argues that "the moral imperative" does not always yield a conclusive answer as to whether states are obliged to prosecute gross violations of human rights, and that other needs and objectives may demand a different approach. In particular he refers to the need for national reconciliation or the need to secure the compliance of strategically located elites in the society, who may otherwise threaten the process of democratization. Thus, despite the affirmative obligation on states to investigate and prosecute gross human rights violations which exists in international law, Cachalia argues that the better view is that such states have a discretion in the exercise of this obligation. However, it is generally agreed, he continues, that all governments at very least have an obligation to establish the facts - so that the truth becomes publicly known and

officially part of a nation's history. This obligation remains where particular conditions may demand that "clemency" is the best possible policy option in a particular state at a particular time.[30] The debate over whether South Africa could have achieved democracy through negotiations without an amnesty agreement, will undoubtedly always generate competing answers.

Legal Truth or Psycho-Social Truth? - The Tension Between Quasi-Judicial Process and Victim-Centered Story Telling

Despite the extent and significance of the above debates over legal and constitutional principle, it would be misleading to assume the that the major legal challenges to the TRC came from frustrated victims. On the contrary, the TRC has revealed one of the richest ironies embedded in the democratization and constitutionalisation of politics in South Africa: the extent to which a defensive resort to constitutional entitlement has been used as a means of procedurally-based protection against exposure, by those very people who formerly perpetrated gross violations of basic human rights. Some mention has already been made of the politically-motivated legal filibustering of the National Party, which tried to undermine the work of the TRC through the courts - on the basis that the TRC's operations were biased. A wide range of procedural points have also been similarly used by alleged perpetrators who threatened defamation suits, demanded prior notice if they were to be implicated, insisted on amnesty hearings in camera, etc. Ultimately it was those who had most to hide who astutely sought constitutional protection, thereby almost crippling the TRC's functions through wrapping it up in very costly and time consuming litigation battles. Like the TRC process, it is highly likely that the TRC's final report will confront similar constraints over whether or not it names the alleged perpetrators.

However, it is fascinating to note that most of the legal and jurisprudential dilemmas presented by the TRC process are actually rooted in its own almost bi-polar roles as both a 'fact-finding' and quasi-judicial enterprise on one hand, and as a psychologically sensitive mechanism for story telling and healing on the other. This duality in the functions of the TRC is manifested in the different approaches and roles of its various Committees. The Amnesty Committee has operated very much along the lines of a quasi-judicial process within the boundaries of substantial procedural constraint imposed by the demands of due process. By contrast, in its public hearings, the Human Rights Violations Committee constantly grappled with the competing needs to allow victims and survivors the space to tell their stories on one hand, and the objectives of verification of information on the other. The result has often been a process in which either the fact-finding mission of this Committee has been utterly sacrificed in the name of being psychologically sensitive to the testifying victim, or alternatively, a process in which sharp cross examination by Commissioners has appeared to completely negate the "story telling" objectives of the Committee.

At the procedural level, most of the legal challenges confronted by the Commission have revolved around prior notification of those named in the testimonies of others, and have centered on the argument that anyone named as a perpetrator should be given due notice and should enjoy the constitutionally enshrined right to defend him or herself. This has exacerbated

the above tensions inherent in the Human Rights Violations Committee, by potentially thrusting the Committee on a path towards adversarial and procedure-bound fact-finding - or alternatively by stimulating self-censorship on the part of victims in order to fend off potential damages claims for defamation if they cannot prove their claims against an alleged perpetrator. Quite apart from the implications which this had for the "culture" of the Committee hearings, it also raised the specter of the earlier Goldstone Commission of Enquiry into Public Violence which, in one instance, via precisely such a route, became procedurally bogged down for over three years in investigating just eleven incidents of public violence. Needless to say, the TRC's Human Rights Violations Committee could simply not afford such a legally oriented approach, especially considering its obligation to publicly hear or take statements from over 20 000 victims... not to mention the impact this would have in compromising the very objective of the truth recovery process - public knowledge.

In many respects, this 'tightrope walk' between the competing claims of truth recovery as a psychologically sensitive, victim-centered process, and truth recovery as a 'quasi-judicial' process centered on verifiable facts, remains fundamentally irreconcilable. The reason for this essentially resides in the simple fact that these are different versions of the truth which are being sought. The 'formal' truth sought through legal process is a testimony constrained by the legal rights of others, is subject to strict criteria of verification and is often deliberately shaped by an agreed universe of facts or information (for example in plea bargaining exercises or where defense 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 which 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, on the other hand, whilst reducible to empirical expression, nonetheless engages with and accommodates contradiction as normative, recognizes the inherent validity of the subjective and exists only in the environment of the wider universe of experience which contextualizes the actions and motivations of the protagonists. Whilst legal truth presumes a definitive resolution of competing interpretations 'judged' by an objective standard, historical or psychological investigation presumes no such resolution, but rather recognizes that there is no single truth, only competing versions. The processes of social and psychological healing through recounting of past abuses, therefore cannot function effectively if constantly subject to the narrowing constraints of formal judicial process.

The South African TRC offers a clear lesson to other societies in transition, in that the process of recovering a suppressed and unwritten history shaped by conflicts - which in many respects endure through the lengthy process of transition to democracy - will inevitably have to engage with these tensions and contradictions. In such a transition, where one of the fundamental objectives is to restore the popular credibility of procedural justice, this objective may often appear to in fact be in tension with creative attempts to provide previously silenced victims with a voice and with public acknowledgment for their suffering. For this reason, it is imperative that victims and survivors are organized and that their voices are rendered directly audible, rather than allowing politicians and policy makers to speak on their behalf. It is to this specific concern that this article will now turn.

