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Transitional justice and conflict transformation: a tenable nexus? the case of South Africa's Truth and Reconciliation Commission

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CHAPTER 1: THE SETTING OF THE STUDY

1.10 Introduction

The end of the Cold War resulted in significant political changes across the world. Repressive regimes came to an end in various parts through peaceful settlements and political transitions toward democratic rule. The question of transitional justice, located within the human rights discourse, emerged from its core values of the post-World War II period in Europe when the victorious allied forces subjected Japanese and German officials to criminal justice for war crimes committed during the war[1.] Informed by the wave of democratization, transitional justice broadened its scope from initial concerns of jurisprudence to political considerations of accounting for the past with a view to promoting democratic institutions and peace.

The legal and human rights origins of transitional justice have strengthened the need for societies moving away from civil war and repressive rule, to reckon with their pasts by promoting accountability, often in very tenuous and fragile contexts. The dilemma is compounded by transitional governments often inheriting weak and ineffective judicial systems which make it difficult to pursue successful criminal prosecutions. These societies are also faced with the need to overcome structural inequalities and deep-rooted fears and hatreds that pose the danger of undermining the new democratic dispensation and animating new circles of violence and impunity.

There have been a number of approaches offered as alternatives for dealing with questions of past conflict and human rights abuse and for creating sustainable peace. One such development has been the emergence of truth and reconciliation commissions. Beginning with Argentina in 1983, Chile in 1990, and the most prominent South African one in 1995, truth commissions have become one of the most preferred forms of transitional justice mechanisms, appearing in various countries in Africa, Latin America, Asia, Eastern Europe and recently, suggestions being encouraged in the Middle East. Neil Kritz (2002) observes that

> Truth commissions have become almost a routine, it has become a standard practice, you have a transition and everybody immediately says we have to have a truth commission without any clear understanding as to why or what they are about.

The South African Truth and Reconciliation Commission (TRC) in particular animated a lot of international interest. Coming up on the backdrop of a protracted conflict and with its ambitious mandate to promote truth and reconciliation, it has come to be regarded as a viable response to dealing with questions of past conflict and past human rights abuses. It has since been hailed by some as exemplary and unprecedented (Mšller-Fahrenholz: 1996: 21) and as a contemporary miracle (Botman: 1996a:39). It has motivated efforts to establish truth commissions in other countries like Liberia, Ghana and Indonesia, and there are ongoing efforts to establish similar processes in Kenya, Uganda, Burundi and the Democratic Republic of Congo (DRC) (Jenkins: 2003: 7-10, Oduro: 2007). In Northern Ireland, the Secretary of State Paul Murphy prompted by the international interest in the South African TRC, embarked on a fact-finding mission on 27 May 2004 to specifically study how South Africa approached the issue of dealing with the past through its TRC practice (Guelke: 2004). A letter to the Guardian Newspaper had earlier observed, 'Nothing less than a full-scale, South African style 'truth commission', which has legal teeth and will tenaciously get at the truth, will finally satisfy Irish and British public opinion, and allow the long, slow process and healing from Ulster's 'dirty war' to begin' (Ennis: 2003).

In Kenya, the South African TRC has since 2002 continuously been invoked as an example of how to reconcile a society and build peace. Raila Odinga, a presidential candidate in the contested December 2007 general elections and later Prime Minister, vouched for a South African style truth commission during the campaigns, stating 'We will copy Mandela, who used the (Truth and Reconciliation) commission to unite his country after he was elected president --- the commission's objective would be to initiate a healing process'(Atsiaya: 2007).

Inherent in the normative treatment of the South African TRC as a paradigm to be followed, is the assumed correlation between its objectives and the process of conflict transformation (Ziswiler: 2006: 5, Graybil, 2002, Norsworthy and Gerstein: 2003, Lederach: 1995, 1997a, 2000). To those who espouse this linkage, the South African TRC is seen as a mechanism that was central to moving the country away from its past conflict and human rights abuse toward a stable and peaceful society (Mšller-Fahrenholz: 1996: 21). This normative treatment of the South African TRC as a paradigm to be

followed, though prominent in a number of other countries,[2] remains problematic for a number of reasons. First, whether the linkage itself is tenable or not, has often passed without any serious critical analysis. The TRC's assumed transformative effect is often premised on one-time events such as feelings of catharsis during the TRC hearings. This mistakes an event for a process and fails to appreciate that transformation can entail a long drawn out process to bring about fundamental change in the affected society. Second, in South Africa there were/are a number of factors, including the democratisation process and the government reform initiatives outside of the TRC process, that have played a significant role in moving or transforming the country to where it is today. Indeed, the ongoing implementation of South Africa's post apartheid constitutional provisions and the perceptions around that process has had an important impact on the actual transformation and reconciliation process. Third, while South Africa remains a relatively stable society, it also continues to witness significant challenges relating to questions of insecurity, social inequalities and the politics of race in the transformation process.

While a number of scholars and practitioners often conclude that transitional justice can transform conflicts and injustices by confronting the past and promoting democratic institutions, the merits in obtaining the objectives of transitional justice remain debatable. More crucially, few studies have framed transitional justice in the context of conflict transformation and therefore the link between the two has not been sufficiently explored. As will be discussed in chapter two and four, transitional justice can have both positive and negative impacts upon long-term reform and sustainable peace. Moreover, the tendency of governments to borrow transitional justice models from other countries with little regard to how the models have or have not achieved their stated goals and what the effects on society are, is a source of concern. For instance current literature on truth commissions has not been very helpful in providing a critical analysis on how truth commissions can or cannot produce the results necessary to promote peace.

Looking at the case of South Africa, the question that emerges is to what extent can the South African TRC be said to have contributed to transforming the country away from its past conflict(s)? Did its process, including the amnesty provision and eventual recommendations foster or hinder the transformation process? Conflict transformation[3]

emphasizes the need to minimize the destructive impact of conflict and maximize the constructive, mutually beneficial processes and outcomes. Its essence is to bring about constructive change that reduces violence and keeps social structures and relationships dynamically responsive to the real life problems and human needs.

The primary aim of this study is to clarify the assumed nexus between the South African TRC and the conflict transformation process. The South African TRC has not been explicitly formulated in the context of conflict transformation theory. By asking whether the nexus between the two is tenable, the study questions whether it can be justified in a fair or rational way that can be defended by reason and evidence. Following from this primary aim, there is also a secondary goal to the study which is to assess whether the South African TRC constitutes a paradigm to be followed by other relevant contexts. While this goal is briefly explored in chapter six, it remains subordinate and should broadly be seen in light of the implications of the critical analysis on the relationship between the TRC and the conflict transformation. This is significant given the increasing interest in the South African TRC and its favourable consideration by other countries, where it is viewed as the standard practice and paradigm to be followed

1.20 Statement of the problem

Many countries that have been undergoing transition from conflict or repressive rule to a more democratic order have been faced with the challenge of dealing with their pasts. Historically, the norm was to do nothing about a country's past legacy. However, since the Second World War, there has slowly evolved a range of mechanisms that are meant, in some form, to address the issue of past atrocities. International human rights law and principle now condemn impunity for gross violations of human rights committed by individuals or former agents of the state. There has been an emerging perception that countries moving away from conflict or repressive rule have to undertake practical, participatory processes to address their past legacies, otherwise the emerging order will most likely encounter resistance to the process of implementing democratic procedures. This resistance is linked inter alia, to the problem of unresolved historical injustices creating new sources of conflict in those societies (Hamber: 1997: 4-16, Van Der Merwe, Baxter and Chapman: forthcoming).

This study investigates the relationship between the South African TRC and the process conflict transformation. It does so by critically analysing in what ways the South African TRC assisted (or not) in moving the society away from its past conflict toward peace (perhaps better interpreted as non-violent conflict). A central hypothesis of the study is that there exists a gap between assumptions about the South African TRC and the role it actually played in the country's transformation process. In contrast to some of the commonly held assumptions about the South African TRC, the role it actually played in moving the country away from its past conflict toward 'peace' is less understood. This study aims to locate the South African TRC in the context of conflict transformation, and explore, discover and develop arguments that present a clearer and deeper theoretical and practical understanding of the relationship between the two.

In conflict situations, cases of widespread violations of human rights are often a consequence of extreme imbalances in the society's socio-economic and political order. Violations of human rights often arise out of inequitable socio-economic and political relations, which lead to competition and conflict and the breakdown of the social fabric. This in turn becomes instrumental in the use of coercion to manage relations between the competing groups and a result, leading to the perpetration and perpetuation of human rights abuse and circles of impunity. Dealing with the legacies of such societies can only be meaningful if the circumstances that originally produced a group's sense of victimhood are recognised and dealt with.

Efforts aimed at dealing with the legacy of the past have usually raised two significant questions. First how to construct a framework that can give reasonable space to all the previously conflicting groups to realise their potential. Second is how to create a catalyst that can contribute to overcoming the legacy of the past and help to rebuild the social fabric of the society. The truth commission mechanism has in the recent past been offered as one such tool for responding to the question of past conflict and human rights abuse in order to transform them toward peace. Graybill and Lanegran (2004) argue that learning the truth about the past or giving some form of punishment to those who were responsible for past injustices are prerequisites for the establishment of democracy and respect for the rule of law.

Internationally, truth commissions have taken on an increasingly central role as tools for developing the societal change that is vital for overcoming past injustices and advancing social cohesion. The South African TRC in particular, has been widely regarded as a mechanism that created the optimism of helping people to come to terms with their past in order to forge national unity and reconciliation (Asseffa:1998:10-16, Graybill: 2002). Its approach of emphasizing restorative rather than retributive justice[4] has drawn interest in many other countries undergoing political transition.

While the South African TRC may be said to have been necessary and innovative, practice to date indicates that it experienced difficulties directly related to the context in which it operated. Among its problematic experiences include the uneasy coexistence with legal processes. For instance there was frustration with the TRC's dissonance between popular understandings of retributive punishment and the version of restorative justice (Wilson: 2001:25). There were those in South Africa who saw the amnesty provision as political expediency that sacrificed criminal justice. Another problem associated with the South African TRC regarded its basic assumptions, some of which eventually appeared more elusive than earlier believed. The TRC is for instance accused of taking on mandates that it could not fulfil. It promised to 'commission the truth' and 'reconcile' the society whereas essentially it was difficult to deliver these mandates in an integrated and consistent way (Simpson: 2002). Moreover, South Africa's democratisation process included a variety of reforms initiated by the government aimed at addressing previous sources of conflict. A number of political, land and security sector reforms were provided for, in the course of the constitution making process and occurred outside of the formal TRC process. In addition, the government channeled enormous resources to sectors such as health, education, shelter and other areas of development. It is for these reasons that the study questions the perception that the TRC was central to South Africa's transformation process. It is possible that other societies that attempt a similar approach may find truth commissions to be sources of frustration because they do not fulfil the promise of conflict transformation.

There is literature full of broad assertions that the TRC helped move the South African society toward peace. Writing against a backdrop of increasing interest in the South African TRC, Jose Alvarez (Cited in Reddy: 2004) stated; 'Truth commissions

today are inescapable tools in establishing the truth of past crimes and a means for victim recompense and instruments to promote peace and reconciliation'. Similar arguments linking the TRC to South Africa's transformation process are held by Odéndaal (1998), who states that there can be no doubt about the importance of the South African TRC as an experiment in conflict resolution and peace-building. The question, he however asks is to what extent the TRC has or will be successful in building peace? He observes that whereas the South Africa TRC may feel with some justification that it has exorcised the major demons besetting the national soul, the fact of the matter is that on local level, individuals and communities have not yet adequately dealt with old demons. Many conflicts at local level are still fuelled by the resentment, anger, fear, hurt and stereotypes of the past. He suggests that there is need to continue healing the wounds although he fails to suggest how.

Lederach (1997a, 1999) argues that sustained peace can only be achieved through reconciliation, which is a social space, a locus, where people come together. To him 'Truth, justice, mercy and peace, are the essential components of reconciliation' (Cited in Reddy: 2004).Ackerman (1994) also links truth commissions to conflict transformation by observing that

> Reconciliation as a process involves the creation of structures that make for durable peaceful relationships between states and thus the transformation of conflict. The final objective of reconciliation is 'structural peace,' a condition of durable peace based on multilateral and bilateral structures. Reconciliation does not eliminate conflict of interest, but it does provide structures and mechanisms that can eliminate the basis for war.

While establishing a truth commission can be seen as part of the broader process of moving a country towards peaceful coexistence, it has to be understood that TRCs are only part of a bigger process. There are other institutional changes and government action that are required to transform a society and promote peace. In practice, truth commissions have rarely had all the positive impacts their proponents claim. In most countries where truth commissions have been established, the number of unsolved cases of human rights violations matches the new facts uncovered. In many instances, truth commissions have issued recommendations for reform that have never been implemented (Hamber and Kibble:1999) There is need to understand the place of TRCs in conflict transformation.

Transforming societies away from conflict goes beyond the truth commissions. The failure to understand that TRCs, however well implemented are not the sum total of what is required to transform conflict is a source of concern because it generates a false sense of expectations that truth commission by themselves can solve past injustices and conflict.

Broadly, the propensity by individuals and countries to espouse the South African TRC as the standard practice and paradigm to be followed, calls for a critical rethinking. It raises fundamental questions about the need to develop a critical theory on the place of truth commissions in conflict transformation. The value of this study lies in its critical analysis of what the South African TRC means in terms of praxis and the nature and role it played in the conflict transformation process. Being a recent vintage, there is need to build on the theory that clarifies the link between truth commissions and conflict transformation. In the light of the study's critical analysis, a set of key issues relating to the treatment of the South African TRC as a paradigm to be followed will emerge as a secondary goal of the study, with some lessons about other relevant contexts interested in similar approach.

1.30 Research questions

The study aims to answer the following questions,

- What is the nexus between the South African TRC and conflict transformation?
- Does the South African TRC vindicate the conflict transformation model?
- An added goal and secondary concern will be to underscore the implications for treating the South African TRC as a normative example to be followed by other countries.

1.40 Relevance of the Study

Conflict and human rights abuse bring about social dislocation and the destruction of the social fabric. There has been a growing credence that besides paying attention to the challenges of socio-economic reconstruction, countries emerging from periods of conflict and human rights abuse need to undertake measures to deal with the legacy of the past. Truth commissions have increasingly being promoted as one such key measure largely

influenced by the South African experience. While the South African TRC has been held as the standard practice as demonstrated by the interest it has generated in countries such as Burundi, Indonesia, Jamaica, Kenya, Morocco, Philippines, Uganda, Ghana, Sierra Leone, Liberia and the Democratic Republic of Congo, one of its main inadequacies according to those who emphasise criminal justice is that it remains among the few examples of truth commissions that granted amnesty for gross violations of human rights.

This study is motivated by the fact that as questions of transitional justice continue to gain currency around the world, interest in the South African TRC is likely to remain. There is however little research that critically assesses the assumptions that is played a central role in transforming the South African society toward peace. There is impressive literature on the South African TRC broadly but there is little research that specifically considers in detail the relationship between the South African TRC and Conflict Transformation Models. A number of authors like Lederach: 1997a, 1999, Asseffa: 1998 and Hamber: 2003: 224-234, have written on some dimensions of the relationship but in their analyses the structural dimensions of conflict transformation are relatively underdeveloped. Their orientation is more towards attitudinal and behavioural change rather than situational or structural change. In political transitions unless this structural dimension is addressed and attention paid to the transformation of institutions and processes, it is difficult to generate stable peaceful relationships. Much of the assumptions in countries that have had interest in the South African TRC are full of broad and unsubstantiated assertions that the South African TRC assisted in the transformation process by promoting reconciliation and national unity. Such anecdotal accounts fail to cast the TRC within the conceptual lenses of conflict transformation, and as a consequence, they fail to clarify the place and role of the South African TRC in transforming the country's past injustices and conflict. It also fails to appreciate the challenges inherent in treating the South African TRC as a paradigm to be followed.

Several years after the end of the TRC process in South Africa, provides a unique opportunity to separate objectives and outcome, which was the context in which the South African TRC was conceived and organised. It is becoming possible to separate information from what the TRC set out to achieve and what its outcome has been. The relevance and significance of this study is embedded in its contribution to clarifying the

nexus between the South African TRC and conflict transformation. It will do so by investigating the convergence and tensions between the two. The value of this analysis lies in appreciating whether there are any connections and overlaps between the two. The assumed correlation remains an area of confusion and real potential to be explored. Indeed one of the challenges facing studies in the area of transitional justice is the need to develop stronger theoretical and normative frameworks. There is still the difficulty of clarifying assumptions when the overarching theory is not well developed. It is within this context that this study seeks to develop a coherent understanding of the relationship between the South African TRC and conflict transformation.

This study is motivated by the need to assess assumptions that justify the South African TRC as the standard practice to be followed because it moved the country away from conflict toward peace. Sam Reis-Dennis (n.d) observes that the South African TRC experiment worked brilliantly and other countries have since followed South Africa's example by setting up similar organizations to mitigate conflicts stemming from injustices directed at particular groups. Despite the growing prominence of the truth commission phenomena, there is not a clear understanding of their effectiveness and contribution to transforming conflicts. Studies have often described TRC processes with little critical analysis of the assumptions attributed to them. Although it will undoubtedly take many more research studies to fully understand the impact of the TRC and its contributions to post-apartheid South Africa, it is not too early to begin questioning the extent to which it contributed (or not) to the country's transformation process. Unfortunately, some of the writings on this subject are anecdotal with arguments such as learning the truth will somehow bring social healing and convince people to put the past behind and move on (See Asmal, Asmal and Roberts: 1996). In some cases some of the assumptions about the TRC are based on what seems intuitively appealing rather than properly conceptualised research (Tristan: 2004). It is for these reasons that this study seeks to examine the relationships between the South African TRC and conflict transformation. While this study is motivated by assumptions about the South African derived from other national contexts,[5] it has deliberately limited its reference to these contexts unless judged relevant to the discussion at hand. The essence is for the study to

avoid losing focus and to concentrate on the South African experience in order to encompass rigour and depth.

Broadly, it is hoped the study will contribute to the development of a critical theory on the nexus between the South African TRC and the Conflict Transformation models, which will influence both the intellectual discourse and actual practice of transitional justice.

1.50 Overview of Literature

This overview examines literature on transitional justice with a specific focus on the South African TRC and on the broad question of options for dealing with conflict.