Listening to the Voices of Victims

It has already been noted that both proponents of punitive justice, as well as those arguing in favor of the South African TRC, claim that their approach is in the best interests of victims of past gross violations of human rights. One of the most important lessons to be learned from an evaluation of the South African TRC relates to the grave disservice done to victims by those who seek to speak on their behalf - whether in the name of justice or reconciliation. In so doing, victims themselves are in fact rendered silent.

Much has already been said of the failures of punitive justice to serve victims as well as is often presumed. More still needs to be said about the dangers of presuming that TRC-based 'reconciliation' - itself a contested term - necessarily achieves a greater amount. In both instances, the disservice to victims resides in the common tendency to treat their needs as uniform and as static. Generalized and conveniently summarized victims' expectations tend to denigrate the complex and inconsistent human identity of such victims and survivors, ignoring the extent to which needs vary from victim to victim and change across time. Presumptions that victims need or demand punitive justice are no more reliable than are the claims that victims are willing to forgive perpetrators who confess, or that they merely seek acknowledgment and symbolic reparations.[31]

The discourse of 'forgiveness' which has embroidered much of the TRC's work, which characterized the dominant Christian religious character of many of the TRC's proceedings and which was prevalent in the media reporting of the public hearings of the Human Rights Violations Committee, is perhaps most illustrative of how this denigration of complex victim needs played itself out during the hearings of the TRC. In many senses, the onerous expectation was set up that reconciliation was premised on victims' ability to forgive[32]. Yet in truth, the TRC was no more about forgiveness on the part of victims, than it was about contrition on the part of perpetrators who sought amnesty. If the Commission did offer an opportunity for dealing with wounds of the past and for healing, then it has to be acknowledged that expressions of anger and the desire for revenge (rather than forgiveness) on the part of victims, may in fact be more functional to the sort of substantive recovery best characterized by the shift in identity from 'victim' to 'survivor'. It is the strong view of this writer that true reconciliation in South African society, can only be achieved by integrating the anger, sorrow, trauma and various other complex feelings of victims, rather than by subtly suppressing them.

A proper evaluation of the TRC process reveals that victim needs were neither static, consistent or constant. They were complex and changed over time, very much in keeping with complex human identity, shaped by the enduring and complex impact of trauma. For some, they craved more than anything else the basic information about disappeared relatives, for others the need was for widespread acknowledgment of their torture. Some sought direct confrontation or victim-offender mediation interventions with the perpetrators responsible for their suffering, others only wanted to know of the systemic issues and the commands given which gave rise to their abuse. Some rejected the TRC enterprise entirely and demanded full justice. For some, their needs were intensely personal and private, for others the quest was for

community-based or political vindication. Not only did these needs vary from survivor to survivor, but the needs of any one victim also changed over time. For many, who initially sought no more than acknowledgment and symbolic reparation from the process, these needs understandably changed when - some time after they testified - a perpetrator confessed for the first time to having killed their loved ones. Similarly, as the prospects of material reparation measures became more real, so did the demands from some victims for monetary compensation. In still other instances, as the TRC failed to uncover or investigate the facts behind some cases, so some victims became embittered and disillusioned with the TRC process.

All of these complex victims' voices are legitimate and all are integral to the challenge of building reconciliation in a traumatized society enduring a transition to democracy. The central lesson of all this, however, relates to the importance of victim support structures and an organized voice for victims as critical to the trajectory and outcome of the process - particularly when both the Commission and its political architects are too often willing to compromise for the sake of politically-based reconciliation. In South Africa, in contrast to the Truth Commissions of Argentina or Chile, there was some early organization of survivor support groups and organs of civil society, able to articulate the demands and needs of victims during the life of the TRC and thereby capable of playing a role in shaping the process as it unfolded. By contrast, in Argentina and in Chile, it was only once the findings of their Truth Commissions left survivors dissatisfied and angry, that they found their organizational voice.

Another critical role of such survivor support structures is that they complemented the TRC's own concerns to provide direct emotional support for victims who endured the anguish of re-living traumas through their testimony before the Commission. However limited the TRC's psychological support to victims may have been, the simple recognition of the need for an integrated victim aid and empowerment component of the Commission is a valuable lesson for others who may tread a similar path[33]. Built into this recognition ought also to be an acknowledgment that the simple process of testifying or of telling the story, does not inherently entail psychological healing or reconciliation[34]. Unresolved trauma through such a process can equally lead to very destructive responses, rendering all the more important the delivery of psychological services as an integral component of the truth recovery process. This is equally important to developing tools for 'self-care for the care givers' so as to deal with the vicarious traumatization of the Commissioners and other TRC staff who are exposed throughout the process by having to listen rather than speak.

In the context of victims' expectations of TRC, it is appropriate to turn to an evaluation of the TRC's reparations provisions. This has been a hotly contested terrain dominated by competing interpretations of what survivors want and need from the TRC process, but in which the victims themselves have often been silenced. This has also - not surprisingly - been an area in which victims' expectations and needs have been particularly complex and often contradictory. Some victims simply expressed a desire for symbolic reparations, such as the provision of a tombstone to commemorate the death of a loved one, whilst others have demanded financial assistance to compensate for the loss of a bread winner. Still others have rejected any form or reparation as an inadequate substitute for punishment of the perpetrators.

Reparations, Redress and Rehabilitation

The issue of state-sponsored reparation has also been implicitly central to the constitutional status of the TRC. Notionally at least, the constitutionality of the whole TRC process rests on the state's substitution for perpetrators in providing reparation to survivors in lieu of legally-based compensation or damages claims. This is because the granting of amnesty to perpetrators has effectively denied victims the possibility of any civil claims[35]. The means of meeting this obligation has taken the form of a commitment by the TRC to provide reparative measures for victims which will, nonetheless, obviously fall far short of the extent of monetary compensation which would have been payable as a result of successful civil claims[36]. However, unlike the decisions of the Amnesty Committee, which are only subject to review by a court of law, the Reparations and Rehabilitation Committee of the TRC was only empowered to make recommendations - or policy guidelines - which remain dependent on the political will and financial capacity of government if they are to be implemented. In theory, such reparations will not merely operate through monetary provisions to individual victims, but will primarily focus on collective and often symbolic reparative measures. A central concern will also be to provide services and counseling for those who testified before the Commission.

However, quite apart from the problems of magnitude (and the implicit risk that the democratic state could easily be rendered bankrupt in an attempt to meet the compensatory obligations of its oppressive predecessor), the current state of government-sponsored victim empowerment services in South Africa strongly suggests that this is an arena which perfectly illustrates the new government's grave difficulties in translating creative and visionary policy into meaningful implementation and service delivery. These limits on the 'reach' of the state demonstrate the vital need for transformation of inherited governmental social welfare services, along with the institutions of the criminal justice system which have already been discussed. The bottom line is that government is highly unlikely to satisfy the recommendations of the TRC in respect of reparative measures for victims and this will undoubtedly raise some retrospective questions about the soundness of the Constitutional Court's perspective. This anticipation is borne out by the fact that, in response to the request from some victims for urgent assistance, the Reparations Committee tabled a draft urgent interim reparation policy as early as March 1997. More than eighteen months later - and only weeks before the publication of the TRC's final report - did government finally deliver some limited formal assistance of this sort to a relatively small group of victims.

Given that victims and their families are anticipating some sort of reparation, it is not surprising that this has raised expectations which will be difficult to fulfill. In defense of the TRC, it ought to be recognized that the question of reparation is an extremely complex one, especially in a society like South Africa with competing developmental concerns and severely limited financial resources. To some extent, this is also an intractable problem considering the TRC's reliance upon government to implement any reparations proposals. Even more striking is the tension between individual needs and demands on the TRC on one hand, and the economic and political rationale which underpins the notions of communal reparation, on the other. Ultimately, all this amounts to an unresolved tension between reparation for individual victims of gross violations of human rights as defined in the Act, and the wider concerns of the new government with redress of historically entrenched inequities more generally. In this

regard, much criticism has been leveled at the TRC for not adequately engaging with the full spectrum of economic beneficiaries of Apartheid[37]. Furthermore, there certainly has been little or no apparent voluntary commitment from the corporate community to invest in any form of reparation or restitution - let alone in in-house transformative reconciliation programmes. In some respects these criticisms of the TRC are accurate, but this is also slightly unfair to the TRC - which can realistically only be one of several vehicles for such redress. In other words, these failures to do full social and economic justice cannot really be placed at the door of the TRC alone, but relate to the wider process of transformation in South African society - in which endeavor the TRC is, at best, a junior partner.

The truth is that the issue of material compensation or reparation to victims raises infinite difficulties. Victims are resentful of the fact that they need to prove that they qualify for reparation, or that the process may measure their levels of suffering in terms of the amount granted. At the same time, it has to be recognized that different victims may require different reparation packages. The dilemma is how to compensate thousands of people (whether monetarily or in kind), with different needs, the majority of whom are impoverished - and doing so without bankrupting the new government. Victims' reparative needs are expressed individually. However, the more individualized the process becomes, the more difficult the debates to which this gives rise and the greater the complexity of the burden of implementation. On the other hand, strictly collective or symbolic reparations (monuments, etc.) do not meet individuals needs. What is of even more concern is the TRC's tendency to underestimate the passion associated with the monetary expectations of many victims. This has often been based on evidence before the Commission of victims' willingness to 'forgive', or of victims' acceptance of purely symbolic reparation as a sign of their acknowledgment. However, it is suggested here that the TRC has been inadequate in monitoring the changing needs and expectations of the majority of victims who will certainly not be satisfied with notions of symbolic reparations - and many of whom are extremely skeptical of government's commitment to providing direct forms of compensation.

The magnitude of the problem of reparation cannot be underestimated and the TRC cannot be too glibly criticized in respect of this aspect of its work. Indeed, for those contemplating a similar process in other countries in transition, a word of warning about this aspect is very important. It must nonetheless be noted that, at very least, the TRC's Reparations and Rehabilitation Committee did seek to achieve the goal of providing psychological support for those coming forward to testify - and in this respect it also utilized the services of non-governmental agencies and service providers rather more effectively than was generally the case by the TRC.

The TRC, Organs of Civil Society and Public Education[38]

Perhaps one of the greatest faults of the TRC was its general failure to either utilize or build the unique capacity of organs of civil society (particularly non-governmental organizations (NGOs) championing human rights) to maximize its achievements. Indeed, it has been suggested in the introductory pages to this article, that the dynamics within the TRC did more

to isolate human rights NGOs from the process than to draw upon them. This critical failure is all the more important by virtue of the fact that the TRC's maximum prospects of success resided in the potential partnership with such organs of civil society. These NGOs had occupied a unique position during the Apartheid era, partially due to the extensive international investment in such organizations as an alternative to the illegitimate government of the day. These organizations had consequently undertaken most of the monitoring of governmental abuse of power during the Apartheid era and prior to the establishment of the TRC. The NGO sector boasted a tradition of robust activism, offered the only significant sources of victim aid, services and empowerment, and was able to play a key role in accessing and educating victims of violence and human rights abuse about the TRC.

Indeed, these agencies of civil society offered the greatest potential for organizing marginalised groupings and rendering their voices audible in the collective re-telling of the story of Apartheid. Furthermore, such NGOs were vital to sustaining the integrity of the TRC enterprise through keeping it on track and ensuring that expedient political compromises were resisted[39]. In addition, considering the inevitability that the TRC would be an incomplete process leaving many unanswered questions and incomplete investigations, it would have to be these organizations which would carry the baton beyond the limitations of the TRC's mandate. The NGO sector was therefore essential to the forward-looking objectives of the TRC, as a primary means of applying social and political pressure on perpetrators who remained in public office, as agencies committed to translating the lessons of the TRC into the building of a human rights culture for future generations, as well as a primary vehicle for monitoring the government's implementation of the TRC's recommendations. Finally, it was clear that in the wake of the TRC, it would ultimately be up to these organs of civil society to act as a social check on the unfettered exercise of governmental power, thereby ensuring that such gross violations of human rights as characterized Apartheid, should never occur again.