1.51 Transitional Justice and the South African TRC

The theme of dealing with the past, has witnessed a considerable growth in the body of its literature. A number of authors have examined the reasons why dealing with the past is necessary. Tutu (1999), Du Toit (1999), Asmal, Asmal and Roberts (2000: 86-98) argue that the past must be confronted to, among other things, acknowledge the dignity of the victims, avoid the repetition of atrocities and establish the rule of law. They give credence to the TRC as one of the best approaches to account for crimes committed against fellow citizens and to prevent future conflict. These authors conclude that failure to deal with a burdened past leads to mistrust between societal groups and towards state institutions, and in their opinion, this hinders the reconstruction of the social fabric that is needed for a democratic and peaceful society

The South African TRC is seen in literature to have brought restorative justice to the victims, not only through the public confessions of the perpetrators, but also through the recommendations of reparations (Llewellyn:, 1999: 96-111, Villa-Vicencio: 2000: 68-76, Tutu: 1999, Minow: 1998). Many of these authors consider the South African TRC as one of best examples of restorative justice to victims, offenders and communities. It is seen to have been the best suited to address issues of transitional justice in South Africa. Most of the above authors plus others like Allen:1999: 315-353, Chapman: 1999, Godobo-Madikizela :1997: 271-276 who extol the South African TRC process, see criminal trials as often concentrating on the perpetrators, which according to them, limits

the restoration of the victim-dignity that was essential and necessary in South Africa. There are however other authors who contest the notion of restorative justice, and question whether it can deter future abuses and allow victims and their families to heal by 'setting the guilty free' (Manda: 1996: 201-209, Bronkhorst: 1995, Motala: 1995: 338-362). The South African amnesty process, has in particular, been subjected to a very heated debate. Authors especially those informed by principles of criminal justice see the amnesty provision as a contradiction to international law given that apartheid was declared a crime against humanity (Bronkhorst: 1995, Motala: 1995: 338-362). A number of other authors are, however softer on the amnesty provision and the TRC generally, arguing that the TRC did not offer blanket amnesty but rather, conditional amnesty that was justified in the South African context (Theissen: 1998, Boraine: 2000). These authors see amnesty as a necessity that was crucial in negotiating the political compromise and South Africa's peaceful transition. On the evolving discussion about the South African TRC and the nature of international justice and the mechanisms for achieving it, a number of authors, view new democracies emerging from periods of massive violations of human rights, to be unable to prosecute all those who perpetrated crimes during the previous regime (Zyl: 1999, Tutu: 1999, 2000, Boraine: 2000, Lerche: 2000) thus making it necessary to establish truth commission processes.

Other issues examined in literature include whether the truth commission approach is fair, moral, and effective in bringing about reconciliation (Rotberg and Thompson: 2002, Hartwell: 2000), in particular whether it led to a democratic culture of reciprocity and debate (Gutto: 2000, Maier: 2000: 261-278), whether it restored confidence in the rule of law (Bhargava: 2000:.45-67) and whether it was the ideal choice for the specific context of South Africa (Levinson: 2000: 211-234). Levinson critiques the absence of legal justice and chastise the TRC for its excessive moral and religious high-mindedness but acknowledges that the South African TRC was the most far-reaching and imaginative of its kind.

Several other authors contest the TRC's approach on the basis that it imposed its viewpoints and frameworks on its participants (Harris: 1998). The TRC in this case is said to have imposed its own discursive framework and the reconciliation agenda upon the victims, thereby ignoring feelings for retribution.

The debate about the South African TRC representing one of the pillars of transformation that was required to help South Africa move away from a deeply divided past of manifest inequalities to a future founded on a human rights culture and mutual respect is taken up by several authors (Lax: 2001: 61-75, Lipton: 1999: 64, Villa-Vicencio: 2000: 68-76). They observe that attempting reconciliation without transforming the conditions of society is meaningless since the priority of victims is to live in conditions that are better than those of the past.

There is also literature that underscores the complexity and nature of questions of truth and justice that were central to the TRC process (Rotberg and Thompson: 2002, Hartwell: 2000, Ignatieff: 1998, Villa-Vicencio and Verwoerd: 2000). The authors look at factual and philosophical debates regarding these questions and note that it is debatable whether the TRC served justice and if it was capable of establishing a shared and absolute truth.

There is literature that aims to explain the possibility of replicating truth commissions in different national contexts. The notable examples are Priscilla Hayner and Mark Freeman who attempt to set standard guidelines for the general operation of truth commissions (Hayner: 1996, Freeman: 2006).

1.52 Literature on Conflict

There is overwhelming literature on the various dimensions of conflict including psychological, interpersonal, organizational, intrastate, interstate etcetera. This overview focuses on options for dealing with intrastate conflicts given the relevance to this dimension to South Africa's past conflict. The overview will cover a number of dimensions including the definition of conflict, sources of conflict, conflict typologies as well as forms of conflict management.

The term conflict has had many definitions which, from an overview point, can be categorised into two. First, there are writers who define conflict in terms of violent disputes that involve battle-deaths of soldiers and military staff (with lowest number of deaths varying from 100-1000 people in one calendar year) and in which at least one of the combatant parties is a state (Singer and Small: 1972: 8, Dwan and Holmqvist (n.d.), Wallensteen and Sollenberg: 2005: 635). This definition is prominent in empirical-

quantitative analyses of conflict although it has been criticised by those who argue that it unnecessarily reduces conflicts' contextual characteristics to two aspects, which does not suit the complexity of the notion of conflict (The Heidelberg Institute for International Conflict Research (HIIK):2005: 2). It is from this argument, that the second category follows, emphasising the broader scope of conflict to involve the clash of interests on national matters between at least two parties (organized groups, states, groups of states or organizations) that are determined to pursue their interests and win their cases.

On the question of sources of conflict, there are authors who reduce them to three main issues, wealth, power, and prestige (Weber: 1947, Deutsch: 1973), although others categorise them broadly to include control over resources, preferences and nuisances, beliefs, values, or the nature of the relationship, territory, ideology, dynastic legitimacy, religion, language, ethnicity, self-determination, resources, markets, dominance, equality, and revenge (Singer:1996: 35-49, Rupesinghe:1992: 61, Frei: 1976: 2). Conflicts in this case are seen to be determined by historical and socio-economic and political conditions of a particular epoch which may have deeper and more distant historical roots whose nature may also be very diversified. There is literature that specifically focuses on the centrality of human needs to the question of conflict (Burton: 1989: 3-23, Van Der Merwe and Odendaal:1992) In this case, human beings pursue their basic needs, sometimes refusing to compromise when they are not fulfilled, and this often leads to the decay of authoritative processes that are unable to satisfy them. These authors see the frustration of identity as a basic need that is at the heart of all deep-rooted conflicts. Other authors emphasize the structural nature of conflicts in which dominated groups try to liberate themselves from dominance while dominating groups attempt to maintain the status quo (Galtung: 1976: 297-98, Reychler: 1979:119, Montville: 1989: 532-540). From an ontological point of view, these sources of conflict are categorised into two approaches, the subjectivist (Deutsch: 1991: 26-56) and the objectivist approach (Schmid: 1968: 217–232). The objectivist approach looks for the origin of conflict in the social and political make-up and structure of society, and maintains that the goals at stake may in fact be compatible. On the contrary, the subjectivist point of view focuses primarily on the perceived incompatibility of goals and differences.

Most of the literature on conflict concentrates on violent conflicts, particularly on wars.[6] The absence of violence, however, does not mean an absence of conflict and there are a number of authors who have taken up this discussion and distinguished between violent and non violent conflicts (Sandole:1998, Diez, Stetter and Albert: 2004: 6, Davies: 1973: 251, Smith:n.d, Doughterty and Pfaltzgratt: 1990: 186-212, Mwagiru:2000:3, 24-35). They maintain that it is easy to identify violent conflicts because they inflict physical harm on those affected. It is however less easy to identify non violent conflicts because they cannot be seen physically and can sometimes not be thought about. Victims of non violent conflict may sometimes not realize that the structure of their relationship is generating conflict. With time, however, structural conflict may lead to physical violence. The authors give the basis for structural conflicts to be when individuals are restricted from realising their full potential.

A focus in recent literature on conflict analysis has been on the conflict categorisation based on the Conflict Simulation Model (COSIMO) developed by the HIIK[7] (2005: 2). At the heart of its methodology stands the dynamic model of conflict, which incorporates five intensity stages, taking into account the phases of non-violent and violent conflict ranging from latent conflict to war. This categorization was developed based upon the conflict escalation dynamic, which was the basic criterion used by Pfetsch when he established five-types of conflict categorization: latent conflict, manifested conflict, crisis, severe crisis, and war (Pfetsch: 1994: 216). Regarding the stages of conflict classified along the lines of its development, the common theme within the typologies is that the conflicts pass through a series of phases where it begins, develops and eventually ends (Brahm 2003, Alker, Gurr and Rupesinghe: 2001, Alker and Mushakoji: 2001). The phases begin with the existence of a latent conflict, followed by emergence, escalation, stalemate, conflict de-escalation and ending with settlement and the post-conflict peace-building.

With the end of the Cold War and the increase in intrastate conflicts, a number of authors have sought to give specified definitions to these types of armed conflicts using terms such as ‘low-intensity conflicts’, ‘wars of the third kind’ and ‘new wars’ (Van Creveld: 1991, Holsti: 1996 and Kaldor: 1999). The intention has been to denote the shift in the direction of conflict away from interstate (involving the military forces of two or

more states), toward internal or intrastate armed conflicts, which have often involved armed factions or contending social groups (sometimes receiving direct or indirect assistance from a third state) as the main conflict actors.

On the question of responding to conflict, there is broad literature with different authors emphasising different approaches which can be generalized into four categories, conflict settlement, conflict resolution, conflict transformation and conflict prevention (Reimann: 2005: 7, Bercovitch: 1984, Zartman: 1989, Fisher and Ury: 1981, Burton: 1990, Kelman and Fisher: 2003: 315-353, and Kriesberg: 1998). Conflict settlement in this case covers all the strategies that aim at bringing direct or manifest violence to an end, without necessarily eliminating the root causes of the conflict. Literature on conflict resolution points toward strategies that aim to find an exit from a conflict's destructive dynamics, toward achieving a satisfying solution for all parties involved. This approach is more prominent particularly in the human-needs theory (Burton: 1990), which maintains that some conflicts involving human needs that entail interests can be negotiated, while those that involve quasi natural needs such as identity are often non negotiable. Conflict resolution emphasises the creation of structures that eliminate causes of conflicts (Evans: 1993, Boulding: 1992: 61, Karel: 1968: 29, Mendlovitz: 1975: 296, Burton: 1989: 3-23, Van Der Merwe, and Odendaal:,1992). The focus is on improving people's way of life by improving the institutional and normative environment. Other authors have discussed the question of relationship as a basis for conflict and its long-term solution (Saunders and Slim: 1994: 43-56, Rupesinghe: 1992: 61). The notion of conflict transformation on the other hand has been shaped by the works of Lederach (1989, 1995, 1997a, 1999, 2000). The bottom line in conflict transformation is the argument that sustainable peace demands an interactive process that seeks to promote human relationships (Lederach: 1995, Miall: 2005, Väyrynen: 1991: 1-25). For conflict transformation, the aim is to transform the context of conflict, its structure, the parties involved, the general conflict issues and the individual actors toward constructive relations and peaceful outcome. Proponents of conflict transformation criticize conflicts settlement approaches, which they regard as generally concentrating only on decreasing or attempting to eliminate the direct forms of violence. The argument especially by Lederach is that where there has been protracted conflict, the focal point for resolving such conflict should be a sustained

dialogue that seeks to build mechanisms that engage the conflicting sides with one another as 'human in relationship.' Sustained dialogue is seen to engender positive outcomes because it rebuilds and legitimises relationships in conflict situations. The legitimisation includes changing the terms of the conflict and the constituency of that conflict (a process referred to as non-violent social transformation).

Debates on conflict prevention maintain that there are many conflict preventive measures (Carnegie Commission on Preventing Deadly Conflict: 1997). In peace times preventive measures aim at strengthening the socio-economic and political structures in order to promote peaceful co-existence. Thus, peace is not simply equal to absence of violence, but rather a situation of positive coexistence. Preventive measures can also be applied in contexts which have experienced conflict to prevent their reoccurrence.

In summary, there is abundant literature on the various dimensions that are central to this study; transitional justice, the South African TRC and on conflict and options for dealing with it. On the particular subject of the South African TRC, the available literature takes on different thematic interests, such as legal, religious, political, psychological, historical and linguistic. It will therefore, be the aim of this study to engage with such literature in an integrated way that juxtaposes the various dimensions in order to appreciate the interrelationships between fields of knowledge.

While there has been widespread international interest in the South African TRC as a conflict management approach, current literature on its process is not precisely formulated in the context of conflict transformation. It is my view (and that of, for example, Hamber (2003) that a proper evaluation of the South African TRC as a conflict transformation framework must be situated not only within short term events accompanying the TRC but also within the specific agenda of socio-economic and political transformation. This perspective demands a shift in debates on truth commissions and transitional justice broadly, away from a largely retrospective focus toward a more proactive engagement with unfolding challenges in transitional democracies. This is because conflicts do not simply end with political settlements. The energy from a latent or manifest conflict often mutates or is channeled into new and sometimes destructive activities. Change can only be meaningful if it attends not only to the retrospective sources of conflict but also if it engages the new challenges of socio-

economic and political transformation. While there is literature that touches on the TRC and the various aspects of the transformation agenda, a large part of this literature is premised on one time events taking the form of catharsis during the TRC process. This evades conceptualising transformation from the point of long term structural changes. Indeed, the ambiguities surrounding the South African TRC and the broader South African society indicate that there are far-reaching challenges to transformation that are still to be met.

This study is important not only because it engages in a critical analysis of the nexus between the South African TRC and conflict transformation, but also because it carries significant implications for other contexts that treat the South African TRC as the standard practice and paradigm to be normatively followed. Societies in transition need not only ask themselves a series of context-specific questions but also to learn from other similar experiences. Given that the South African TRC has been widely regarded as remarkable, yet its process and aftermath were/have been confronted by significant challenges, the question that arises is to what extent can the assumptions about the South African TRC as a conflict transformation framework be judged relevant and tenable? There appears little serious research on this question and this study seeks to fill that gap.

As regards originality, although there is a good deal of literature to draw upon on the South African TRC, there is little research that specifically formulates the South African TRC within the conflict transformation theory. It is this formulation and the critical analysis of the nexus between the two that engenders originality

1.60 Analytical Frameworks

In Social Science research, analytical frameworks constitute the conceptual lenses through which social phenomena can be understood (See Ragin: 1994:74). They help to capture and rationalize arguments that are relevant in a specific research context. There are several such frameworks that can be used in relation to sections or the whole of this study. These include mediation theory, democracy and conflict transformation models.

Broadly, in the area of conflict, the dominant framework has been the process of mediation, which largely underscores the need to find a mutually agreeable settlement to an immediate conflict (Moore: 1996). It is oriented toward reaching agreements or

signing of peace accords. The mediation framework, to an extent seeks to empower the conflicting parties to understand their own situation and needs, as well as encourage them to recognize the situation and the needs of their opponent(s) (Baruch and Folger: 2005). While such recognition can lay the groundwork for a mutually acceptable settlement, the mediation framework is accused of often ignoring the lingering psychological and physical suffering and the enemy perceptions generated and reinforced by conflict and human rights abuse. The capacity of drawn-out hatred, fear and enmity to explode into further violence is therefore left un-addressed. Agreements and ceasefires emanating from the mediation framework may minimise the overt conflict behaviour but they are limited in dealing with issues of damaged relationships or human suffering which conflicts and human rights abuses engender.

Democracy is another prominent framework for dealing with questions of conflict, societal repression and human rights abuse. It conveys the idea that societies with an established democratic polity will avoid relapsing into destructive conflicts and human rights abuse. Democracy's potential to enshrine liberty or make government accountable and more representative, its participatory dimension, and the inclination towards good governance and social responsibility in the administration of economic resources are certainly useful in enhancing social reconstruction, the rule of law and the respect for human rights (Mansbridge: 1983). David Bloomfield and Ben Reilly (2003:7-25) observe that democracy can help transform a society by providing a foundation and impetus for the new government to reform institutions and ideologies. In societies that are moving away from conflict and human rights abuse, this can be useful in the establishment of institutions that allow for accountability, meaningful competition for political power, participation in the selection of leaders and policies which can positively contribute toward the social reconstruction (Diamond, and Plattner: 1994).

There are however those who argue that the democratic approach of exposing important issues to competing processes can aggravate or burst the deep cultural and social antagonisms (The John Hopkins University: Paul H. Nitze School of Advanced international Studies: n.d). In deeply divided societies, often, ethnic, cultural as well as kinship loyalties are exploited for votes. The democratic approach of winner takes all, may therefore, not always transform a society's political structure and culture, but can

aggravate existing tensions. It may in fact entrench inequality and motivate the minority to challenge for power in a violent way because they don't feel strong enough to gain power through an electoral process. This tendency can be exacerbated especially after periods of conflict and where the new government does not address properly the groups' original grievances. Democracy is also accused of not dealing with the lingering psychological and physical suffering and the enemy perceptions generated and reinforced by conflict. Often conflicting groups living in close geographical proximity continue to emphasize their distinct identities while tying responsibility for past injustices to their neighbouring adversaries, even after the overt conflict has ended. While therefore democracy can be useful in easing transitional societies toward the respect for human rights and enhancing of public trust and confidence in state institutions, it can also have its own limitations particularly in dealing with legacies of past conflict and human rights abuse.

The conflict transformation models (See Curle: 1991, Kriesberg, Northrup and Thorson: 1989, Lederach: 1999) are offered as a framework that presents a holistic perception of dealing with conflict. They will in this study constitute the analytical framework through which to conceptualise and understand the contribution of the South African TRC to dealing not only with the country past but also in terms of bringing about constructive changes in society. Conflict transformation states that the goal of dealing with conflict and human rights abuse should not only be to end physical violence and injustices, but rather to construct positive and sustainable relationships that promote stable and peaceful societies. The use of the term transformation in this case, refers to fundamental change in structures of society, attitude and behaviour of individuals and in the relationship between conflicting groups. The conflict transformation framework articulates the belief that any conflict can be a catalyst for deep-rooted enduring change in individuals, relationships and structures of human community. The central concern of conflict transformation is to initiate a process within the society affected by the conflict or repressive rule in order to empower actors within that society to become owners of social change. The underlying guiding principle is that social conflict and repressive rule emerge and develop on the basis of meaning and interpretation that people involved attach to socio-economic and political actions and events (Lederach: 1995: 8). Therefore

while social change can begin with outside intervention, the conflict transformation model emphasizes that the affected society must be empowered to own the process if it is to be sustainable.