For all these reasons, the relationship which the TRC sought to build with organs of civil society was vital to its success. However, this relationship was complicated by the fact that such organizations were simultaneously playing a dual role - both as potential partner to the TRC, and as critical watchdog of the TRC process and actions. In both capacities, NGOs often acted in the interests of the victims and survivors of human rights abuses who were supposedly the primary focus of the TRC. Nonetheless, it is arguable that it was in fact the internal politics within the TRC which was most debilitating in respect of the building of such relationships. The "politicking" internal to the TRC - which occasionally revolved around racial tensions and which frequently spilled over into the public domain - undoubtedly contributed to creating fragile TRC structures, undermined public confidence in the reconciliation enterprises of the TRC and generated public criticism which, in turn, caused the TRC to further distance itself from some civil society organizations.

It is ironic that the most notable of these organs of civil society were the human rights NGOs, which at one and the same time had most to offer the TRC (due to their historical role as monitors and service providers dealing with human rights abuse), and which were also best able to organize a powerful critical lobby. Unfortunately, these very organizations which might have best represented and educated civil society in relation to the TRC, were consequently

marginalised early on in the life of the TRC. The unfortunate irony is that these NGOs were probably marginalised precisely because of their past track records of commitment to human rights - a disposition which under Apartheid had led to an understandable sympathy and affiliation with those resisting the coercive might of the government. This allowed elements within the TRC to easily construe these NGOs as being politically biased, which in turn threatened the already delicate internal balance within the Commission and fed concerns over accusations that the TRC may be biased against former governmental operatives who may have been involved in gross human rights abuses.

The irony in the 'relative' disintegration of this relationship between the TRC and these organizations is even greater considering the extensive role which many of these human rights NGOs were able to play during the period leading up to the legislating and formation of the TRC. During this period, a coalition of NGOs working in the human rights field had compiled an extensive data-base of cases of human rights abuse based on research and statements from victims during the turbulent years of Apartheid. This database was later handed over to the TRC. NGOs were also active in assisting with the drafting of the TRC Act itself, in the design of the TRC organizational structures, in establishing the format of the panel for selection of the Commissioners, in designing and producing proto-types of TRC civic education packages, in researching the feasibility of a TRC witness protection programme, in doing policy research on truth commissions in other parts of the world, as well as an impressive range of other activities.

Thus, whilst the pre-TRC period provided a model of NGO participation and consultation, once the TRC was up and running, these productive relationships effectively evaporated. Taking into account the relatively short life span of the Commission, and considering the vital role which NGOs will undoubtedly have to continue to play in translating the work of the TRC into a sustainable human rights culture once the TRC has served its two year mission, the failure to bring NGOs on board can only be considered to be a major tactical blunder which should be guarded against at all costs in other countries contemplating a similar process.

It is not being suggested here that the TRC has in any way wilfully undermined civil society during its operations - although some may even go so far as to make such an argument. On the other hand, it is also understatement to merely suggest that the TRC did not realize its potential - as part of a forward looking enterprise - to strengthen and consolidate this sector which remains so vital to the consolidation of embryonic democracy and human rights in post-Apartheid South Africa. It is ironic and unfortunate that - by its omission - the TRC has failed to take a unique opportunity to support and build the capacity of one of the strongest safeguards against future violations of human rights - an active and thriving human rights movement and organized civil society.

It is equally important to recognize the very concrete losses suffered by the TRC as a result of the failure to utilize available support from within the NGO sector - including human rights, educational, religious and other community-based organizations. A primary asset which the NGO sector offered to the TRC was extensive access to victims and survivors at a grassroots level. Indeed, one of the biggest failures of the TRC, was its inability to build such a working relationship with civil society - and that this was in no small measure due to the failure of the

TRC's public education programme, as well as its communications strategy and community outreach initiatives. The first priority of the TRC should have been to develop a comprehensive and extensive civic education and communications strategy. This would have served to publicize the work, the terms of reference and to educate the public about what the TRC was able to do, as well as what it could not realistically be expected to achieve.

A direct result of the failure or the lack of a grass-roots communications strategy, was the considerable uncertainty that existed amongst victims about how to access the Commission, particularly emanating from the rural areas. It is also arguable that the Commission did not adequately counter popular reservations and controversy about the role of the TRC in granting amnesty to perpetrators. The ambit and frame of reference of the TRC was also not adequately communicated through grass-roots public education programmes, and this undoubtedly contributed to confusion and uncertain expectations over what reparations - if any - the Commission could be expected to deliver. In all these respects (and for the reasons outlined above), it is a fair criticism that the TRC did not maximize its ability to utilize the skills and commitment of religious groupings, NGOs and human rights organizations in generating such public education. Instead, the Commission relied rather too much on the extensive media coverage which its activities attracted, thereby substituting media profile and 'hype' for fully informative public education.

The problems of communication and public education also reflect some deeper rooted misconceptions which have plagued the operations of the TRC. It is this author's view that the TRC made some dangerous assumptions with regard to its relationships with the public. One was the presumption that civil society would voluntarily become involved in the process and that the TRC would automatically be viewed as a widely accepted and legitimate organ of transformation. The other was the assumption that survivors wanted to tell their stories, appreciated the benefits of telling these stories and that these stories had never been told before. These assumptions may have contributed to the TRC's failure to implement a thorough public education programme.