The conflict transformation model asserts that it is possible to respond to conflict and structural violence in new and unexpected ways that break the patterns of destructive behaviour and cycles of impunity. For this to happen requires imagining possibilities that go beyond securing the occasional grudging agreements or signing of peace accords. The concept of conflict transformation points descriptively toward the inherent dialectical nature of conflict and human rights abuse, that social conflict and repressive rule are phenomena of human creation lodged naturally in human relationships (Heinrich: 1997: 4-6). They are phenomena that alter human relationships and the social reconstruction process needs to involve the rebuilding of those social relationships and the social realities (Lederach: 1985, 1995: 17). Conflict transformation holds that the transformation process may sometimes create the appearance that the conflict is only getting worse because of increased expression of different viewpoints (Kraybill: 2001: 7). With time however, people recognize that there is room for them to voice their concerns and they often become more constructive in the way in which they interact with each other.

In transforming a society away from conflict and human rights abuse, the desired change is not supposed to be coerced. Purely coerced change is in fact not a transformation; it is an adjustment to force. Conflict transformation however acknowledges that coerced change can sometimes lead to opportunities for meaningful reflective encounters. But unless the encounter takes place, coercion only polarizes and separates people without addressing the causes of conflict. As soon as the coercion is gone the situation reverts to the old destructive ways. The transformation approach is based on the view that protracted conflict destroys the relationships of parts in a system and the social reconstruction processes should focus attention on rebuilding the relationships within that system. Just as the impact of violence and human rights abuse can lead to the destruction the socio-economic and political ties, the transformation process envisions a process of rebuilding these societal relationships. The critical point is to find ways of dealing with the breakdown without getting locked into a vicious cycle of

generating more rifts and mutual exclusiveness. Conflict transformation framework therefore holds that mechanisms for dealing with conflict and human rights abuse must be pursued in an integrated manner, covering all the distinct but interrelated dimensions.

The South African TRC has been offered as a mechanism that has contributed to the transformation of the South African society away from its past conflict and human rights abuse toward a positive, stable and peaceful South Africa. This study investigates whether this projection is tenable. It will do so by critically analysing the assumed cross-cuting aims and objectives, complemented by primary research on whether the South African TRC contributed to bringing about fundamental changes in the structures of society, attitudes and behaviour, and in the relationships between the previously conflicting groups in the country. The value of this approach lies in investigating the connections and overlaps between the South African TRC and conflict transformation. As detailed in the next section on research methodology, the study will weigh the implications of the research data collected on the South African TRC against the conflict transformation frameworks and inferences that ran contrary to those predicted by the conflict transformation models will be taken as falsification of the South African TRC as a conflict transformation framework while those in agreement will be taken as corroborating it. The study will then analytically compare the explanatory value of the competing sides of debate on the South African TRC as a conflict transformation framework and make tentative judgments on that basis.

1.70 Research Methodology

This study's research questions emerged from a concern about the increasing number of countries that treat the South African TRC as the standard practice and paradigm to be followed. Often, the basis for this treatment is the perception that the South African TRC was a central mechanism to moving the country away from its past conflict toward 'peace', a conceptualisation, which this study considers anecdotal and unsatisfactory. The concern is that if the assumed relationship does not exist or exists only minimally, the results for other countries that attempt similar processes will turn out to be disappointing. This calls for putting the assumptions linking the South African TRC to conflict transformation to research and critical analysis.

This study considers research as an ongoing process of learning, which is rigorous and insightful but not overly constrained by the positivist research protocols. It is underlined by the thinking that insights into phenomena can be gained through a careful study of collected examples. The research philosophy and methodology applied to this study primarily involves a reflective mode of inquiry, although this is, once in a while complemented by primary data. In assessing the nexus between the South African TRC and conflict transformation, the study draws its datasets from qualitative data, and makes judgements through integrating conceptual analyses and analytical/discursive reflection. It aims to explore, discover, develop and consolidate knowledge on the relationship between the South African TRC and conflict transformation, in order to influence practice. The study is therefore, not wedded in the 'hard data' but rather integrates and marries up various of information from secondary data, occasionally blended with primary data, in order to build up a more complete picture of the 'world'. In developing the various chapters, the study proceeds back and forth between the various sources of data. The study seeks to be both informative and transformative. Heron makes a distinction between informative and transformative inquiry (Heron: 1996: 48-49). An informative inquiry seeks to describe and explain a domain of experience while a transformative inquiry seeks to influence change. The first section of the research methodology focuses on the study's analytical/discursive reflection approach which benefitted primarily from secondary datasets and documented primary sources such as the TRC report, while the section after, covers the primary sources of data collected through interviews by the researcher to complement the analytical/discursive method. This primary data should however, be understood to be derivative rather than principle to the study's research methodology.

1.71 Analytical/Discursive Reflection Technique

Any discussion of the bases of qualitative research presupposes certain assumptions of an ontological and epistemological nature concerning the nature of social reality and how it is known. There are those who conceive reality as natural, which implies that it exists before being known, and not only is it independent of human beings but also precedes them. Pérez (Cited in R. F. Droguett: 2007) for instance argues that,

> There is reality and there was reality before there were human beings. This is something more than a 'conviction' or a fact. It is—no more and no less—the conceptual structure of our actions. We act as if it were certain.

This study however assumes a constructionist perspective in which reality about the South Africa past conflicts and human rights abuses and the South African TRC are constructed through meanings that give them sense. Meanings about the contribution of the South African TRC to conflict transformation are the dynamic result of social relationships, located among writings and people's perceptions, that is to say, in the space of meanings that are constructed by people. The idea of construction means that social reality is interpreted differently by different people. Ontologically, conflict is a socially constructed interaction between people who both individually and collectively form meaning out of the surrounding world. The surrounding world entails the socio-economic and political characteristics of the conflict. Constructivism offers insight into how people jointly create conflict and how that conflict can be transformed (socio-economically and politically). Lederach (1995) sees people as 'active participants in creating situations and interactions they experience as conflict'. He creates the linguistic space for the recognition of constructivism by distinguishing the purpose conflict transformation from the conventionally used term of conflict resolution. Transformation is both descriptive of the conflict dynamics and prescriptive of the overall purpose of building peace, both in terms of 'changing destructive relationship patterns and in seeking systemic change'(Ibid: 18).

The study's analytical framework is based on the hypothesis that the South African TRC, by giving the impression that it sought to resolve the country past injustices through truth telling, healing and promotion of national unity and reconciliation (Ross: 1997) embodied a conflict transformation approach. It assumed that it would transform the country's past legacy of conflict and human rights abuse into a positive, stable and peaceful society. This study therefore treats this assumption linking the South African TRC to conflict transformation as an analytical hypothesis to be tested. The aim is to clarify the relationship between the two.

A characteristic of this study is the breaking away from the epistemological foundations of empirical research, in terms of rejecting the idea of absolute objectivity that considers social reality as an entity independent of the knowledge that one has of it. From the vantage point of this study, the research assumes an interpretation of interpretations, to the extent that it gathers together and critically analyses the points of view of diverse sources of data on the relationship between the South African TRC and conflict transformation. The study should be understood as the production of a set of interpretations and critical reflections that seek to render the relationship between the two more intelligible. The interpretative character of the research implies that it often distances itself from the positivist style in order to take up research as a discursive construction built through conceptual analysis and critical reflection, drawing primarily from theoretical propositions, although from time to time combined with primary data.

Through the analytical and discursive reflection approach, the study extracts essential concepts that drive transitional justice broadly and those that guided the South African TRC. The research clarifies those constructs that have been used to make connections between the South African TRC and conflict transformation. These constructs like those concluding that the South African TRC transformed conflicts by confronting the past and promoting truth, reconciliation and democratic institutions are often taken for granted to be true, yet there is only anecdotal substantiation to suggest that the TRC played a role in South Africa's transformation. Through critical analysis and discursive reflection, the study makes judgments on the value of assertions linking the South African TRC to conflict transformation.

By working back and forth between conceptual /analytical and discursive reflection, complemented by secondary and occasionally primary datasets, the study delineates the instrumental and practical value of those constructs that drove the South African TRC, and in a critical, interpretive mode, builds new and better conceptual understandings. The aim is to help advance sound conceptual understanding of the nexus between the South African TRC and conflict transformation. The secondary data that the study draws from includes literature collected and published in various forms (textbooks, journals, compact disks, papers distributed at courses and seminars, and from the Internet). The study combines published literature to reflect diversity in experiences (for

example legalistic and non-legalistic perspectives and from both academic and non-academic backgrounds). The aim is to bridge the gap between academic expertise and the knowledge held by practitioners. The use of secondary data on the TRC is intended to provide insights into its phenomena as a process. Secondary data is used as a path that points and leads back to primary experience since insights gained through the conceptual approach do make a difference in actual practice. The conceptual/analytical and discursive reflection method of the study is organized around goals of clarity (logical accuracy and focus of arguments) and context (the building and understanding of the South African context under investigation). The value of this approach lies in assessing axioms, assumptions and the actual TRC processes and resonating them within the conflict transformation framework in order to establish if there is any convergence. Using qualitative research is more valuable for this study because the research questions posed require a conceptual/analytic approach that is grounded in an understanding of the context of the study, which in this case has been made possible through the researcher's residence in South Africa and also through a degree primary datasets which are briefly examined in the next section.

1.72 Primary Data

The contribution of primary data is meant only to supplement, where necessary, the analytical/ discursive reflection method. The research approach deemed appropriate was to complement where necessary a meta-analysis of existing disciplinary knowledge with primary data. For primary data the study was specifically interested in obtaining information and responses on a range of certain identified variables such as individual and group perceptions and experiences on questions of social injustices, truth telling, amnesty, justice, reconciliation, reparation, and on the entire TRC process and lessons for other countries interested in similar approaches. The study entered into dialogue with various actors in South Africa, including victims/survivors, ex-combatants, alleged perpetrators, TRC officials and other individuals knowledgeable on the subject. The qualitative approach allowed discussion of both normative and non-normative questions on how those individuals and groups viewed and understood the various aspects and dimensions to the TRC process. The research technique did not aim to reduce the

complexity of social life of the various actors into manipulable equations, neither did it seek the 'detached objectivity' of the quantitative researcher. The aim was to understand the feelings, attitudes and behaviour of the various actors toward the TRC process, and it was hoped that through sharing their frame of reference, the study would accurately comprehend the individual subjective realities and establish whether the TRC altered their behaviour, perceptions and relationships in any way. Ascertaining attitudes about the TRC and its role in improving relationships was important in establishing whether or not it corresponded to the conflict transformation models.

For a fuller discussion of the approach adopted towards primary research, see Appendix 1.

1.80 Chapter Outline

This first chapter outlines the background of the study, the objectives, research questions, literature review and the analytical framework. Chapter two focuses on the theory of transitional justice. It does so by considering the policy options available for societies undergoing political transition in dealing with their pasts**.** It aims to build a theoretical and practical understanding of the role of transitional justice by assessing the interaction of political, legal and ethical imperatives in times of transition. The chapter also delineates the reasons that have motivated the increasing interest in transitional justice broadly, and in the truth and reconciliation commission approach in particular, against the backdrop of other available options. Chapter three examines the character and trajectory of conflict and human rights abuse and the overall structure of the South African society constituted by the socio-economic and political cleavages that were mutually reinforcing in generating the various conflicts and human rights abuses. The chapter examines some of the conceptual obstacles in past studies that have impeded more balanced analyses of questions of conflict and human rights abuse in South Africa. Chapter four focuses on the specific case of the South African TRC. It discusses in detail the structures, mandate, methodology and findings of the South African TRC and analyses it in light of its assumed mandate and objectives and against alternative responses to gross–human rights violations such as total criminal prosecutions and blanket amnesties. Chapter five

encompasses a critical analysis of the assumed correlation between the South African TRC and the conflict transformation framework. It interrogates not only the assumed cross cutting aims and shared objectives but also the tensions that exist between the TRC and the process of conflict transformation. The primary aim is to construct an understanding about the role of the TRC in moving the country away from its past conflict toward a stable and 'peaceful' society. Chapter six draws tentative lessons from the South African TRC approach as a normative framework to be followed by other contexts. The chapter uses illustrations from the Kenyan context and brings up a new dimension to transitional justice accountability debates, the question of economic crimes. This dimension, while not central to the South African TRC process, animates fundamental discussions about whether truth commissions can be used to deal with past human rights violations beyond the social and political rights. The aim of the chapter is to appraise not only the significant contributions that the South African TRC can make to other contexts, but also to point out the limitations of applying the South African TRC to other distinctively different contexts. The objective is to bring to bear the importance of disaggregating the contextual factors in promoting transitional justice. Chapter seven forms the concluding section and highlights the connections between the research questions, the methodology, the analytical framework and the study's various chapters. It summarises the observations from the various chapters and then concludes by tying up the entire study.

CHAPTER 2: TRANSITIONAL JUSTICE THEORY

2:10 Introduction

The end of the cold war has witnessed an increasing ascendancy of sets of practices for dealing with past conflict and human rights abuse. Principles of democracy, human rights and transitional justice are part of this. In this sense it can be said that an international understanding of dealing with past conflict and human rights abuse is slowly evolving. It is also contributing to pushing the idea of dealing with conflict away from the basic aim of realising the cessation of physical hostilities toward addressing the underlying sources and the effects of the conflict in order to prevent its re-occurrence. Elements of transitional justice have broken the initial mold of jurisprudence to encompass broader societal concerns of strengthening democracy and peace—the key goals for societies picking up from after periods of mass abuse. This chapter examines the challenges and policy options for dealing with questions of past conflict and human rights abuse. It aims to build a theoretical and practical understanding of the role of transitional justice, and the underlying assumptions and relationship between its various dimensions including questions on whether to prosecute or not, the challenges of what constitutes justice and reconciliation and the problems inherent in truth telling processes.

2.11 Back ground

The field of transitional justice gained momentum in the late 1980s and early 1990s, mainly in response to the political transitions that took place in Latin America and Eastern Europe—and the claims for justice advanced during those transitions. At the time, human rights activists and others were concerned with the question of how to address effectively the systematic abuses of former regimes but still reinforce and not derail the political transformations that were underway. Since these changes were popularly called ‘transitions to democracy,’ people started calling this new multidisciplinary field ‘transitional justice’ or ‘justice in times of transition’ (United Nations: 2008). Transitional justice emerged as part of a recognition that dealing with systematic or massive abuses requires a distinctive approach that is both backward- and forward-looking with the consolidation of democracy being one of its key objectives. Today transitional justice is a diverse field that has found common ground with social

justice movements, who have adapted measures in order to gain redress for legacies of systematic injustice. Ultimately, there is no single formula for dealing with a past marked by massive and systematic abuse and each society has to find its own path. In South Africa for instance, the nature of conflicts during the apartheid era were contributed to shaping the negotiation process in such a way that it gave rise to discourses on transitional justice in two stages[8]. The first stage was the achievement of constitutional settlement in which protagonists both submitted to a compromise and the provision of amnesty clause. The second was the provision of a Truth and Reconciliation Commission after the democratic elections of 1994. Arguably the nature of these past conflicts in South Africa was instrumental in shaping the establishment of a Truth and Reconciliation Commission as a transitional justice response to the country's past.

The question of transitional justice has become more critical especially with the attempts by various countries to utilise it as a tool for building sustainable peace, democracy and the rule of law. However, many significant but unanswered questions remain, about whether transitional justice mechanisms do actually influence or produce the results envisaged in their mandates. The concern over whether and in what ways fledgling democracies should make accountable those in the previous regime accused of committing gross violations of human rights, has indeed produced intense legal, ethical, political and practical debates (Mendez: 1997: 255-282, See also Bassiouni: 1996: 9-28, Malamad-Goti: 1990: 1, Zalaquett: 1992: 1425–380. Transitions from an authoritarian system to democratic rule can represent an opportunity as well as a risk to successor governments. The successor government faces both ethical principles that ought to be pursued and actual political opportunities and constraints that ought to be taken into account. Juan (1997: 255-282) argues that it is a mistake especially for the human rights movement to 'allow itself to be painted into a corner of either a 'legalistic' or a 'moralistic' position. He discusses the legal and ethical principles that ought to be followed and the political challenges inherent in political transitions and concludes that there is need to take a sober and realistic view in proposing any accountability measures (See also Ratner: 1998, Zalaquett: 1992, Huyse:1995: 51-78). An emerging democracy's primary concern would normally include the establishment of the rule of law and the fostering precautionary measures to promote the respect of human rights so that human

rights abuses do not occur again. Some scholars argue that failure to prosecute those responsible for committing gross violations of human rights could seriously undermine the legitimacy of the newly elected government. While human rights groups, in particular, believe that impunity remains one of the main contributing factors to patterns of violence (Amnesty International: 2008), developing a strategy of transitional justice is not an easy task, it combines the enormous challenges and difficulties in balancing a variety of competing and legitimate interests such as redressing the harms of victims while at the same time ensuring the democratic stability of the country.

2.20 Meaning of Transitional Justice.

Transitional justice is increasingly invoked as a key aspect of establishing lasting peace and building effective and just states. Yet, the definition of transitional justice is still disputed and debated. The term 'justice' itself has many possible meanings and in many cases, the definition of 'transitional justice' is simply assumed. Broadly, in various countries around the world, there has been a proliferation of transitional responses in the form of truth and reconciliation commissions, international criminal tribunals, hybrid courts and traditional forms of justice espoused as responses to dealing with past conflicts and human rights abuses. While these measures have broadly been referred to as transitional justice, the definition of the term has remained contested with some scholars regarding it as an extension of regular conventional criminal justice.

Teitel (2003: 893) defines transitional justice as 'the view of justice associated with periods of political change[9] as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes'. Teitel's definition focuses on (re)establishing the rule of law through legal mechanisms, while paying little attention to restorative needs of societies in transition. Roht-Arriaza (2006: 2) broadens the delineation of transitional justice away from legal imperatives to include 'sets of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law'. To her, these sets of practices, mechanisms and concerns include truth commissions, criminal prosecution, vetting and reparations. She privileges civil and political rights over economic, social and cultural

rights thereby leaving out concerns relating to structural inequalities and the need for institutional reforms, although she justifies this by arguing that 'broadening the scope of what we mean by transitional justice to encompass the building of a just as well as peaceful society may make the effort so broad as to become meaningless' (Ibid: 2).

Alex Boraine (2005) augments the view that transitional justice is wider than prosecuting perpetrators by observing that it is impossible to deal with the true intent of justice by court procedures alone since it is unfeasible to prosecute all offenders in times of political transition. This introduces the vexed problem of selective prosecutions and, to Boraine, this selectivity undermines the ideals of individual criminal responsibility so fundamental to the understanding of the rule of law and therefore legal punishment cannot be the last word. Transitional justice should therefore be seen as an attempt to complement retributive justice with alternative forms such as restorative justice (Ibid). To Villa-Vicencio (2005), the five components of transitional Justice are accountability, truth recovery, reconciliation, institutional reform and reparations. The UN Secretary General in his 2004 report (para. 8), defines transitional justice as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof' (2004: para. 8).

Transitional justice can be viewed in the above terms, but broadly conceived, it encompasses all efforts to transform a society that is less fair and equitable into one that is more so. The damage suffered by abusive societies is far more than the sum of the injuries to the individual victims. An unjust society damages the rule of law and destroys the institutions and norms through which people can govern themselves and resolve disputes peacefully. Unjust societies ignite and inflame conflicts between social classes and religious and ethnic groups, which continue long after the policies that gave rise to them. The essence of transitional Justice is to address challenges facing societies that are moving away from authoritarianism to a form of democracy. Often these societies are at the end point of a serious conflict and high incidences of human rights violations.[10] As a

consequence there is often a breakdown in the judicial system, stark divisions and apportioning of blame, institutional collapse and economic downturn. Transitional justice in this case does not need to be seen as a contradiction of criminal justice, rather, it is a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and start a process of reconciliation and transformation in a shift towards a more just and fair society.[11] Mani (2002: 17) contextualizes transitional justice within the parameters of peace-building and advances a three-fold view of what she terms 'reparative' justice. This includes, restoring the rule of law through reforms to prisons, police and judiciary, rectifying human rights violations through trials, truth commissions, reparation and traditional mechanisms, and redressing the inequalities and distributive injustices that underline war. Drawing on Galtung's (1996) negative peace (cessation of conflict) and positive peace (removing structural and cultural violence) Mani underscores the need for a holistic approach in dealing with challenges that confront societies that are moving away from authoritarianism or conflict in order to promote sustainable peace.

This study conceives transitional justice to entail the application of a wide range of approaches in tackling legacies of past conflicts and human rights abuses with the aim of creating a more just, peaceful and democratic society. Transitional justice measures are tasked with a wide range of responsibilities and expectations, some explicit, some implicit. Their mandates normally include establishing an authoritative record of the past in order to overcome denial of past atrocities and also to facilitate public acknowledgement of those atrocities.[12] They are also expected to accomplish a wide range of goals including restoring dignity to victims, providing them with psychological healing, preventing violence and future human rights abuses, creating a collective memory or common history for a new future, forging a basis for a democratic political order that respects and protects human rights, identifying the architects of past atrocities and excluding or shaming them for their offences, legitimating and promoting the stability of the new regime, promoting reconciliation across social divisions, educating the population about the past and recommending ways to deter future violations and atrocities.

The task of addressing the past can be difficult, perhaps even impossible because of the competing goals such as discovering and publicizing the truth about past human

rights abuses, making a symbolic break with the past, promoting the rule of law and strengthening democratic institutions, deterring future wrongdoing, punishing perpetrators of such crimes, healing victims and achieving social reconstruction. The challenge facing new governments that come to power on a platform of democracy is that they are expected to address the past in a manner consistent with most of these goals (Fenwick: 2003: 3). While this assumption may be noble in theory, it can be extremely difficult to achieve in practice, particularly when one considers the fact that key figures in the predecessor government may often continue to wield influence and resist attempts to expose their past wrongs. The policy choice adopted to deal with past impunity is most likely to be a function of the path taken toward the democratic dispensation like was the case in South Africa where the TRC arose out of a negotiated settlement. Dealing with past human rights violations can only take place in a context where the stability and peace of the country is considered to be durable enough to withstand the challenges of the process (Ibid: 2).

Societies that are making the transition from repressive regimes to more democratic ones are faced with a number of dilemmas that include the need to distinguish between the old regime and the new one. The new government must decide whether to punish the leaders and henchmen of the old regime or grant them general or conditional amnesty. If the new government decides to punish or prosecute, it will normally be faced with the challenge of determining who in the former regime should be prosecuted. In other cases where the nature of past human rights abuses are diverse, the new government has to decide whether to prosecute issues of human rights violations only or to include other crimes such as economic mismanagement. The new government has to deal with a wide range of transitional concerns such as whether to purge members of the old regime from the public sector or not. While the continued presence of the old bureaucrats could make it seem that the new government is merely following the old regime's conventional way of doing things, those individuals may sometimes be the only ones with the knowledge needed to administer crucial public sector institutions. In South Africa for instance, institutions such as the judiciary had to retain personnel from the previous regime because the new government did not have enough qualified new ones to replace them. Furthermore, the new government has to decide whether to compensate victims of

past human rights violations, yet on the other hand the new government may lack the resources to make these compensations and may in fact consider the available resources to be better spent on rebuilding the state's institutions and infrastructure. Developing a transitional justice strategy is therefore not an easy task, it entails enormous challenges and difficulties. Neil Kritz, however, observes that while the process of transitional justice may be expensive in the short term, failing to deal adequately with issues of past human rights abuses can animate new conflicts and make the situation even much more expensive in the long term (Kritz: 1995: xix-xxx).

2.30 Transitional Justice and International Law

There is an emerging trend in International Law that provides for universal jurisdiction on issues of accountability for gross violations of human rights. This trend is supported by various international treaties, human rights instruments, customary international law and regional systems that protect human rights and sustain the notion of an existing duty to investigate, prosecute and punish perpetrators of gross human rights violations. The legal framework for these standards results from the various treaties and customs that are now established norms of international law.[13] Traditionally, the state where human rights violations were committed had the primary duty to investigate and prosecute those crimes. This was premised on the convention of state sovereignty and practicality in accessing and availing witnesses, the usefulness in understanding the history and knowledge of the violations and the minimizing of communication problems by the use of the local language, all which made it much more appropriate and practical to comprehend and confront the relevant problems of impunity. Since the Second World War, however, the fight against impunity has become a universal cause. States are expected to comply with various affirmative obligations in response to gross violations of human rights. For instance by Article 2(3) of the International Covenant on Civil and Political Rights, state parties undertake to ensure that victims of human rights violations 'shall have remedy, notwithstanding the fact that the violation may have been committed by persons acting in an official capacity' (Office of the High Commissioner for Human Rights: 1976). This imposes on states the obligation to permit civil actions for damages, although in case of violations as grave as crimes against humanity, no remedy short of

prosecutions and imprisonment are to be considered effective (Robertson: 2002: 266). Article 5 of the Torture Convention is precise in requiring each state party to 'establish its jurisdiction' over offences committed in its territory either by or against its nationals and to submit the case to its competent authorities for the purpose of prosecution (United Nations: 1984). Each state must ensure that its appropriate authorities promptly and impartially investigate allegations such as torture and ensure in its legal system that the victims of such acts obtain redress.

There is in international law a duty on states to punish crimes against humanity although in practice there has been an apparent failure in various circumstances to do so. Examples include the failure of the international community to bring to justice some of the perpetrators of gross human rights violations in Cambodia (Hall: 2008), the former Yugoslavia (Amnesty International: 2005) and even in South Africa following the end of Apartheid. One of the significant developments in the area of international law has been the obliteration of laws that provide for amnesties and the annulling of restrictions, including official immunities that are designed to block prosecutions of serious crimes against humanity. States are expected to guide themselves by these emerging principles, which can also constitute a reliable legal source to be used by judges in courts anywhere in the world in dealing with issues of impunity and human rights abuse. In practice however, this has sometimes created tension between international legal expectations and domestic constraints. For instance international legal standards would have expected the new regime in South Africa in 1994 to prosecute the perpetrators of severe human rights abuses during the apartheid era, when in practice some of the alleged perpetrators still wielded considerable military and political power and could create chaos and instability if they were to be prosecuted. It is because of this that South Africa opted instead, to take a path that attempted to balance legal principles of prosecutions and the ethical and political constraints.

Nonetheless, human rights norms are increasingly becoming acceptable across the world. There is a growing connection between international law obligations on human rights and the domestic court practice on the issue of impunity. Impunity laws and the state practice of impunity are widely deemed to be contrary to the ideals of democratic organisation and international law. Although human rights norms have become

indisputable, it is no guarantee however, that contraventions will not occur (Zalaguett: 1992: 1425). In practice, although violations of human rights have declined in various parts of the world, they still persist in other places. The very political changes that have contributed to the strengthening of the human rights cause, such as the end of the Cold War and the subsequent 'wave of democratisation', have also brought about fresh political challenges and ethical dilemmas about dealing with the ills of the past. Today most human rights abuses particularly in Africa are caused by insurgencies and armed groups in the name of liberation struggles or by governments under the pretext of countering upheaval. It is the problem of solutions posing new challenges. Successor regimes have to struggle to nurture democratic institutions while at the same time attempting to maintain peace and foster social reconstruction. Sometimes it becomes very difficult to consider measures for promoting transitional justice in such contexts because most of the political actors, government and opposition groups have been complicit and therefore ought to be brought to account.

While international law requires the punishment of violators of its various international human rights treaties, it by its very nature is a set of binding norms that has lacked a unitary and efficient enforcement mechanism, thereby leaving the various legal instruments to be selectively implemented by national governments. It is for this reason that the successor regime in South Africa in 1994 opted to exercise its discretion on the question of bringing to account perpetrators of past human rights abuses.

2.31 The Notion of Impunity

Today the issue of dealing with impunity continues to raise thorny questions about its theory and practice. Louis Joinet defines impunity as the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account, since they are not subject to any inquiry that might lead to their being accused, arrested, tried and if found guilty, sentenced to appropriate penalties and to making reparations to their victims (Cited in Commission on Human Rights, Sub-Commission on prevention of Discrimination and Protection of Minorities: 1997: 4). Mary Margaret Penrose (1999:269) states that impunity is the inability to prosecute and/or punish due to limited financial resources and a minimally effective judicial system or simply a lack of political

will manifested by the exchange of amnesties or pardons borne out of complacency of realpolitik. François Hampson (1995: 7-12) makes a distinction between what he calls contemporaneous impunity and impunity for past actions. The former he says, refers to the breakdown of domestic mechanisms for securing accountability whereas the latter refers to the specific issue of how to deal with past violations of human rights when there is a political transition from an authoritarian to a democratic regime.

The issue of impunity is significant in discourses on transitional justice because it brings out the tensions between the desire to bury the past in order to avoid provoking the ire of powerful wrongdoers and the ethical and political demands to confront past human rights abuses. According to Priscilla Hayner (2001:10-11) this dilemma is one of the most difficult ones for which there may be no satisfactory resolution but which cannot be avoided and leaders must attempt to deal with it. A succeeding government is at the time of transition faced with the challenge of ascertaining its credibility and commitment towards human rights and the rule of law. The government's decision not to actively deal with past impunity has to be considered in the light of its specific circumstances. It may be influenced by numerous factors such as, the type of repressive rule or conflict endured, the type of crimes committed the level of societal complicity, the nation's political past, the abruptness of the transition and the new democratic government's powers and resources. In South Africa, internal and external forces including opposition to apartheid and the end of the Cold War shaped the national politics and lead to the negotiation process and ultimately the 1994 political transition. The South African transition followed the model of a pact or political compromise, between the Apartheid regime elites and what Elisabeth Wood (2000) terms 'insurgency elites.'

In South Africa, the actual political change in 1994 depended in large part on a series of contingent events which influenced the establishment of a TRC. Former President Nelson Mandela was a major catalyst in the establishment of the TRC.

2.40 Transitional Justice Policy Options

Varying transitional justice approaches have been presented as a means of dealing with past conflict and human rights violations. These approaches range from taking an aggressive line by adopting policies aimed at emphasizing punishment and condemnation

of perpetrators to taking more lenient measures that emphasize forgiveness and conciliation. Still there are procedures that accommodate a middle ground approach favouring policies aimed at balancing numerous goals including punishment, reconciliation and the establishment of an accurate historical record like was the case with the South African TRC. The flexibility in the formulation of a transitional justice process is in most cases attributed to the fragility of transitional contexts that vary from context to context. Transitional justice measures therefore, need to reflect the needs a particular context.

States in transition from violent conflict or repressive rule toward peace and democracy need to undertake profound internal reorganization in order to bring about new political and constitutional provisions that inhibit the reoccurrence of past impunity. Such arrangements can include restructuring the legal and political structures that promoted past impunity in order to encourage a process that emphasizes political accommodation and compromise. In South Africa, a TRC with a conditional amnesty was the mechanism preferred in dealing with the country's past. One significant challenge for transitional justice arrangements is that most societies in transition often experience paradoxical demands. For instance while in some cases victims feel entitled to legal justice, truth and reparations, perpetrators, who may have varying degrees of power, will possibly insist on amnesty or exemption from punishment. In South Africa, one of the most contested issues in the negotiation process was whether or not the past government was to be granted amnesty for crimes committed during the apartheid era. The National Party insisted that there should be a general amnesty while the ANC pushed for accountability for all past crimes. Ultimately, it was agreed that the country's pursues an accountability process that would provide for conditional amnesty to perpetrators only after they had fully disclosed their crimes, and proved that they were, indeed, politically motivated. Those who did not do so would be the ones to be subjected to prosecutions.

In attempting to establish mechanisms for transitional justice, the new government would normally face an array of challenges including the need to meet the basic needs of the society and this can in some cases limit the capacity or willingness of that government to devote resources to accountability or reparative mechanisms for past human rights abuses. Societies in transition need to ask different things of justice

structures than those asked of formal courts in established democracies (Aukerman: 2002: 39-97). These societies for instance may value stability of the country and reconciliation rather than processes of retribution. They need to come up with policy options that relate to specific goals desired by that society. The essentials for constructing policy frameworks for dealing with past conflict and impunity include the following,

a) Amnesty

In the aftermath of conflict or repressive rule, the new government can decide to grant general amnesty for crimes and human rights abuses committed by members of the previous regime. Issuing amnesties and granting presidential pardons was common, especially in the various transitions from military rule and dictatorships in Central and South America.[14] These actions do not necessarily indicate a lack of caring by the respective governments. Instead, they reflect the precarious position in which many new governments find themselves. The new government may not have sufficient power to control disgruntled members of the former regime. New leaders fear that subjecting the perpetrators of human rights violations to prosecution or their activities to public scrutiny may initiate an aggressive response that can undermine the stability of the nascent democracy. In many of the cases, the former violators are not totally defeated or eliminated during the transition. They may still retain considerable power and influence. In other words, they still pose a threat to the stability of the successor government. In Chile for example, the democratically elected president had to share power with a former military dictator (Marks: 1994: 18), just like it was the case in the Democratic Republic of Congo before first democratic elections in November 2006, when President Joseph Kabila had to enter into a powe sharing agreement with four Vice Presidents some of who were leading insurgents who had committed human rights atrocities in the eastern part of the country. Attempting to prosecute such individuals can seriously undermine the peace and stability of the country and it is easy to understand why under such circumstances some successor governments would opt to issue general amnesties or pardons.

Amnesty can therefore be meaningful where it serves to minimize the threat of perilous societal reprisals and help forge a constructive relationship between the

successor government and powerful members of the former authoritarian regime. In cases like South Africa where an authoritarian regime had committed human rights violations against its citizens, its members, particularly the security apparatus, were reluctant to embrace the new government. While their responsibility in perpetrating past crimes may be well-known, the necessity to secure their support and cooperation may be crucial to the new government's effort to limit the likelihood of violent reactions. Indeed few governments undergoing political transition away from an authoritarian regime can function effectively without the support of the former regime's civil service and security machinery. Granting amnesty can therefore be a useful way of securing their cooperation, since any gesture of prosecution or punishment increases the chances of escalating hostility. In its effort to punish past human rights violations, the new government can in fact turn out to appear to malicious and harbouring the intend to engage in witch hunting of officials of the former regime. A case in point is Kenya where some of the officials of the former regime repackaged themselves politically after the 2002 general elections as 'defenders of the oppressed' and an attempt to prosecute them was interpreted by their followers who in most cases came from those leaders' ethnic communities as an affront on the whole community. The corollary of this is that these ethnic interpretations are in most cases translated into national discourses and in deciding fundamental national issues in parliament and even in voting during national elections. This is not to suggest that prosecutions cannot or should not be undertaken in such circumstances but rather to point out some of the political challenges and costs inherent in transitional justice policy measures that are retributive in nature.

The above arguments in support of amnesty notwithstanding, general amnesty has also negative implications. Amnesty legislation rests on a precarious and problematic foundation. By granting immunity from prosecution to alleged and even confessed perpetrators, amnesty laws may be seen as a violation of fundamental international obligations to prosecute serious and systematic crimes against human life. It is a measure that falls short in addressing the concerns of victims and casts doubt on the obligation of the successor regime to deal with impunity. When a government grants amnesty to human rights violators, it may be interpreted by some of the victims as a failure to acknowledge their past anguish. Like the repressive regime, the successor government

stifles the victims' rights and concerns to the needs of the state. The successor regime exchanges justice and victim recognition for greater political stability. Without identifying or prosecuting the violators, large numbers of victims may remain politically alienated and unhappy with the successor regime. Without the support of the victims, the nascent government can be even less stable by suffering from lack of trust and influence on its citizens. Under these circumstances, some of the victims may be inclined to avenge for themselves or pursue what they consider their own form of justice rather than rely on the government or legal authorities. Both of these concerns are likely to diminish the contribution that amnesty makes to the stability and social reconstruction process of the country. Therefore, while the general amnesty policy option may answer the demands of the powerful and influential members of the former regime, it may undermine the concerns of victims and also hinder legal proceedings against violators of human rights abuse. In essence, amnesty laws officially absolve human rights violators of their crimes. Without criminal responsibility, it is impossible to successfully prosecute a criminal or civil case against former officials (Sebastian: 1994: 4). Despite these drawbacks, new governments often feel constrained in pursuing alternative policy options so that they end up going in for amnesties and presidential pardons.

b) Truth Telling

Unlike the amnesty, the policy option of putting in place a truth telling process akin to what happened in South Africa after 1994, may be illustrate the new government degree of confidence and security in undertaking measures toward addressing the previous regime's human rights violations by identifying those responsible and acknowledging the victims (Correa: 1992:1457). The goal of a truth telling process, especially one carried out publicly, is to put in the public domain an account that is as accurate as possible of the policies and practices of the previous regime. In most cases truth telling processes end with the writing of a report of the accounts and sometimes making suggestions about institutional reforms.