Despite these criticisms it must be recognized that the TRC attracted unique and extensive media coverage in both the print and electronic media. In particular, images and voices of victims and survivors, who testified about their experiences under Apartheid's repression, were viewed and heard in the homes of most South Africans. Over two years, this unquestionably had a dramatic impact on the popular psyche of all South Africans. This alone went some way towards achieving one of the TRC's major aims: the public acknowledgment of the trauma experienced by victims on all sides of the South African conflict. Whatever criticisms there may be of the TRC, this enduring achievement cannot be underestimated. However, it is also arguable that in the last few months of the TRC's operation, the general public became saturated with images of horror of the TRC. This was probably once again due to the fact that the major part of the TRCs information was imparted through the media which was increasingly inclined to seek to grab headlines through reporting on the most sensational and often the most gruesome of cases.

Access to Information, Investigation and Witness Protection

In addition to all the lessons which may be thrown up by the evaluation contained in the preceding pages, there are also some important practical considerations which must be borne in mind by others who may consider the South African TRC as a model which is worth emulating. In particular, these relate to the constraints imposed by poor access to information which may equally plague any elaborate social truth recovery exercise, as well as undermining either prosecution or amnesty application processes. The point has already been made that - in stark contrast to the experience in former East Germany - in South Africa, access to archival information or documentation has been severely restricted, not least as a result of the systematic destruction of documents during the protracted phase of negotiated transition.[40] This has played a key role in limiting the 'truth recovery' or investigative successes of the TRC, despite substantial powers of search, seizure and subpoena available to the Commissioners under the TRC Act - powers which the Commission proved extremely reluctant to exercise.

The problems of access to information have also been further complicated by limitations on the TRC's own investigation unit. Apart from the dire lack of human resources - only 60 investigators were employed to 'investigate' as many as 20 000 cases - this under-staffing was also compounded by a reliance on investigators who were themselves often drawn from the ranks of former South African Police personnel. This both presented credibility problems in the eyes of some victims and survivors, as well as giving rise to allegations that some investigations were inhibited through either active or passive resistance on the part of the investigators. These problems of access to information were also further exacerbated by the severe limitations on the witness protection programme established by the Department of Justice specifically to service the purposes of the TRC.

Both the limitations on the capacity of the Investigative Unit and on the TRC Witness Protection Programme, were essentially rooted in cost considerations. In many respects this raises the wider evaluative question of the cost effectiveness of the South African TRC, especially considering the range of competing developmental concerns crying out for more effective funding from government. Indeed, the real danger is that despite the expenditure of at least R200 million over the two year period (making the TRC an exceedingly expensive endeavor even prior to the allocation of any reparation funding) the cost cutting exercise in critical areas amounted to leaving the TRC with an 'unfunded mandate' to investigate and compile as complete a picture as possible of past conflicts. If such a truth recovery process is to be successful, then it will be exceedingly costly and there can be little reason for undermining the process by under-funding it.

'Putting out Fire with Gasoline?': Reconciliation, Impunity and The shifting Nature of Conflict in South Africa

In the final analysis, it remains difficult to draw any linear conclusions about whether the South African TRC has made quite the contribution to reconciliation that is often marketed by

its most ardent supporters and assumed by international audiences from a distance. Certainly, it would be a grave mistake to judge the 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 must be recognized as process rather than as a hard-copy end product. Yet by the same token, one would be wise to heed the warning against a report or a process which simply offers a 'sanitized public transcript' of reconciliation which suggests the absence of sustained anger, emotions of vengeance, or ongoing levels of violent conflict in post-Apartheid South African society.

Indeed, there is a grave risk that through the testimony and confessions of a few, a truth is constructed which disguises the sustained levels of marginalisation and exclusion which continue to reflect the systematic oppression and exploitation of black South Africans under Apartheid. This view represents a romantic notion of a post-conflict South Africa in the wake of the TRC and denies the extent to which the fundamentals of social and economic justice have not been undertaken by the TRC through its much narrower mandate. Yet in the continuity of marginalisation and exclusion which the TRC did not hope to fully redress, resides the simple truth that far from overcoming conflict and violence in South Africa, the roots of such violent confrontations have essentially remained the same. However, in the slide from political to criminal violence, we should detect that it is simply the forms and expression of violent conflict which has shifted in nature.

It ought not to come as a great surprise - considering the historical criminalization of ordinary political activity under Apartheid - that the post-Apartheid era demonstrates a high level of violent crime which is frequently popularly rationalised in political terms. Apartheid rendered it noble for most South Africans to be on the wrong side of the law and it must be acknowledged that there is a grave risk that a sense of impunity based on the granting of amnesty to confessed killers, may actually compound the problems of non-existent popular confidence in the rule of law or in 'politically polluted' institutions of criminal justice in South Africa. The result is sustained or growing levels of violent crime - or anti-social violence - which presents as if it is a new phenomenon associated with the transition to democracy, but which is in fact rooted in the very same experiences of social marginalisation, political exclusion and economic exploitation which are slow to change in the transition to democracy and which previously gave rise to the more socially functional violence of resistance politics. The criminalisation of politics and the politicisation of crime are really flip sides of the same coin.