When compared to prosecutions, the public truth telling policy may be considered rather passive, but the disclosure of the past human rights abuse can make a meaningful contribution to recognising the suffering of victims and also limiting the culture of denial

in society. There are arguments that the desire to merely forget the past provides a weak basis upon which to build democratic institutions of the new government (Cardenal: 1992: 314). In South Africa, the truth telling process is seen to have facilitated an understanding of the country's divided past while also recognizing the untold suffering and injustice of victims. Paavani Reddy (2004) states that coming to terms with the past through truth telling was fundamental to promotion of national reconciliation and for building the new South Africa. Nonetheless, it is far from certain that truth telling can actually guarantee reconciliation. As will be observed in Chapter Four, it is possible that some individuals would be hurt by new revelations about past brutal acts committed against their relatives. Justice Albie Sachs argues that truth, by its very nature, is not neat, it is not compact, it is not finished (The San Francisco Chronicle: 2006). Nonetheless, truth telling processes have largely been combined with other procedures such as amnesty and reparations in constituting truth and reconciliation commissions.

c) Reparations

In contrast to amnesty provisions and truth telling, both of which to a large extent focus on perpetrators, reparation primarily focuses on victims. Reparation is often linked to processes of truth telling and sometimes amnesty. In many cases, it involves financial compensation or payouts to assist survivors. Reparation stresses the recognition of the damages caused by injustice to victims and the need to address some of their needs. It serves victims or their relatives to cope with the material aspects of their losses by helping them fulfil their basic survival needs. Hamber (1998) observes that reparations contribute to the process of publicly acknowledging wrongdoing, restoring survivors' dignity and raising public awareness about the harms victims have suffered.

In many cases, seeking financial compensation for damages may be the victim's most crucial remedy.[15] While it is feasible to bring to account individuals from former regimes who were involved in past crimes and human rights abuse, it is not possible to bring to justice the institution of state or the government that was responsible for those violations once individuals constituting that institution have left power (Dimitrijevic: 1992: 215). What the new government can do therefore is to use its own resources to compensate victims of past crimes and human rights abuse. Often succeeding

governments pay monetary damages (in South Africa, this was part of the recommendations of the TRC process) and sometimes arrange for counseling programmes for victims. Other options could include providing low-cost housing and educational subsidies. Regardless of their form, reparations are an attempt by the successor government to even out the victims' anguish and restore their dignity.

Often it is the successor government that compensates for the injuries of victims rather than the actual government or individuals guilty of the violations. The tendency of successor governments to link truth commissions with reparations has in the recent past become very common. This has been duty-bound by the mandates of truth commissions most of which seek to delineate cases of past human rights abuse and in the process identify not only the perpetrators, but also their victims. Once the victims are officially identified, it would appear irresponsible for the successor government, especially one promising democratic virtues, to ignore the victims' need for assistance.

d) Prosecutions

Trials/prosecutions as a transitional justice option can be pursued through domestic or international courts, or in some cases through special courts such has been the case in Sierra Leone. Internationally, there have been a number of initiatives especially by the International Criminal Court (ICC). As a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression, the ICC is designed to complement existing national judicial systems and can only exercise its jurisdiction when national courts are unwilling or unable to investigate or prosecute. This section will however, limit itself to domestic prosecutions which constitute the focus of the South African TRC.

Subjecting past violations of human rights to domestic law comes with its own challenges. Under repressive governments, it is mostly the powerful and influential individuals who devise and support the perpetration of human rights abuses. Asserting judicial authority over these groups poses significant challenges because they are most likely to resist such measures as much as they can and sometimes even violently. Nascent democracies therefore shrink back at aggressive prosecutions for fear of subjecting their fragile democracies to more turbulence (Orentlicher: 1991: 2544-45, Ocampo: 1990:

357). Assertions by those said to be perpetrators linking attempts at prosecutions with political vengeance and witch-hunt can make matters worse, much more so, if such individuals have a political constituency where they draw political clout. If these perpetrators are brought before domestic courts, which are under the jurisdiction of the successor regime, they are likely to whip up public emotions on the pretext that it is their communities that are being targeted.

It is also true that the courts can be misused by the successor government as an instrument to silence the opposition. In Zambia, former president Fredrick Chiluba attempted unsuccessfully to use courts to declare his predecessor, Kenneth Kaunda, a non citizen in order to banish him from politics. Overzealous prosecution can indeed weaken the sense of fair play of the trials and animate new political problems for the new government. There is also this general assumption with the prosecution approach that the process of subjecting the alleged perpetrators to court processes fits into the wishes and interests of victims. It is possible that while there would be victims who would want to see those who violated them or their relatives prosecuted or punished, it is also plausible that there would be victims who would not necessarily want to pursue that road. There could be victims who would only want their story brought to the public or those that would only want to be financially compensated.

Despite these possible weaknesses, several nations have attempted criminal prosecutions with domestic courts for instance Argentina, Brazil, Chile and even South Africa (Hayner: 2001: 32-47). Although prosecutions can signal the need to end impunity and promote human rights, countries that have attempted them have shown a lack of resolve to pursue them on a full scale. In countries where prosecutions have taken place or attempted like in Argentina, Chile and South Africa, only a very small number of the perpetrators have been prosecuted. In South Africa the recommendations of the TRC for prosecutions have largely been ignored partly due to President Mbeki's lack of commitment to the TRC's recommendations (Freeman and Hayner: n.d. 2) and also because of the apprehension that successful prosecutions would require large amounts of resources to carry out detailed investigations, hire lawyers and generally follow them to their conclusion (Munusamy: 2003). In various cases where the accused are convicted they often receive light sentences (Bronkhorst: 1992: 2-19). Besides, the individuals who

are prosecuted are often low-level officials and junior security officers (Argentina is the notable exception).[16] While some of the low level cadres in the former regime may be prosecuted, those who designed and implemented the human rights violation policies usually evade prosecution. In South Africa, Pieter Botha a former President under apartheid rule, refused to testify before the South African TRC and remained largely untouched by the post apartheid governments.

e) Lustration

The term lustration is derived from ancient Greek and Roman purification rituals and in transitional justice has come to refer to the means by which some countries deal with a legacy of human rights abuses through mass disqualification and limiting of participation of those associated with past abuses in successor governments.

In the period of post-communism, especially in the former European Communist states, countries adopted the policy of limiting participation of former communists, and informants of the communist secret police, in successor regimes, as part of the wider 'decommunisation' campaigns. In transitional justice, lustration is seen as a key requirement for effective governance, and an important factor to consider when setting up structures for new regimes (Brahm: 2004). If the earlier regime was discredited, and especially if this was due, in part, to significant abuses of human rights, it is important for the new government not behave in the same way as the old regime (Ibid). Whereas criminal trials can be extremely expensive, lengthy, and may be unsuccessful, lustration is seen as a form of instant justice for those who were abused by a past government.

Lustration can however, be a very crude instrument since instant 'justice' is served without any fair hearings. As a result the innocent may wrongfully suffer. Such sweeping response may also be exploited out of malice or to revenge. Moreover, those excluded may be the most experienced in doing their jobs and their loss would pose new problems as bureaucratic expertise, scientific knowledge, and teaching skills could be lost at a time when they are greatly needed.

2.41 Blending Policy Options

Responding to concerns of past human rights abuse in an emotionally charged and politically sensitive environment can be very problematic. The bottom-line becomes whether to prosecute or not? The question of criminal justice has been central to conventional legal systems. The argument is that that there can be no 'justice' if those who violate fundamental rights are freed from the action of the courts. In this way, justice is seen to exist only if there is full respect and protection for human rights as well as an independent and impartial judiciary able to investigate and bring to trial those who have broken the law and violated human rights. Additionally, under international obligations, states have a duty to deal with impunity by bringing those responsible for human rights abuses to justice. The conceptual underpinning for taking legal action against perpetrators of human rights abuses is based on various premises, including the argument that justice requires such measures. In this case the successor government has the moral duty to punish cruel crimes against humanity. Prosecution in this case is seen as a moral obligation owed to victims and their families. There is also the contention that democracy is based on law and a point must be made to affirm that neither high officials nor anyone else is above the law. Prosecution can also be seen as important in deterring future violations of human rights. Prosecutions, therefore, are perceived as a necessity in asserting the supremacy of democratic values and norms and to encourage the public to believe in them. In other words, unless major crimes are investigated and punished, there can be no real growth of trust, no implanting of democratic norms in the society at large and no genuine consolidation of democracy (Whitehead: 1989: 84). The prosecution of perpetrators of past crimes is seen to represent the substantive recognition of human rights and commitment to the rule of law. Close to this school of thought is the view that where authoritarian crimes are not prosecuted, it is necessary at a very minimum, to bring into the open the extent of the crimes, the identity of those responsible and a full and unchallengeable public record. Aryer Neier (1990:35) states that the principle of accountability is essential to democracy and accountability requires exposing the truth and insisting that people should not be sacrificed for the greater good, that their suffering should be disclosed and the responsibility of the state and its agents for causing suffering be made clear.

Those opposed to prosecution make countering arguments, that democracy has to be based on reconciliation where key players in society endeavour to patch up their past divisions. In this case the process of democratisation involves the explicit or implicit understanding among groups that there will be no retribution for past outrages. In many conflict situations, members on both sides of the divide play a role in perpetrating human rights abuse. A general amnesty in such circumstances may be deemed as a fair and stronger base for democracy than efforts to prosecute one side or the other or both. In some cases the crimes of the authoritarian officials were justified at the time by the overriding need to suppress what may have been perceived as rebellion in order to 'restore law and order.' These actions may even have been supported by sections of the public at the time and this creates a complex situation on the issue of responsibility. Like was the case in South Africa, each side to the conflict had people who supported its course albeit perhaps not being actively involved in the struggle. Many people and groups in society may have shared in the guilty of the crimes committed by the apartheid regime. In such cases, some form amnesty may be necessary because of the challenges of bringing all those culpable to book. In any case, legal and moral arguments for prosecution may be countered by the moral imperative of crafting a stable democracy. In such a case, the consolidation of democracy takes precedence over the punishment of individuals.

The arguments for and against prosecution and amnesty may sound noble, but in actual practice, to prosecute or not, is less affected by moral or legal considerations. In South Africa, it was almost exclusively shaped by politics of negotiation, by the nature of the democratisation process and the distribution of political power during and after transition. In nascent democracies, efforts to break with the past is fraught with a whole range of challenges that cannot be satisfied by the action of courts, even if the courts function well and there are no limits placed on prosecuting the wrongdoers, which is unlikely. Many alternative and complementary approaches to accountability have thus slowly taken shape. The concrete needs of victims and communities that were damaged by violence may not be addressed through prosecutions, except in providing some solace if some perpetrators are successfully prosecuted. The institutional or societal conditions that allowed massive abuses to take place, the structures of the security apparatus, the

judiciary or the laws that should constrain the actions of officials for example, remain unchanged even as a more democratic and less abusive government comes into place. Many questions may remain open about what exactly took place during the years of repression, and the tensions between communities may continue to fester or deepen, if these are left un-addressed. It is with these many and multifaceted problems in mind that the subject of transitional justice has emerged to examine viable alternatives to responding to past conflicts and human rights abuses.

Eventually, the historical context of the society and the prevailing circumstances of the society in transition should be the factors dictating the appropriate blend of the policy options to be adopted. A fine balance of options calls for a clear understanding of each policy's implications. While the classic response to human rights violations has been the criminal prosecution approach, the circumstances that obtain in a broad range of modern contexts of human rights abuse has necessitated recourse to alternative approaches that blend a variety of policy options.

2.42 Goals of Transitional Justice.

There is considerable debate about the goals that transitional justice processes are designed to pursue and whether those goals can actually be realised. The various transitional justice mechanisms have sought to undertake a variety of specific goals which are categorized differently by different scholars to include retribution, criminal accountability, deterrence, rehabilitation, restoration and establishing a common truth, while others simply refer to prevention and reparation (Minow: 2000: 253, Evenson: 2004: 730-767, Aukerman: 2002:39-97). These scholars, however, maintain that the context of each individual societyy should shape its specific transitional justice goals. An assessment of the success of any transitional justice mechanism needs to be based on a clear understanding of the goals that mechanisms set out to achieve.

In South Africa, the government opted to pursue a variety of goals ranging from deterrence, justice, to making a record of the past and reconciliation. Taken together, the different contributions of each goal may, however, sometimes create debilitating contradictions. Simultaneously pursuing justice and deterrence may animate minimal

policy conflicts but adding reconciliation may come into conflict particularly on the issue of criminal justice. The problem arises from fundamental contradictions in the way the policy of criminal justice can in some cases undercut the practice of reconciliation and vice versa. The extent to which a government wants to emphasize one dictates the degree to which the other maypossibly be diluted. Lerche (2000) states that in most cases, there is a tension, if not full-blown contradiction between the officially proclaimed need for reconciliation and the capacity of the state to provide justice to the victims of past wrongs. The long term healing, stability and development of many societies may well depend on the degree to which such contradictions can, at least to some extent, be resolved. Countries in political transition may envisage several goals in adopting a given transitional justice mechanism but the inherent policy contradictions need to born in mind when blending the various transitional justice policy options. The following section looks at a number of transitional justice goals are likely. Not all goals are covered. The essence was to emphasise those goals, that are more problematic to blend. Some of the other goals are disscussed in chapter four under the section on the Dilemma of Meaning.

a) Reconciliation

Seeking to establish social harmony and healing the social and political cleavages that were exploited by a previous authoritarian regimes is a common goal of transitional justice for successor government. Permitting these societal ills to fester can condemn the country to cycles of violence and impunity. Conflict whether latent or manifest can become the status quo unless a strategy is adopted to transform the various cleavages underlying the status quo. Various theorists and practitioners promote reconciliation as just such a tool for transformation. *The international Year for Reconciliation* (2001) observes that reconciliation is essential to the construction of sustainable peace.[17] Reconciliation is in this case considered to be the process of dialogue between conflicting parties, leading to the recognition of each other and respect for the other's interests and values. It is seen as the action of restoring relationships. Reconciliation can be interpreted to mean an attempt by the new regime to end the repressive policies of its predecessor and unify the society under a responsible government. There are however those who feel that measures such as granting amnesty in the name of reconciliation can actually limit a

government's commitment to dealing with impunity.[18] It is possible to make a case that when a new government grants amnesties to individuals who committed serious violations of human rights, its behavior appears more or less similar to that of the former repressive regime in condoning impunity. Under the repressive regime, the human rights violators act with impunity. Granting them amnesty or issuing pardons may appear as if the new government is encouraging exemptions from punishment for wrongdoing. It is also possible to question the authority and integrity of a government that is reticent in reproaching officials of the former repressive regime. Richard Wilson (2001: 25) a critic of the 'amnesty for reconciliation' process, argues that in South Africa, there was a dissonance between the popular understandings of retributive punishment and the version of restorative justice proposed by political figures. Sometimes measures intended at promoting reconciliation can have the potential of undermining the transitional justice process despite being motivated by good intentions.

Truth telling, provision of amnesty and reparations are seen as processes that support the goal of reconciliation, but the addition of prosecution has the potential to undermine as well as consolidate the goal of reconciliation. The fear of prosecution can motivate those responsible for past crimes to violently oppose the successor regime (Human Rights Watch: 1994: 1-2). Such opposition can initiate additional human rights violations by both sides. There are nonetheless instances where selective prosecutions[19] of individuals who perpetrated past human rights abuses can bolster reconciliation. Prosecutions can be an effective method of eliminating an organization that systematically violated human rights. Where killing squads are guilty of human rights violations, carefully singling out some of their leaders for prosecution could signal the new government's intolerance of such behavior and demonstrate its authority. If carefully defined, prosecutions may sometimes not acutely undermine the stability of the new government. Establishing some authority is a necessary obligation for the process of reconciliation. Without it, the public is not likely to trust and value the new government and would therefore not take its efforts at reconciliation seriously. Clearly, establishing authority and influence over violators of human rights abuses can contribute to public confidence in state institutions and the reconciliatory process.

b) Prosecutions/Trials

Prosecutions or criminal trials are often seen as the basic tenet for accountability and fairness in the protection and vindication of rights for the well being of society. Carrying out prosecutions or trials for crimes committed, is a concept rooted in many cultures and traditions. While its administration has conventionally come to imply legal mechanisms, it is arguable that there are other dispute resolution mechanisms such as traditional justice approaches that can be equally relevant in promoting accountability. There are distinct moral, legal, political and economic challenges in achieving criminal justice in a society that has been affected by conflict and human rights abuse particularly when the basic institutions of the state have been ruined or corrupted. The contradictions and conflicts that can result from a simultaneous pursuit of reconciliation and criminal justice highlight the anxiety and difficult choices facing new government that want to deal with past injustices.

Discourses on human rights have witnessed competing debates between ethical considerations and arguments for criminal justice. Some authors particularly those with a legal background maintain that governments have a moral duty to prosecute human rights abuse. This duty is based upon the philosophical understanding that each human being is responsible for wrongs and injustices that he or she commits (Beres: 1991: 487-503). Whoever ignores human rights atrocities can also be blamed for furthering injustice. According to international law, all people and governments have an obligation to pursue the prosecution of human rights abuse. Granting amnesty does little to promote the punishment of impunity. Instead of reprimanding impunity, amnesty laws disregard the punishing of human rights violations and shield the perpetrators from prosecution. Such actions are inconsistent with criminal justice. With the amnesty protection in place, there is no punishment for human rights abuse and in legal terms the crime remains unpunished. In can therefore be difficult to strike a balance between criminal justice and amnesty.

The pursuit of criminal justice therefore can conflict with reconciliation, although this does not mean that criminal justice and reconciliation are always mutually exclusive. There are inherent contradictions between the two, but what this suggests is that successor governments will find it necessary albeit challenging to balancing the two.

Indeed the tensions between criminal justice and reconciliation has attracted the restorative form of justice; one that aims to deliver fairness to the collective and to promote nation building and coexistence.

c) Deterrence

Criminal prosecutions are generally said to provide the means for punishing wrongdoers while enhancing a society's ability to deter future crimes. Deterrence is a widely accepted principle of criminal justice that is informed by the assumption that punitive consequences for criminal behavior dissuade individuals from committing similar crimes. The lack of accountability is in this case regarded as a primary cause of human rights violations (Fein: 1994:5).

In a repressive regime or in conflict situations, individuals may commit human rights abuses, without necessarily thinking about the possibility of being punished. The removal of this veil of impunity, thorough the promise of criminal prosecution or accountability, is therefore, seen as the primary goal of the deterrence. While the theoretical justification for pursuing accountability for crimes committed in order to deter future repetition appears sound, a careful analysis of the circumstances that typically surround human rights abuses suggests that deterrence is far more elusive than generally believed. In justifying accountability for past crimes as a form of deterrence, it is assumed that human rights violators are rational actors who carefully weigh the gains of the violations against the chances that they will be caught and punished. While this may be true in some cases, it is possible that in other cases individuals commit crimes believing that they will get away with it and without calculating the possible punitive consequences. The threat of accountability in such cases fails to deter the repetition of similar crimes because the individuals involved are unaffected by a distant threat of punishment. For some individuals, particularly in repressive regimes, the threat has a negligible impact because prosecution can occur only when they have been removed from power. The desire to enhance their gain becomes far more attractive than a mere threat of future prosecution. The threat of prosecution has indeed failed to deter several notable human rights abusers, including Saddam Hussein and the Bosnian-Serb leadership (Human Rights Watch: 1994: 1-2). Despite these potential drawbacks, many

governments and scholars continue to pursue the deterrence objective, with the expectation that it will at least deter some potential violators from abusing human rights.

d) Legitimacy

One of the main purposes of pursuing transitional justice is to establish legitimacy and the rule of law. Legitimacy is an essential characteristic of any authoritative body, especially a new democratic government, because it gives institutional rules their force. Legitimacy is the actors' perception that an institution's commands and laws create binding obligations on them. An order or law that is perceived as legitimate is far more likely to be obeyed than one that is backed with force. In South Africa, the inheritance of a previously excessive policing institution that had been at the centre of human rights violations, meant that one of the first things the new democratic South Africa needed to do, was to prioritize the security sector reform in order to promote its legitimacy. South Africa adopted a community policing approach in an attempt to build confidence in the institution of the security police. This has however not been very successful due to deep seated societal perceptions and resistance to change and also because the South African Police retained a strong historical culture in the way they work and which has hindered change (Simpson, Hamber & Stott: 2001).

Establishing legitimacy in a transitional context can be a complex and delicate process. Sometimes it necessitates pragmatic principles guided by criminal justice in order to reinforce the sense of adherence to the rule of law. The new government needs to exercise authority by demonstrating that no segment of the population is above the law, if it needs to foster respect for the rule of law and support domestic institutions such as the courts, legislature and the law enforcement agencies. Institutions are important sources of legitimacy because they replace the skewed interests of a single person or small cadre with the opinions and collective decision-making skills of many. The decisions of a larger group are more likely to establish legitimacy because an institution's decisions are more likely to reflect the opinions and interests of the community. Yet societies in transition are usually limited by the lack of effective legal frameworks and social contingencies in exercising authority in pursuing criminal justice. There are cases where the administration of punishment can pose acute rule of law challenges since the application

of law may create debilitating contradiction for the stability and security of the country (Teitel: 2000: 36–39, 46–51). These challenges have been evident in countries such as Rwanda and even South Africa where the country decided to forego general prosecutions in favor of alternative policy choices of truth-seeking and accountability. These alternative policy choices such as amnesty provisions and pardons may on the other hand undermine the establishment of legitimacy. They can also undermine the rule of law since granting of amnesty can be interpreted as excusing those who violated human rights from criminal justice. If the government does not enforce its laws or is seen to be unwilling to do so, its authority can be significantly compromised in the eyes of those who come to believe that the government is ineffective in upholding binding obligations. It is therefore apparent that the selection of most transitional justice policy options usually ends up producing significant but often contradictory social and political outcomes to the new regime. This calls for a precarious balancing act between imperatives that are at times inconsistent with one another.

2.50 Theorizing Political Transitions.

A country's decision to deal with its past is significantly influenced by the type of transition that it has gone through. In South Africa the incentive for negotiations resulted from a combination of internal and external factors. The apparent problems of governing through apartheid compounded by inherent economic difficulties, international economic sanctions and the end of the Cold War put pressure on the South African government to reform. The negotiated processes that guided the South African transition were rooted in the mass political organization that had emerged during the apartheid conflict.[20] It was during the negotiation process that political compromises were made.

Samuel Huntington (1995:65) has outlined three types of transitions, which he refers to as Transformations, Replacements and Transplacements. In transformations, he argues, those in power in the authoritarian regime take the lead and play a decisive role in ending that regime and changing it into a democratic system. In this case the elites in power take the lead in producing democratisation. In transplacements, democratisation is produced by the combined actions of the government and opposition. Within the government, the balance between what he refers to as standpatters[21] and reformers is such

that the government is willing to negotiate a change of regime but is unwilling to initiate that change. It has to be pushed to and/or pulled into formal or informal negotiations with the opposition. This situation reflects the South African negotiated settlement where the apartheid regime entered into formal negotiations with opposition movements and this eventually resulted in a political settlement and the first democratic election in 1994. Huntington (1995:66) states that for transplacements the moderates in the opposition are powerful enough to overthrow the government, hence they see virtues in negotiations.

Replacements on the hand involve a very different process from transformations. Reformers within the regime are weak or non-existent. The dominant elements in government are standpatters who are staunchly opposed to regime change. Democratisation consequently results from opposition gaining strength until the government collapses or is overthrown. Unlike the situation of transplacement where there is a balance between standpatters and reformers, in a replacement the standpatters gain strength and become dominant thus leading to replacement. In short, replacement involves three distinct phases, the struggle to produce the fall, the fall and the struggle after the fall. Huntington notes that in replacements, the former opposition groups come to power and the conflict enters a new phase as groups in the new government struggle among themselves over the regime they should institute. To Huntington, sometimes the line between transformations and transplacements is fuzzy and some cases might be legitimately classified in either category.

The nature of the transition and the makeup of the new government greatly affect the type of mechanism to be adopted in dealing with the impunity of the predecessor. For transformations where the elite in government take charge in producing the democratisation process and for transplacements like was the case in South Africa where the democratisation process was realized through negotiations, the typical situation is that there is resistance to punishment as agents of the former regime would usually insist on guarantees for immunity. The nature of the transition is central to the transitional policy option to be adopted and theoretically it is easier to pursue prosecutions in a replacement situation where internal opposition elements have gained strength and unseated or replaced the former government. Efforts aimed at transitional justice cannot be

considered entirely on the basis of the politics of the time. They are informed by the historical context of a given country and the nature of the transition that it experienced.

2.60 Transitional Justice: A Political Expediency?

One dilemma in establishing a transitional justice policy is the question whether political transitions by their very nature require a unique form of justice, one which in most cases emphasizes reconciliation as opposed to strict retributive system, or whether transitional justice results from a mere political compromise in which justice becomes the casualty of a political calculation (Jonathan: 2001: 315-353). There are divergent views over whether the unique socio-political and economic circumstances of transitional periods legitimately call for responses to past human rights abuses favouring compromise and reconciliation over retribution. There remains considerable debate for instance in South Africa over whether the granting of conditional amnesty to those who confessed to past crimes before the South African TRC, was a political expediency that sacrificed criminal justice or an appropriate policy given South Africa's political context.

One fundamental question is under what conditions should a society turn to trials, or truth commissions, or both. Miriam Aukerman (2002: 39-97) sees a preference for prosecution at work in the international legal community, and is supported by Diane Orentlicher (1995: 375-416) who however, adds that there are conditions under which prosecuting those in the past regime accused of human rights violations is unwise. The prosecution approach emphasizes the observance of the rule of law. It holds that human rights norms cannot be established among a society while an impotent judicial system allows prominent criminals to enjoy impunity. There are others who however, see retribution as only one of the many goals of transitional justice. The bipolar nature of trials, in which prosecutions seek to make a clear distinction between the innocent and the guilty, is in some cases inappropriate for redressing the systemic exploitation and violence which many societies in transition have experienced (Bass: 2000, Humphrey: 2003: 171-187). Ruti Teitel (2000) stresses the limited character of transitional justice and takes note of the compromises to formal justice that it entails. She argues against the prevalent view that favours punishment and contends that while law plays a profound role in periods of transition, often societies ravaged by brutal human rights legacies find

themselves subverted by the challenges and compromises inherent to the transition itself. She is supported by Brian Walsh (1996: 111-122) who observes that prosecutions of human rights violators can jeopardize the stability and reconciliation process of a country (See also Minow: 1998:5). Elin Skaar (1999: 1109-1128) concludes that whether a new government chooses truth commissions, trials or nothing, depends on the relative strength of demands from the public and the outgoing regime, the choice tending towards trials as the outgoing regime becomes weaker and towards nothing as the outgoing regime becomes stronger, with truth commissions being the most likely outcome when the relative strength of the demands is roughly equal. It is true that there will always be the incompleteness and inescapable inadequacy of each possible response to collective atrocities. It is for this reason that structures of retributive and restorative justice have come coexist during periods of political transition. It is also possible for truth commissions to augment the work of prosecutions in the process of establishing accountability for widespread human rights abuses like it has been the case in Sierra Leone (See Evenson: 2004: 752).

Societies in transition face an array of challenges and are sometimes forced to ask things about 'justice' other than those asked of formal courts in established democracies (Jonathan: 2001:315-353, Aukerman: 2002: 39-97, Zalaquett: 1995: 3-31). Understanding the problem of justice in times transition is best considered when located in the actual context and historical realities of the given society. Transitional contexts are affected by the features of the former regime and by the socio-economic and political constraints of the time. Where the dispensation of criminal justice poses acute rule-of-law problems, it is only appropriate to balance accountability with mechanisms that would help steer the nascent democracy and rule of law. The overall aim in that case should be to ensure the stability of the country in order to encourage and make possible social-economic and political reconstruction of the society. On the problem of whether to prosecute or not, Alex Boraine states that the answer is surely not either /or. 'Once it is agreed that there must be balancing of imperatives then it is surely both.'[22]

Transitional justice has become an integral part of the reconstruction process in societies that are moving away from conflict and human rights abuse toward the rule of law. Nonetheless there remain few criteria against which to blend a viable transitional

justice policy option. If a new regime decides to pursue a transitional justice policy, it needs to relevantly tailor it to suit its specific own context rather than promoting a one size fits all approach.

2.70 Economic Crimes: The Missing continuity

Most transitional mechanisms have previously focused their investigations on serious human rights abuses (torture, disappearances, extrajudicial killings, crimes against humanity, genocide, etcetera.), as well as violations of international humanitarian law and war crimes. But increasingly, there are efforts to include economic crimes in the transitional justice agenda (Office of the United Nations High Commissioner for Human Rights (OCHA):2006:16). The rationale is that economic crimes are intrinsically linked to civil and political human rights violations. The two are often mutually reinforcing. In some countries like Nigeria and Kenya, economic crimes by former regimes have been as pronounced and as destructive as the civil and political rights violations.

While there are calls to include economic crimes within the mandates of truth commission, there are a number of challenges that are likely to confront any effort to include economic crimes in the mandates of truth commission. For instance, the methodology and timing required for investigating corruption and economic crimes are quite different from those required for investigating individual or systematic practices of torture or killings. Moreover, a broad focus on economic violations might suggest the need to look into many other related concerns like poverty, which could risk expanding the mandate of the commission so broadly that it may be impossible to reasonably complete its task. This debate on transitional justice and economic crimes is important, because it underscores the need to moor transitional justice policies relevantly to specific contexts. While for instance the South African TRC has been widely held as the standard practice, it is likely to face serious challenges when extrapolated into a context where economic crimes are the central concern. This debate is taken up in detail in chapter six, which examines lessons offered by the South African TRC to other transitional contexts, where the example of Kenya is taken.

2.80 The Role of Leadership

Generally transitional justice mechanisms are elite driven particularly in their implementation and this raises the question of the role of leadership in influencing a country's ability to deal with its past. In South Africa, the transitional justice infrastructure strongly harnessed the ethical leadership of Nelson Mandela. Mandela was an example of an individual who held fast in giving leadership to the South African truth and reconciliation process. Having been inaugurated as President, Mandela faced up to the political restrictions in dealing South Africa's past. He remained the leading moral voice in the establishing the TRC and played a critical role through his non retributive approach in increasing the chances of fulfilling the moral mandate of 'reconciliation' that was at the centre of the TRC which was in fact a policy theoretically bound by the ethical purpose of dealing with the apartheid legacy and seeking to build a democratic South Africa.

Leadership needs to make people believe that it carries the goodwill to address the legacy of past human rights violations and build a just and fair democratic system and it needs to take care of possible diversion from that compass because of new political constraints. José Zalaquett (2004) argues that when faced with the formidable challenge such as deciding whether or not to deal with the past, leaders should not pick their choice on such a momentous matter 'as from a ready menu but rather must work hard to create the conditions for any given choice to be politically feasible.' He observes that leaders should find inspiration in the concept of the ethics of responsibility, coined by Max Weber where it is demanded from politicians to act in 'the tangled world of politics in a manner that effectively increases the chances of fulfilling the moral mandates that guide them.' In Max Weber's concept of the ethics of responsibility originating from his 1919 Conference on *Politics as a Vocation* (See Weber: n.d), he states that in difficult situations where the stakes involve the whole society, leaders need to be guided by the ethical maxim of responsibility as opposed to ethics of conviction (ethics of ultimate ends). In his view, responsible politicians do not shy away from pursuing the fulfilment of basic ethical principles, even in dangerous circumstances rather, they assess carefully the circumstances so as to be able to attain the desired results to the fullest extent possible (Ibid). He cautions against leaders invoking the need for prudence as an excuse for

inaction and cowardice Weber clarifies that an ethic of conviction does not imply lack of responsibility, just as an ethic of responsibility does not imply lack of conviction. Rather he stresses the fundamental difference that exists between acting according to an ethical precept regardless of the outcome and acting while taking into account the predictable consequences of one's actions. In Weber's view politicians must always be guided by an ethic of responsibility instead of an ethic of conviction where one pursues what he believes to be a rightful goal without minding the foreseeable consequences of his course of action. In the ethic of responsibility a leader has to take responsibility for bad consequences and not blame destiny or people for failing to follow his lead. The ethics of responsibility may actually call for determined, bold measures. Mandela can be said to have been inspired by the ethics of responsibility in the face diverse political restrictions and the necessity to be accountable to the whole nation.

It is a midst such complex and sometimes changing circumstances that political leaders must try as much as possible to act responsibly. Since there is no blueprint to direct their actions, they must rely on good judgment. Responsibility also requires taking into account the accomplishments and failures of other countries that have faced similar challenges.

2.90 Retrospect and Prospects.

The choice made in devising a transitional justice policy are difficult and have in some cases resulted in certain trade-offs and compromises. The chosen response of government has often depended on the political stability of the country and what principle goal of the process is, whether it is justice, reconciliation or a different aim and how such goals are seen in relation to each other. Timing is also a critical factor. For example providing formal justice on a large scale may not be compatible with achieving political stability in the initial stages of a transition. The ability or willingness of a state to ensure respect for due process standards may also be limited especially immediately after transition. At the same time abstaining from providing transitional justice at an early stage may contribute to festering resentments and the closing down of windows of opportunity. In Kenya for instance, after the widely hailed political transition in 2002, the incoming government did not work quickly to establish a transitional justice framework and in the process other

new issues including political wrangles and new forms of economic crimes emerged thereby restricting the chances of bringing to account past perpetrators.

Each transitional justice mechanism brings with it difficult choices in the process of design and implementation, such as prioritising certain types of violations over others. When designing transitional justice process, it is essential to identify the goals that such course of action aims at and is able to realise. When a country chooses to reckon with past wrongs, it may intend several outcomes, some backward-looking while others forward-looking. They may for instance include, establishing the truth about the past, punishing offenders, supporting victims, reconciling conflicting parties, promoting institutional reform. There is no universally correct way of realising these goals. Each society has a unique historical legacy and contemporary challenges, and what is appropriate in one context may be inapplicable in the other.

2.91 Conclusion

The recent wave of transitions toward democracy has fashioned a paradigm shift in the way new leaders respond to past violations of human rights. There is a growing interest at both domestic and international levels in bringing 'justice' and healing to people who have experienced gross violations of human rights. Transitional justice is increasingly seen as a key component of social reconstruction and the promotion of just and fair institutions in societies that have suffered conflict and human rights abuse. The subject of transitional justice is slowly evolving into a discipline as a result of the increase in public interest and expectation that accountability is due after periods of mass atrocities and human rights abuse. This chapter examined the challenges involved in establishing transitional justice mechanisms. It sought to build a theoretical and practical understanding of the role of transitional justice, and the underlying, often contradictory relationships between its various elements such as the proclamation of amnesty and the need for criminal justice. The chapter observed that developing a strategy for transitional justice is not an easy task, it is an enormous challenge that calls for a balancing of a variety of competing and legitimate interests.

The chapter evaluated some of the legal, ethical and political challenges that successor governments confront in dealing with past human rights abuses and argued that

debates on transitional justice need to recognize the distinctive differences in the transitional contexts of each specific country. Too often transitional justice measures are evaluated according to universal standards simply adopted from stable western democracies and abstract political and legal thought without considering the differences in circumstances of many of the societies in transition. Most studies particularly those advocating for prosecutions of violators of past human rights, typically understand the concept of transitional justice within the framework of state responsibilities, with an underlying assumption of western type institutionalised states that are not constrained by the dynamics of social-political and economic pressures and whose relations are mediated by the law (Chabal and Daloz: 1999: 5-6). The chapter argued that efforts to establish transitional justice need to take into account the distinctive features of the rule of law and justice in the specific contexts of political transition.

One common premise in discourses on transitional justice is the implicit assumption that political changes, otherwise known as political transitions, do necessarily mean that countries are on the way to democracy and the rule of law.[23] There are cases where political transitions are said to have occurred only for these countries to carry on without any substantive change in the business of politics. In Somalia, for instance a Transitional Federal Government was put in place in 2004, only for an Islamic militia, The Union of Islamic Courts, to seize control of much of country in 2006. It was only after the intervention of Ethiopian troops that the Union of Islamic Courts was driven out of power. There is therefore need for caution against the assumption that societies that are moving away or show signs of moving away from conflict or repressive rule toward some of form of democracy, will progress sequentially in a linear way.