The implication of this analysis is that it sets a rather more stringent test by which we must measure the achievements of the TRC in its stated objective of ensuring that such violations of human rights do not occur again in South Africa. Rather than presuming that the risk is of such social conflict merely playing itself out along the same lines of political and racial cleavage as in the past, the real challenge resides in a recognition that this social conflict expresses itself through new forms of violence. Indeed, the risk is that the TRC may even have contributed to a sense of impunity which compounds the problem of burgeoning violent crime.[41] Nor is this a phenomenon which is unique to South Africa. In fact, in this simple formulation lie some of the most fundamental potential lessons about the nature of societies in transition from autocracy to democracy.[42]

In fact, it is in the context of violent crime that the gravest threat currently presents itself to an embryonic human rights culture in South Africa. Understandable popular hysteria and moral panic over the levels of violence has begun to generate a backlash against human rights which are perceived as only servicing the perpetrators of violence - at the expense of the victims. The implications for freezing processes of institutional culture change within criminal justice institutions is best reflected by the sustained levels of police brutality and ongoing concerns about police torture and deaths in police custody - forms of violence which reflect much of the continuity amidst all the changes taking place in South Africa.[43]

There are undoubtedly times when all countries may have to sacrifice legal principles in the name of political pragmatism - in order to end wars or to achieve peace. However, so long as this is done with scant regard for its impact on the credibility of the criminal justice system and of criminal justice processes, we breathe life into the culture of impunity which is a foundation stone of criminal behaviour in any society. At some point when amnesties are granted, someone has to bear the moral responsibility - not ony for the political violence of the past - but also for the burgeoning violent crime that has emerged in many countries after transition to democracy and within newly deregulated and emerging economies, once the so-called political violence has decreased. Ultimately, in South African society, the practical translation of the rhetoric of reconciliation into reality depends upon whether reconciliation initiatives reach beyond the limits of formal political and constitutional change, to tackle those deep rooted social imbalances, which - at the most fundamental structural level - underpin the culture of violence.

ENDNOTES

1. On this see: Alex Boraine, "Reigning in Impunity for International Crimes", in Christopher C. Joyner and M. Cherif Bassiouni (Eds.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference*, (Siracusa, 1998), 221-224; Graeme Simpson, "Proposed Legislation on Amnesty / Indemnity and the

Establishment of a Truth and Reconciliation Commission," Submission to the Minister of Justice for South Africa, (Johannesburg, 1994); Graeme Simpson and Paul Van Zyl, "South Africa's Truth and Reconciliation Commission," Temps Moderne, No.585, (1995); and Graeme Simpson and Paul Van Zyl, "'Witch-hunt or Whitewash?': Problems of Justice in Transition in South Africa," Center for the Study of Violence and Reconciliation Occassional Paper, (Johannesburg, 1997).

2. The general amnesty law passed in Chile specifically excluded the killers of Orlando Letellier, the Chilean Foreign Minister who was assassinated in Washington. This exception occurred, not because the civilian government was in a sufficiently powerful position to demand this concession, but because of pressure from the United States government.

3. While the Post-amble was most certainly an "after-thought" it is not without consequence. Section 232(4) of the Interim Constitution states that it should be regarded a binding part of the constitutional text.

4. There is no one word in the English language which accurately reflects the meaning of the African word: *Ubuntu*. The closest representation is probably "tolerance" or "reconciliation". A more general expression which conveys the notion of *ubuntu* is the notion that: "a person is only a person through other people".

5. My emphasis. Section 251, Constitution of the Republic of South Africa Act, No. 200 of 1993.

6. See Graeme Simpson, "Blanket Amnesty Poses a Threat to Reconciliation", Business Day, 22/12/1993.

7. Memorandum by the Parliamentary Committee of the General Council of the Bar of South Africa (October 1992), 1-2.

8. For a brief discussion on the broad-based definitions of "security" in South African legislation under Apartheid, as well as for a partial description of the range of this legislation, see: Sandy Africa, "An Assessment of National Security Legislation in South Africa", Military Research Group, Unpublished (1992). Also see Rocklyn Williams, "Covert Action and Democracy: General Considerations and Concepts", Military Research Group, Unpublished (1991).

9. Act Number 34 of 1995.

10. In order for a person to qualify for amnesty he or she must satisfy two basic requirements. In terms of Section 20(1)(c) of the TRC Act, he or she must fully disclose all acts in respect of which amnesty is being sought. Full disclosure may also entail providing evidence in respect of the activities of co-conspirators or those who gave the orders for the offenses in question. Furthermore, the crime which is disclosed must meet the definition prescribed within the Act. Sections 20(2)(a)-(f) of the TRC Act specify four broad categories of person who can 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 (this refers specifically to former Apartheid "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 of a 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 engaged in a political struggle against a former state or vice versa.
4. Any person involved in a coup d'etat or attempted coup d'etat against a former state.

Section 20(2)(g) stipulates that a person who does not fall into one of the above categories him/herself but who associated him/herself with any of these acts can also apply for amnesty. Once it is ascertained that a person who applies for amnesty is a member of one of the categories referred to above, a further requirement must also be met in order for their amnesty application to succeed. Whilst the first requirement relates to who the applicant is and against whom he/she acted, this second requirement relates to the nature of the crime. In terms of Section 20(3) of the TRC Act, the Amnesty Committee will have to consider all of the following criteria in order to make an overall determination as to whether amnesty should be granted in respect of a specific crime:

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 offense, including its gravity.
4. Whether the person was following orders.
5. The relationship between the act and the objective pursued.
6. The proportionality of he act to the objective pursued.

Any person who acted for personal gain (Section 20(3)(I)) or out of personal malice, ill-will or spite (Section 20(3)(ii)) against the victims or his/her act, will not be granted amnesty.

11. At the time of writing this article, Eugene De Kock's amnesty application is finally being heard by the Amnesty Committee of the TRC. It is striking to note that this seminal application is taking place only two weeks before the due deadline for submission of the TRC's final report, and will in all likelihood continue beyond this date.

12. In view of the fact that contrition is not a requirement for receiving amnesty, one commentator noted rather quaintly that most former perpetrators entered the amnesty process not because they have "seen the light", but rather because they "feel the heat".

13. This is something of a generalisation, of course. The very nature of the transition to democracy - or the basis of the emergence from conflict - may have a significant impact on whether such a "truth recovery exercise" is in fact possible. In post-war Mozambique, for example, it was specifically agreed by the parties to the peace that there would be no prosecutions and no truth commission. This was stipulated specifically on the basis that none of the parties were "clean" and that such an enterprise could only re-ignite conflict in the context of a very fragile peace settlement. As a result, one of the most fascinating aspects of Mozambique's reconstruction, has been the variety of local-level initiatives at building reconciliation - frequently through customary cleansing rituals used to re-integrate former combatants back into their local communities. The long term "success" of such processes remains to be evaluated.

14. See: Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*," in Cherif Bassiouni and Christopher C. Joyner (Eds.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17-21 September 1998* (Siracusa, 1998).

15. Some further attention will be given to these debates in the pages which follow, specifically in the context of the Constitutional Court decision on the amnesty provision in the TRC Act. However, due to limitations of time and space, it will not be possible to do full justice to the complex debates within international law in the course of this article.

16. Constitution of the Republic of South Africa Act, Number 200 of 1993.

17. By this the Court did not imply that such rights were purely theoretical, nor that they were not claimable against the State. This reference to an 'abstract right', although open to misinterpretation, should rather be taken to mean that the rights conferred were tangible, but in large part were impossible to exercise in practice. The same could arguably be said of civil

claims which may be severely impaired in practice by South African rules of prescription which dictate that civil claims prescribe after three years.

18. In contrast to the experience in former East Germany where the records of the secret police - the "Stasi archive" - were captured largely intact after the fall of the Berlin wall, the protracted four year period of negotiations in South Africa, lent itself to the systematic destruction of incriminating evidence of this sort. Indeed, recent evidence suggests that South Africa's National Intelligence Service (NIS) was still active in destroying files as late as 1996 - two years after the African National Congress came to power. For these reasons, access to information through the confessions of perpetrators may well be the only available means of gaining such information. See: Graeme Simpson, "'Truth Recovery or McCarthism Revisited?' - An Evaluation of the Stasi Records Act with Reference to the South African Experience", Occasional Research Paper of The Centre for the Study of Violence and Reconciliation, (Johannesburg, 1994).

19. It is of course a matter of considerable debate as to how (or whether) the Amnesty Committee has applied the criterion of full disclosure. There are strong indications that at best it has been inconsistently applied and has occasionally be quite arbitrarily defined. The result is that in reality "full disclosure" has been at least as abstract a concept as the right to criminal justice. See: Maria Saino, "'Gone Fishing': An Initial Evaluation of the South African TRC's Amnesty Process", Centre for the Study of Violence and Reconciliation Occasional Paper, (Johannesburg, 1998).

20. Whether this is in fact the case may be the subject of considerable debate if one considers the manner in which the Amnesty Committee is dealing with amnesty applications in practice. Based on a study of an initial seventy four amnesty applications, Saino has argued that the application of the criteria set down in the TRC Act has been inconsistent and at times arbitrary. At the time of writing, the initial two year mandate of the TRC has ended and the Amnesty Committee has received a third extension to rule on the outstanding applications. The Amnesty Committee received 7060 applications, which were divided according to the Act into gross human rights cases, which must be publicly heard, and non-gross human rights violations, which are decided administratively in chambers. The majority of the applications the committee has ruled on were administratively refused. More specifically, as at 18 June 1998, the Committee lists five grounds for the 4 510 administrative refusals it has made: 385 were refused because the applicant had denied guilt in respect of a matter in which a previous court had held them to be guilty; 320 because the act was deemed to have been motivated by personal gain; 2 830 because the application disclosed no political motive; 410 because they were outside of the jurisdiction of the TRC; and 565 applications were refused because they fell outside of the cut-off date for amnesty applications. Of the remaining non-gross human rights violations for which amnesty was sought, the Committee has granted 50 amnesties in chambers. In terms of the gross human rights violations cases, the Committee has granted 75 and refused 61 applications after completing public hearings. At this stage the Committee must still rule on 139 cases which have completed the public hearings process. However, the primary challenge facing the Amnesty Committee is to rule on over 1 200 unheard applications involving gross human rights violations. Maria Saino, "'Gone Fishing'...". Also see the TRC Web-site at http://www.truth.org.za/amnesty.html.

21. This anomaly resulting from the jurisprudential split in the criminal and civil justice system may be referred to as the "OJ Simpson phenomenon". In the OJ Simpson trial, a prosecution which failed to establish guilt beyond a reasonable doubt was followed by a successful civil claim on behalf of the survivors, which satisfied the onus on a balance of probabilities. In the South African case the scenario being sketched is one which implies that even where the more onerous onus is satisfied, this offers no guarantee of a successful civil claim by the victims or survivors unless they are at least able to pursue such a civil claim through a separate legal process.

22. This section is drawn extensively from an article by Paul Van Zyl and Graeme Simpson, "'Witch-hunt or Whitewash?' - Problems of Justice in Transition in South Africa," Centre for the Study of Violence and Reconciliation Occasional Paper, (Johannesburg 1996).

23. In Rwanda, a law was passed by Parliament which organizes and provides for prosecutions. In addition, the United Nations has established the International Criminal Tribunal for Rwanda which is responsible for prosecuting those responsible for the Rwandan genocide.

24. In Ethiopia the Special Prosecutors Office named 3 000 officials of the fallen Mengistu regime to be tried for crimes ranging from Genocide to torture. See: Luc Huyse, "To Punish or Pardon: A Devil's Choice," in Joyner and Bassiouni, (eds.), *Reining in Impunity...*, 79-90; and Girma Wakjira, "National Prosecution: The Ethiopian Experience," in Joyner and Bassiouni, (eds.), *Reining in Impunity...*, 189-192.

25. The recent case in which a Spanish court has sought the extradition of former Chilean dictator Augusto Pinochet from Britain, demonstrates well the failure of blanket amnesties and provides some important limitations of the South African Constitutional Court's interpretation of the impact and importance of international law in relation to domestic amnesty arrangements.