In a nutshell, after a period of protracted conflict or repressive rule, a country and its people need to move on from the violence and human rights abuse. To do so, various countries often seek to look back with the purpose identifying the root causes of their past problems, in order to generate ways to prevent future occurrence of similar cases. Transitional justice needs to be seen as an interim measure that aims to address the crimes of the past in order to lay a foundation for legitimate democratic reforms. Each country needs to moor the transitional justice policy options, relevantly to its context.

This is because each transitional case usually varies in its experience of past conflict and human rights abuse.

The next chapter examines the nature and trajectory of South Africa's conflict during the apartheid era. The aim is to lay the basis against which to analyse the relevance of the TRC as a transitional justice response to the country's past conflict and human rights abuse, which forms the basis of discussion in chapter four.

CHAPTER 3: THE CONFLICT TRAJECTORY IN SOUTH AFRICA. [24]

3.10 Introduction

South Africa went through a celebrated political transition in 1994. Coming against a backdrop of protracted conflict and widespread human rights abuses, the new government was widely hailed as a milestone in the realm of democracy. The apartheid era had witnessed widespread conflict in which thousands of people lost their lives. This conflict has however sometimes been framed in simplistic terms of surface issues such as violence and racial differences. Indeed the conflict was much more complex and deeper, rooted in the underlying socio-economic and political structures. This chapter aims to explore and analyse the various sources and forms of conflict and human rights abuses that characterised South Africa from 1960-1994, although a number of issues outside this period will be referred to where necessary. The purpose is to critically assess the nature and meaning of South Africa's past conflict in order to provide an expanded view of the context in which transitional justice was situated and to lay the foundation on which to build subsequent chapters.

The specific period of 1960-1994 is selected because, besides it forming the period of severe armed conflict in South Africa, it is also the time frame that constituted the focus of the TRC process. There were other cases of conflict and human rights abuse that occurred in South Africa outside the above period. These will however remain outside of the scope of this study. In transitional justice, the problem of time frame is significant because, often, it is not possible to address the whole gamut of a country's past. Transitional justice measures therefore focus on a specific period, which often excludes the distant past. In South Africa, the conflict and human rights abuses that occurred before 1960 were not part of the TRC's mandate.

3.20 The Intractable Nature of Conflict in South Africa

Apartheid is generally said to have started after the 1948 election victory of the National Party (NP), which used that concept as a program of its election campaign (Davenport: 1991: 519, Worden: 1994: 87). However, segregationist policies and attempts to classify the South African population were already noticeable centuries before, effectively since the early roots of colonialism in South Africa (Brown: 1988:33-46, Worden: 1994:112).

By the end of the 18th century certain racially discriminatory regulations were in place (Worden, 1994: 66-67), but it has been argued that 'it was only in the period between the end of the Anglo Boer War in 1902 and the 1930s that a cogent ideology of segregation emerged and was implemented' (Ibid:72).

Although apartheid started as an Afrikaner project, which was visible in several of its preferential measures for Afrikaners, it managed to get broader white support, and also entailed distinct advantages for the white English speaking population. Apartheid was characterized by its central policy of 'divide and rule', which was aimed at ensuring white survival and control by dividing the non-white population along racial and ethnic lines (Kashula and Anthonissen: 1995: 38, Bennett: 1995:7). Consequently, the corresponding majority was divided into a host of minority groups, which could no longer pose a threat to the white minority. That design was, inter alia, demonstrated by the official language policy, which excluded any indigenous language and was limited to English and Afrikaans, by the job reservations for Afrikaners in the public service and by the attempt to promote the Afrikaner people through a highly compartmentalized education system (Wilkins and Strydom: 1978: 253). Consequently, apartheid has been described by some as a system of affirmative action for the white population and especially for the Afrikaners (Sachs: 1992: 98, Sonn: 1993: 6). Apartheid and its labyrinth of regulations were based on an imposed group membership on the primary basis of race but, for the black population, also ethnicity (Manby: 1995: 27, Kotze: 1997:2). The entire classification process was legally imposed and ascribed, more specifically on the basis of the 1950 Population Registration Act, and often arbitrarily implemented. The apartheid regime indeed did not limit its racial classifications to black and white but also further subdivided the overwhelming non-white majority in three sub-groups namely Africans, coloureds and Indians/Asians. In furtherance of its divide and rule policy and in an attempt to prevent the emergence of a unified resistance movement, the apartheid government created an intermediate position for the coloureds and the Indians (Carrim: 1996: 46-51).

Segregation extended to just about every sphere of human life through various pieces of legislation. The most important of these acts include the 1950 Group Areas Act (implementing nationwide and obligatory residential segregation),the 1953 Reservation

of Separate Amenities Act (instituting obligatory segregation of all public amenities), a host of pass laws and labour control legislation (to support the segregated residential pattern while instituting migrant labour for the black population), the 1953 Bantu Education Act (and the other acts implementing segregation in education) and the 1959 Promotion of Bantu Self-Government Act. The latter Act laid down the basis for the policy of independent homelands or Grand Apartheid (Davenport: 1991:328-341).

Hendrik Verwoerd[25] and his successors implemented a broad plan of political and social engineering, called 'separate development' or Grand Apartheid, which attempted to concentrate and limit African political rights to the respective, ethnically defined Bantustans (Bennett: 1995: 7). Ethnic homeland loyalty was to replace national political aspirations in a move which the state hoped would defuse calls for the moral necessity of African self-government within South Africa itself (Worden: 1994:110-111). Because the separate development strategy was justified in terms of self-determination for the distinctive ethnic groups, that concept, as well as the system of federalism on ethnic grounds, were burdened with negative connotations and thus looked upon with suspicion by black South Africans.

The apartheid policies resulted in systematic inequity which formed the structural underpinnings of marginalisation and violence. The consequence was protracted conflict in which thousands of people were killed and many others disappeared or detained. A central reason for the intractable nature of conflict during the apartheid era was the manipulation of territory and populations by a well-organized minority.[26] Through partition and racial classification constituted in terms of minorities and majorities and through a combination of force and ethnic solidarity, the majority fought the minority government in the name of exercising the right to self-determination (Johnston: 1990: 5-22). The more violent form of opposition to apartheid rule evident from 1960 (in contrast to the mass nonviolent resistance of the 1950s) was justified on the basis that the political system had been fashioned in a way that limited democratic space, through repressive laws and partisan security forces. The increasingly intractable nature of the political rules invited violent opposition and the violence prompted intractability. The cycle violence and counter violence post 1960 – the human rights consequences of which formed the purview of the TRC – stemmed broadly from the more thoroughly repressive

enforcement of apartheid policies even as apartheid reached its apogee under the premiership of H. F. Verwoerd and his successor B. J. Vorster. It was not in the interest of the apartheid regime to find a shared ground on which to build a fair relationship with the opposing side(s) until the system became burdened with internal and external pressures as will be observed in the section under the reform process.

In South Africa therefore, the policy of apartheid was central to the exacerbation of the conflict and human rights abuse. The repressive rule and discriminatory government policies served to deny or restrict those excluded from participating in national political processes and accessing national resources. Many socio-economic and political elements therefore coalesced to exacerbate the deeply rooted structural violence that was central to the escalation of the conflict. Apartheid affected all areas of life for majority of South Africans and its effects were prominently visible in such areas as education, employment opportunities, and in the places where the different groups of people lived.[27] From a position of conflict management theory two powerful forces combined to escalate the apartheid conflict. One was the aspect of identity, the mobilization of people in communal identity groups based on their race. The second element related to distribution, the means of sharing the economic, social and political resources. The perceived imbalance in distribution of resources in South Africa coincided with identity differences and this fuelled the deep-rooted conflicts in the South African society. The conflicts and human rights abuses took place at various levels. There were cases of state-led atrocities where state security visited violence on opponents and innocent civilians. There were state supported atrocities where individuals from the oppressed groups were recruited by the government to support state activities. There was violence by government opponents in the name of fighting oppression, for instance the violence perpetrated by armed wings of the African National Congress and the Pan African Congress. Lastly there was violence among the oppressed people for instance between members of the African National Congress and the Inkatha Freedom Party.

Like many other intractable conflicts, it is difficult to attribute the development and build up of conflict and violence in South Africa to a single cause. The conflict concerned deeply rooted issues of political identity and human needs. The apartheid conflict involved actors with a long sense of historical grievances revolving around

discrimination in various facets of life. The cycle of violence was perpetuated by government's desire to enforce and entrench privileged racial status the one hand and the desire by opposition groups to level out what they perceived as social injustices. Over time the South African society became quite polarized and dominated by perceptions of enmity and hostility.

3.30 The Reform Process and Resistance

Reforms to the apartheid system began well over a decade before the 1994 elections. In the early 1980s there was increasing international pressure for sanctions against South Africa. The consequence of this was that the apartheid regime held various negotiations with African nationalist leaders including Nelson Mandela in prison but balked at the idea of allowing Africans to participate in the political system. There were various constrains to the negotiations that took place. These included the hostile perceptions between the various racial groups and their sympathisers who saw each other to be determined to preserve or alter the basic rule of relationships among sectional interest to their decided advantage, or perceived their rival in menacing terms (Rothchild: 1989: 33-35). Each group saw its very survival culturally, socially, politically and economically to be threatened to the core and the elites and their constituents thereby responded defensively. The ANC was, for example viewed by the apartheid regime as a terrorist organisation intent on destroying the white run state. The ANC and other political organisations on their part saw themselves as liberators and the apartheid regime as the enemy who had destroyed their livelihood. Such perceptions fed on themselves, leading to a negative reciprocity expressed in terms of fearful and aggressive behaviour.

Another barrier to negations related to the divergence on the core issues of concern. These consisted not only of questions of interests but also matters of basic values and belief. What was perceived to be at stake in the South African conflict, were not distributive interests that are by their very nature negotiable, but matters of principle. For the dominant whites issues such as the maintenance of group rights, separate schools and racially distinct residential areas had developed to a point where they entailed basic values on which whites did not wish to compromise. For the blacks, majority rule, the complete ending of white minority power and privilege, and individual rights were

principles over which no accommodation seemed possible. Also, the political and economic power disparity in favour of white minority gave them a distinct edge in power relations. So long as racial relations reflected this striking power imbalance, the dominant minority had little incentive for concessions while the majority were unable to make effective claims upon the state. For Africans, the perception of victory made some of them reject the quest for compromise on issues they regarded as critical. Therefore throughout the 1970's and 80's, compromise was seen to offer little incentive of altering the existing structures of power relations in fundamental ways. The remaining alternative for all its apparent costs was a protracted struggle.

3.40 Negotiations and the End of Apartheid

Nonetheless negotiations in South Africa played a significant role in moving the country toward a peace accord and the 1994 democratic elections. A combination of internal and external factors created conditions that led both the ANC and the NP towards the realization that their aims would be best served through political negotiations. The apparent problems of governing South Africa by apartheid were compounded by inherent economic inefficiencies. By 1989 the South African apartheid system faced pressure from demographic, economic and international sources (See broadly Worden: 2000). Around the same period, the world was undergoing dramatic changes which later resulted in the collapse of the Soviet Union and the rise of democracy in Eastern Europe and many parts Africa in the early 1990s. Coincidentally, Botha stepped down as the National of Party leader and President and was succeeded by F.W de Klerk who appeared sensitive to the external and internal pressures. He announced far-reaching changes in 1990 by repealing most of the apartheid legislation and releasing political prisoners including Nelson Mandela. The two leaders agreed to negotiate a political solution and both made concessions as a result of which de Klerk and Mandela ran the risk of losing the support of their constituents. Whites were loath to forfeit power and privileges, while blacks had hoped to win complete control of the state. Although a majority of the white voters endorsed the negotiating process in a referendum in 1992, both white and black extremists attempted to sabotage the process through various acts of terror (Strauss:1993: 339-360). However by the end of 1993, Mandela and De Klerk and leaders of 18 other

parties endorsed a new interim constitution to take effect immediately after South Africa's first election by universal suffrage in April 1994.

In the negotiation process, the ANC was the largest of the opposition political groupings. Within it however, there were other various sub-groupings along the lines of 'the exiles' and the 'internal group,' the so-called 'militants' and 'moderates' (Mandela: 1991). There was therefore a range of separate political formations, some of which opposed negotiations. These comprised the anti-apartheid movement together with the ANC. There were a number of political groupings within the white population too, ranging from radicals opposed to any form of negotiations to people who supported a democratic transition toward equal opportunity. There were also a number of parties that had formed around the different homeland governments or to represent specific ethnic group interests, such as the Transvaal Indian Congress. Of these, the largest was the Inkatha Freedom Party (IFP), led by Chief Mangosuthu Buthelezi, which drew its support primarily from the Zulu community. As an ethnic and regionally-based party, it tended to be conservative and believed that a state based on some form of ethnic federation would favour its interests more than even a minimum degree of majority rule (Centre for Conflict Resolution: 2002). As the process developed, it partnered with Afrikaner conservative parties in an effort to strengthen their positions. The ANC and NP were the engines that drove the negotiation process and it was inconceivable that an agreement could be reached without the consent of these key parties. The proliferation of political groupings that together drew support from large numbers of South Africans had to be represented in the talks if the process and its outcomes were to be seen as legitimate.

The South African leaders, with the assistance of civil society peacemakers and technical experts from home and abroad, slowly constructed an inclusive and principled process for managing the multiple transitions to a post-apartheid State, followed by a power sharing transitional government, and finally a new constitutionally mandated state structure and governing system. The process moved from the initial secret talks between NP and ANC representatives, to the post-February 1990 bilateral pre-negotiation talks between key parties to determine the shape of the negotiation process, to the initial multilateral negotiations between political parties to develop the 1991 National Peace Accord to address the political violence, to formally constituted multi-party negotiations

to agree the rules for a transitional government and key constitutional principles, and which finally culminated in an elected Constitutional Assembly with an ambitious public consultation programme to draft the new Constitution. The negotiation process was not smooth, it had its own hitches including the walk out by the ANC following the Boipatong massacre of 17th June 1992 where 46 residents were killed by mainly-Zulu hostel dwellers. The ANC accused the then ruling National Party of complicity in the attacks (African National Congress: 1992). The Convention for a Democratic South Africa (CODESA) talks which had began on 20 December 1991 were abandoned as a result of the walk out were replaced by bilateral negotiations between the ANC and the NP. The issue of how to pursue some kind of transitional justice was significant during the negotiations. For the NP government it was important to secure assurances about the future in order to limit the damage of 'giving up power'. An agreement was reached on a series of 34 Constitutional Principles with which the final Constitution had to comply. In order to give greater comfort to all parties, it was agreed that the final Constitution would not erode the fundamental values and principles contained in the interim Constitution.

Broadly, the negotiated processes that guided the transition were rooted in the mass political organization that had emerged over almost a century of struggle, as well as in the political organizations of South Africa's white population. Both had evolved representative political parties with systems to hold leaders accountable to their members and constituencies. During the negotiations, political leaders had to pay careful attention to bringing along their supporters when making agreements. The South African public had the opportunity to witness much of the later negotiations through media broadcasts. Many of the political parties consulted frequently with members to gauge their reaction to proposals and to identify issues of continued concern. There were opportunities to contribute ideas and comment on the draft Constitution and to participate in peacemaking through the local and regional peace committee structures of the National Peace Accord.

Rene Lemarchard (1994: 58) contends that South Africa was one of the most unusual political transformations of the 20th century where people defied the logic of their past and broke all rules of social theory to forge a powerful spirit of unity from a shattered nation. He maintains that on the eve of its transition South Africa was a ranked society in that it had a vertical pattern of stratification in which the politically dominant

group also controlled access to health, education and status. South Africa therefore opted for a transitional formula that brought the incumbent and opponents to the negotiating table, in what Samuel Huntington (1991:114) calls a transplacement, a democratisation process that is produced by the combined actions of the ruling regime and resistance groups, with the latter willing to negotiate a change of regime but unwilling to initiate it. It thus needed to be pushed into a negotiated settlement through internal or external forces. In South Africa the main political players eventually saw a power sharing as a more promising method for managing intergroup conflicts.

3.41 Reassessing the Vortex of Violence

Broadly, during the apartheid era, the South Africa society was prone to violence and confrontation because of racial and ethnic polarizations that combined with the aggravating socio-economic and political conditions that served to make the conflict much more violent and intricate. Protracted internal conflicts are always very devastating to the social fabric of the society. The actors often live in close geographical proximity and have a collective history of belonging to one country. The lines of conflict drawn by actors in most intra state conflicts follow a combination of socio-economic and political lines. In South Africa the political ideology of apartheid interacted with economic and social discrimination to make the conflict pervasive and emotionally charged. The issues involved in the conflict went right to the heart of what gives people their sense of identity, what defines their bond to their communities and what defines their source of satisfaction or frustration for this identity (Harris and Reilly: 2003:11).

The apartheid regime generally attempted to deal with conflicts by suppressing them or trying to eliminate opposition to them. While some conflicts can be controlled through coercive means albeit usually at certain costs, deep-rooted conflicts as was the case in South Africa cannot easily be managed that way. They embody questions of identity and human needs which are central to the livelihood of most societies, and human beings often are willing to go to all extremes to protect them. Addressing problems of internal conflict and repression has to consider the importance of constructing internal socio-economic and political structures that are responsive to the actual sources of conflict. Lewis Coser (1967: 106) observes that it is by having open

channels for political communication and allowing all groups to articulate their demands, that political violence can be minimized. This means that issues of internal political organisation of a state are of central importance in dealing with the various forms of internal conflicts. The conflict dynamics in South Africa were built on internal grievances. Apartheid imposed appallingly heavy burdens on most South Africans. Despite the growth of the national economy, for most South Africans, life was a struggle for day-to-day survival. A consequence of increased white oppression was the increase in tension and hostilities to the apartheid system.

A classic understanding of conflict sees it as a dynamic phenomenon, one actor reacts to what another actor is doing and this degenerates into action and reaction. Quickly the stakes in the conflict escalate. One sequence of events follows another and it becomes difficult to decipher which party is more responsible for what happens. Peter Wallensteen (2002: 34) has evoked the analogy of the mirror image to explain such conflict situations. He says that parties see the issues in the conflict in the same way but only in a reverse picture. During the apartheid era, both parties to the conflict came up with justifications for waging the conflict. In interviews with some of the ex combatants from Gugulethu and Khayletsha in Cape Town, and Soweto in Johannesburg, they observed that despite the occurrence of deaths to innocent people in the course of the struggle, they believed theirs' was a just course, waged to liberate the oppressed.[28] A member of the Katlehong Self Defence Unit (Republic of South Africa: 2003:316-317) observes that he felt nothing when killing people he perceived to be enemies because he had suffered a lot and he no longer had mercy. He says,

> I felt nothing … because we no longer had mercy, we no longer cared about everything. I did not have a heart… The violence affected everybody, young and old … when it crawls into a group it just destroys everybody.