26. The court itself concedes that there is no fixed definition of amnesty and that the notion can be interpreted as having a number of meanings. If this is the case then the Court should interpret the meaning, and consequences, of amnesty in such a way that it does not violate international law.

27. Van Zyl and Simpson, "'Witch-hunt or Whitewash?'...," 18.

28. For greater insight into the debates within international law see: Dianne Orentlicker, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," Yale Law Journal, C, (1991), 2537-2615; and Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", California Law Review, LXXIII, (1990), 449-513. For a specific examination of the debate within the South African context see: Firoz Cachalia, "Human Rights in Transitional Situations: Towards a Policy Framework", Unpublished Paper, Centre for Applied Legal Studies, (Johannesburg, 1992); and contrast with "South Africa: Accounting for the Past - Lessons from Latin America", Africa Watch, IV, (1992).

29. See Diane Orentlicker, "Settling Accounts...".

30. Cachalia, F "Human Rights in Transitional Situations...", pp.1-2.

31. On this and the perspectives which follow, see: Centre for the Study of Violence and Reconciliation (CSVR) 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. Two documentary videos were also produced by the CSVR, detailing victims expectations of the TRC at the beginning of the process and then revisiting the same victims one year later to evaluate their sentiments. See: Henion Hahn and Lauren Segal, *Khulumani - Speak Out!* (video), Center for the Study of Violence and Reconciliation, (Johannesburg, 1995); and Lauren Segal, Brandon Hamber and Henion Hahn, *SisaKhuluma: We are Still Speaking* (video), Center for the Study of Violence and Reconciliation, (Johannesburg, 1997).

32. Indeed, at one stage, the head of the TRC - Archbishop Tutu - actually chastized those victims who challenged the constitutionality of the amnesty clause in the TRC Act, claiming that they were opposed to reconciliation.

33. Brandon Hamber, "The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African TRC", American Image, LV, (1997).

34. Brandon Hamber has analysed and written more than anyone on the subject of the psychological implications and limitations of the TRC process. For example, see; Brandon Hamber, "Dealing with the Past and the Psychology of Reconciliation: The TRC, A Psychological Perspective", 4th International Symposium on: *The Contributions of Psychology to Peace*, (Cape Town, 1995); and "Do Sleeping Dogs Lie? The Psychological Implications of the TRC in South Africa", Center for the Study of Violence and Reconciliation Occasional Paper, (Johannesburg, 1997); as well as: Brandon Hamber and Sharon Lewis, "An Overview of the Consequences of Violence and Trauma in South Africa", Center for the Study of Violence and Reconciliation Occasional Paper, Johannesburg, (1997).

35. It should be noted that in addition to the problems of evidence necessary to sustain such civil claims, there are other legal problems which render civil compensation less likely in practice than it may appear to be in principle. For example, South African rules relating to the time-based prescription of civil claims, may well render most long-standing claims defunct.

36. There is an interesting point to be made here in relation to the debates over international jurisdiction as well. If the notional basis for extinguishing criminal and civil claims at the national level rests on the commitment to at least symbolically substitute government's contributions for the perpetrators' in providing some form of reparation for survivors, then ought this not also apply to any suspension of international criminal jurisdiction? Would it not be appropriate for the international community to, for example, extinguish the crippling international debt incurred by the Apartheid regime, on condition that this is reinvested in collective rehabilitation of Apartheid's victims, thereby making a significant contribution to sustaining and maintaining an embryonic democracy?

37. This, despite the fact that the TRC did hold special hearings on the role of the business community under Apartheid.

38. For a more detailed discussion of this topic, see: Graeme Simpson, "'Truth Dare or Promise': Civil Society and the Proposed Commission on Truth and Reconciliation", CSVR Conference on: Making Ends Meet: Reconciliation and Reconstruction in South Africa, (Johannesburg, 1994); Brandon Hamber, Thloki Mofokeng and Graeme Simpson, "Evaluating the Role and Function of Civil Society in a Changing South Africa: The TRC as a Case Study", DHR Seminar Paper, Catholic Institute for International Relations, (London, 1997); and Hugo van der Merwe, Polly Dewhirst and Brandon Hamber, "The Relationship Between Peace/Conflict Resolution Organisations and the TRC: An Impact Assessment", Aspen Institute International Study of Peace Organisations, (Johannesburg, 1998).

39. For example, it was largely due to the vocal and organised advocacy of a coalition of human rights NGOs, that provisions for amnesty hearings to take place 'behind closed doors' was eventually rejected and excluded from the TRC Act.

40. Simpson, "'Truth Recovery or McCarthism Revisited':An Evaluation of the Stasi Records Act o f 1991 with Reference to the South African Experience", Centre for the Study of Violence and Reconciliation, Occasional Paper, (1994). For example, evidence gathered by the Goldstone Commission indicated that at least 135 000 security files were destroyed after covert police operations were uncovered in mid 1991. It has been noted above that further evidence suggests that destruction of records continued until at least 1996.

41. See Graeme Simpson, "A Culture of Impunity", The Star Newspaper, 24/01/1998.

42. In a comparitive context see: Brandon Hamber, "Living with the Legacy of Impunity: Lessons for South Africa about Truth, Justice and Crime in Brazil", Centre for the Study of Violence and Reconciliation Seminar Paper, 4, (Johannesburg, 1997); and Laurence Mazure, "Truth Commissions, Human Rights and Impunity: Contemporary Views of Chile, Argentina and South Africa", Centre for the Study of Violence and Reconciliation Occassional Paper, (Johannesburg, 1998).

43. There were 737 reported deaths in police custody or as a result of police action during the twelve month period from April 1997 to March 1998. 429 such deaths were reported in the six months from January to June 1998. David Bruce, Ian Liebenberg and Ros Atkins, "Towards a Strategy for Prevention: The Occurrence of Deaths in Police Custody or as a Result of Police Action", Report for the Independent Complaints Directorate, (1998).