This position of justifying the past conflict and human rights abuse in South Africa was also held by John Deegan, a former member of the security police and the Special Forces unit Koevoet who was responsible for a number of atrocities. According to his testimony to the TRC, his father had been murdered and this had an indelible mark on him. He felt

desperate as a victim of his father's death and used it as a justification to commit atrocities (Cited in Boraine: 2000:129-130).

A conflict usually takes on a life of its own, engulfing actors and thrusting the hostilities much deeper. The South African government generally suppressed the violent riots in African townships with gunfire and brought in new laws with harsher penalties. The resort to brute force did not however create stability. Picard and Keller (1989:13-24) observe that the decade of the 1980's in particular provided the backdrop to a demographic and administrative revolution. That it was characterized by a number of both mutually reinforcing and contradictory themes as South Africa moved slowly toward a negotiated majority rule. They argue that coercive measures including the declaration of the state of emergency and the effective banning of the seventeen internal organizations in February 1988, did not diminish the influence that both internal and external anti apartheid groups had among black South Africans (Ibid).

In the early 1990's South African townships and rural areas were riddled with crime as poverty, family disruption and high unemployment created social instability. Criminal violence shaded into political violence as people sided with rival factions especially in Natal and in the industrial heart of the country's then Transvaal. In Natal the conflicts were mainly between the Zulu supporters of the ANC and members of the IFP, a Zulu ethnic movement led by Chief Mangosuthu Buthelezi. In Transvaal most of the conflicts occurred between Zulu migrant workers and residents of adjacent townships. The conflicts reflected the quest for political dominance in Natal and Transvaal between the ANC and the IFP.

Mathews (1986: 284) gives two main reasons why South Africa was prone to violence. First, he observes that South Africa was a deeply divided society characterized by significantly racial, religious, ethnic and linguistic divisions. He argues that such societies are notorious for their political instability, and contends that unlike dissatisfied individuals who do not share identity, groups with a specific identity and a common set of grievances can mobilise support by appealing to those who identify with them culturally and racially. Second, Mathews says South Africa was susceptible to instability because of its modernization process. He describes the essential features of that modernization process as rapid economic growth and the absorption of the traditional

patterns of life by urbanization and by the high levels of increase in literacy, education and media exposure. This kind of modernization, he says, heightened the potential for disruption and violence in a deeply divided society, since many of the people who relocated to the more developed urban areas experienced a new awareness of improved forms of life. They became aware of their relative deprivation. The traditional values, family and social institutions were disrupted and they lost their binding influence. Malcom Cross (1971:479) argues that in most societies conflicts take place along economic boundaries but in a plural society, racial and ethnic differences coincide with these divisions (or are made to coincide with them) so that instability is more likely to result.

There have been questions raised whether South Africa was a plural or homogeneous society during the apartheid era. Adam and Moodley (1986:20) argue that South Africa was not a genuinely plural society because by the 1980s little cultural distance separated the urbanized population groups. However, Lijphart (1989) disagrees and maintains that ethnicity continued to be a strong factor in many facets of the South African society (See Jordan: 1997). While urbanisation indeed had a degree of homogenising effect on the South African society as it expanded the area of shared values among Africans, Coloureds, Indians and Whites living in Towns, ethnic mobilization nonetheless has remained a feature of the South African Society.

Conflicts have a life of their own and in most cases they take on both tangible and intangible issues along which makes the situation dynamic and much more complex. In the South African conflict, socio-economic and political aspects shaded into racial divisions and into each other so that violence arising out of one level resonated into other spheres. Political violence often disrupted the social order and affected economic operations and vice versa. Indeed the multiple sources and forms of volatile conflicts reverberated across other spheres and this served to reinforce each other, thereby generating deeper hatred and antagonism.

3.50 South Africa's Conflict(s): Conceptual Challenges

In South Africa the evolution of apartheid manifests complex conceptual problems. There have been various conceptual obstacles that have tended to impede a clear analysis of

South Africa's conflicts during apartheid era. There have been views which often reduce the conflicts either to a question of class or race, in the sense that explanations of South Africa's social order is assumed to be explicable by either of these phenomena operating in isolation.

Apartheid in South Africa emerges both at the level of ideology and at the level of state policy (the racial allocation by the state of political, social and economic roles). Ashforth (1992: 370-371) says apartheid was pre-eminently a racist system of controls on movement and residence framed in a state ideology, which interpreted political and social rights in terms of nationalist principles relating to people and places. Harold Wolpe (1988:5) argues that it is not sufficient to say South Africa was a racist society. He observes that race although of central importance operated in specific ways and did not eliminate class formation. That in fact it was the class formation articulated with racial divisions and with deliberately fostered ethnic rivalries that resulted in intense violence and confrontations. The situation was highly complex and though class-consciousness was not automatic, yet competition among class and groups played an increasingly important role in heightening tensions in South Africa

In terms of the social structure, racial tensions in South Africa were closely related to ethnicity and were significant in exacerbating the conflicts. The attitude between social groups with different physical characteristics is what created prejudice. Prejudice resulted from learning and this learning was closely related to similar racial or ethnic groups towards an antigroup or outgroup. It created a process of channelling hostility against a definite target and contributed to specific intensity or hostility. In South Africa there was the development of symbolism and prejudice against 'a symbolic colour', which continuously enforced the prejudice (black had everything negative and white as positive and vice-versa) (Feliks: 1966: 43).

Halisi (1989: 49-68) states that the major fault lines in the South African society were not racial divisions but the class divisions that were reinforced by racial legislation and administrative fiat. He argues that racial proletarianisation meant an intersection of race, class and power relations into a political culture that shaped both social conflicts and cooperation.

Logically, it is not right to account for the conflicts in South Africa by reducing them to class or race. The evolution of apartheid in South Africa poses significant questions, which relate to the relationship between class, race, the capitalist economy and white domination. This study posits that that class, race, the capitalist economy and white domination stood in a contingent relationship to one another. In consequence it is plausible to segregate the sources of conflicts in South Africa during the apartheid era into various categories, class, political and social all of which however intertwined. Economic tensions for instance often intensified social and political tensions etcetera and vice versa.

A society commits violence against its members when it forcibly stunts their development and undermines their well-being (Galtung: 1978). There is a difference between the terms conflict and violence. Conflict arises where there are incompatible goals or issues while violence refers to the actual damage or violation caused to a person's character, feelings, rights, property or interests. There are various forms of violence. There is overt violence that is physically manifest and easily recognised. There is also the latent form of violence that is indirect and less dramatic but quite insidious. People may be denied their rights without them immediately realising the effect of the damage to their lives. If a conflict is seriously deep and is not prevented from escalating, it may enter a phase of overt violence (Galtung and Jacobsen: 2000:107). It is possible for victims in that society not to realize that the structure of their relationship is generating conflict. The basis for structural conflicts is when individuals are restricted from achieving their full potential (Mwagiru: 2000:3, 24-35). South Africa witnessed both overt and widespread forms of structural conflict over a very long period of time that worked to erode human values and impoverish people's lives. Conflicts are a phenomenon of human relationships and are evident in all societies. In most cases, the underlying reasons that lead to physical violence are often in place long before the actual outbreak of overt forms of violence.

The escalation of conflict in South Africa was often preceded by incompatibilities in access to socio economic and political privileges between groups, asymmetric inter-group power relationships, as well as triggers that served to mobilize or rally the different groups around their grievances (The Conflict Management Program: 2001). Adam (1972:

4) observes that in the early 1970s South Africa displayed the classical Marxian prerequisite of a pre-revolutionary situation, an extreme gap between advanced forces of production and obstructive modes held together by the chains of an outdated political superstructure. Peter Randall (1973:10) adds that the overall structure of the South African society constituted by the various cleavages were mutually reinforcing in generating conflict (see also Kuper: 1971: 20). Indeed the social-economic and political boundaries between the various groups, racial or otherwise reinforced each other so that conflicts arising at one level or in one sphere over specific issues were at times rapidly generalized to other spheres, leading to intense group conflict that in turn attracted forceful regulation of group relationships.

The structural phenomenon of superimposition, that is the convergence of lines of group conflict, had serious political consequences (Dahrendorf: 1989: 214, 316-317). It was because of racial cleavages on the whole coinciding with the lines of economic exploitation, political domination and social stratification that the society assumed such volatile proportions. Structures that generate conflict in society do interact in various ways, socio-economic and political and this is what makes conflicts to be very intricate and dynamic. Rarely does a conflict come defined in a single issue. In the words of Blalock (1989), conflicts are ubiquitous and come in many forms and involve vastly different kinds of parties. In most conflict situations, the hostility may often continue even in cases where the issues that initially gave rise to them have been forgotten or become irrelevant. This is because conflict has a constantly shifting dynamic. In South Africa for instance, while many of the discriminatory factors that contributed to the apartheid conflict have diminished in the post 1994 era, new forms of violence taking the form of criminal activities have become predominant.

3.51 A Conflict Analysis Perspective.

Efforts aimed at de-escalating a conflict or settling it are, alone not sufficient to build lasting peaceful relationships. Any conflict formation has many parties with stakes in it. These parties will normally have incompatible issues and goals and it is these clashing incompatibilities and disharmonies that call for management, resolution or transformation (Galtung: 1996). To foster social cohesion and peaceful coexistence it is necessary to

reconstruct the social fabric by addressing the underlying causes of conflict and prevent it from re-erupting. It is important to distinguish between root causes and triggers of conflict. While root causes refer to the underlying fundamental incompatibilities of a conflict, triggers constitute more proximate events or factors that cause a conflict to escalate. In South Africa the pathological conditions of violence and human rights abuse can be widely seen to have had common roots in discriminatory rules and unequal socio-economic and political relationships. Triggers on the other hand related to those day-to-day events such as political speeches, police harassment and arrests. For preventive action triggers must be identified and tackled effectively. To create sustainable peace however, a shift in focus beyond the immediate to the longer term and a reorientation from the symptoms to the underlying causes is vital.

An overwhelming priority given to descriptive accounts of conflicts and violence produces relatively little guidance about the complex nature of conflicts and ways for resolving or managing them. Protracted social conflicts are generally not single-issue situations. The conflicts in South Africa for instance involved questions of identity, symbolic meaning, control over resources and a sense of meaningful security. Such conflicts usually inherit a past that acts as a heavy burden on the future. In dealing with these types of conflicts, attention needs to be paid to addressing the underlying causes and transforming the conflictual behaviour.

The conflicts in South Africa concerned, on the one hand, subjugated groups trying to liberate themselves from oppressive rule, while the apartheid regimes on the other hand did not want to change the discriminatory power relations. There are various theoretical approaches that have been put forth to deal with conflicts of this nature. Reychler (1979: 119) outlines two strategies. The first one associates mechanisms for dealing with conflict with structural transformation. This is the Marxism school prominently articulated by Karel (1968: 1-27, 1979: 119). According to Reychler, the Marxians take the proletariat of the world as their main objects. He states that Marxians do not see violence as *a priori* negative but that they in fact recognize the justification of the use of violence provided such use is relevant to historical progress. The liberation movements in South Africa often resorted to violence as a means to changing oppressive structures and justified the approach as necessary. Opposition to the apartheid system in

South Africa was through a protracted armed struggle that claimed thousands of deaths but which however was seen as just. The rationale behind the opposition struggle in South Africa thus fits into the Marxism school of thought.

The second approach identified by Reychler is the World Order Model, as articulated by Mendlovitz (1975: 296). The World Order Model holds that peace cannot be realized unless improvements are made with respect to poverty, social justice, ecological instability and alienation or identity crises. This view closely relates to that of Burton (1989: 3-23) who has emphasized the contribution of human needs to processes of conflict management and peace-building. According to Burton it is the nature of human beings to be driven by basic needs such as identity, development and security. He observes that, in the long run, human beings refuse to compromise the fulfilment of these needs thereby leading to universal decay in authoritarian systems unable to fulfil them. Burton singles out identity as a basic human need that cannot be frustrated in its drive for fulfilment without serious consequences. In many cases of internal conflicts the frustration of basic needs is usually at the heart of most of them. These conflicts are often intractable and difficult to manage because parties are less willing to compromise on questions of human needs. Conflict management approaches such as negotiation and bargaining can be appropriate when dealing with questions of conflict that relate to issues of interests. Interests include matters such as power sharing which are amenable to bargaining and negotiation processes since they involve issues, which entail concession and that can be compromised. But deep-rooted conflicts caused by the frustration of irrepressible drives such as the desire to live, the need for food and identity crises are not easily amenable to such approaches since they embody fundamental concerns bordering on human dignity and are on the whole treated by human beings as matters of life and death. Responses to conflicts involving such needs have to take into account the review of institutional and normative environments accordingly and making them more responsive to the problem of human needs.

Van Der Merwe and Odendaal (1992:145) have emphasized the need for conflict management approaches to be indigenous. They argue that the process of conflict management must adequately appreciate the behaviour of contending parties as determined by their various historical contexts and cultures. Van Der Merwe and

Odendaal were writing in the context of negotiations toward the first multiparty elections in South Africa and observed that the process had to contribute to resolving conflicts in such a way that involved people at the grassroots level in building the new South Africa. Indeed conflict is one of the many forms and phases of the development of a specific society's history (Frei: 1976: 2). A conflict is objectively determined by historical and socio-political conditions of a given epoch and of the particular period within that epoch. The conflict itself may have deeper and more distant historical roots, which may also be much more diversified. The South African conflict during apartheid rule was influenced by subjective factors and unique intra state dynamics. Approaches to dealing with such conflicts need not be restricted to predetermined processes. There is need to understand that any conflict is dynamic and often develops a life of its own. There is need to resist the temptation to promote the 'one size fits it all' approach by directly introducing mechanisms and institutions appropriate to one context into another. Such mechanisms should instead be fashioned so that they are relevant to the new circumstances. In order to break historical cycles in conflict situations, there is therefore the need for innovation.

It is important to place the conflicts and human rights abuse in South Africa within the socio-economic and political contexts in order to explain how they became institutionalised. At times the government knowingly and deliberately violated legal frameworks inscribed in the constitution or codified new rules and structures in the legal framework in order to coercively preserve the status quo. The repressive tendency corresponded with the structural necessity to intimidate the victims of injustice and also with the unequal distribution of wealth. The persistence and aggravation of inequalities subjected citizens to more structural violence. It is plausible to argue that while tangible issues such as human rights violations underpinned the conflicts in South Africa, there were also socio-economic and political structural realities that formed another significant dimension in the conflict. These structures were reinforced by legal measures and inhibited the development of the dominated groups and consequently led to both latent and manifest violence. The apartheid regime sought to manage the resultant conflicts through coercion, repression, co-option and piecemeal reform, which however, did not succeed in bringing about peace. It only polarised and separated people without addressing the real causes of the conflicts.

In managing structural conflict the focus should be on improving people's lives and promoting social justice. The goal should be to transform the phenomena of conflict lodged in human relationships towards organizing fair structures for human community. This calls for a reconstruction of the social organization and realities. If the basis of conflict is the denial of particular needs, then the resolution process must identify those needs and include ways of responding to them. Peter Wallensteen (2002: 39) observes that resolving conflicts requires decentralised structures and ways in which economic, psychological, and relational needs can be satisfied. Social reconstruction in societies that have experienced overt violence needs to involve a broad range of short and long-term political, institutional and developmental activities that are directed at ameliorating the root causes of the conflict. It should encompass reconstruction and developmental efforts that are carried out to, among other things, prevent recurrence of the conflict. Cousens and Kumar (2001:183) observe that peace-building efforts should focus on those factors that allow stable political processes to emerge and flourish.

An examination of conflicts around the world since the 1990's reveals that many contemporary destructive conflicts are primarily intra state in character occurring between different groups living in close geographical proximity. Although such conflicts are in most cases caused by substantive issues of skewed political and economic relationships, they are however fuelled and perpetuated by psychological and cultural factors (Lederach: 1997). Most of these conflicts stem from acts of socio-political and economic discrimination and when these grievances are seen by actors to coincide with ethnic, linguistic, cultural or historical lines, they add elements that make the situation even more polarized and explosive. The psychological dimension in intractable conflict compounded by a setting in of underdevelopment and poverty, make efforts aimed at dealing with conflict an enormous task. Unfortunately, most mechanisms for dealing with internal conflicts remain oriented toward the traditional interstate approaches such as standardised negotiation procedures. Interstate approaches are not well suited to respond to the dynamics that give rise to the sort of violence that is evident in deeply divided societies. Dealing with inter-state conflicts necessitates a comprehensive view of the context, actors and issues that produce the hostilities that feed the conflict. It calls for both short and long-term commitments to establishing infrastructures across the levels of

society that allow for mutual participation in political processes and socio-economic activities. It calls for approaches that help to transform society toward peaceful relations and this entails the issue of local ownership of such processes but with the maximization of contributions from outside.

3.60 The Negotiated Transition and Transitional Justice.

In South Africa, the delicate historical process of negotiated transition in the period after February 1990 led to an interim constitution in 1993 and eventually the first multi party elections in 1994. The Interim Constitution (Act No 200) of 1993 included an epilogue for transitional justice with the heading 'National Unity and Reconciliation' which provided that amnesty was to be granted in respect to acts, omissions and offences associated with political objectives in the course of past conflict (Republic of South Africa, - Interim Constitution:1994). When the ANC led government came to power in 1994, it faced the delicate task of complying with the constitutional duty of dealing with the past, and granting amnesty to perpetrators of human rights abuses at a time when many victims of the apartheid were clamouring for their prosecution. The risks were high, the outgoing regime still commanded huge resources including control of the military and security forces and had the ability to derail the fragile democracy. There was therefore a need to prevent the breakdown of the rule of law and appease those who wanted revenge for serious crimes of the past as well as prevent the recurrence of the human rights violations that had occurred during the apartheid era.[29]

The new government of National Unity inherited a dependence on many of the former regime's civil service institutions and personnel. Of particular significance were 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. Many of these institutions and personnel were alleged to have been directly involved in the clandestine torture, extra-judicial executions and enforced disappearances or in sustaining the legal framework that had allowed such abuses to occur. Yet the nature of the transition meant that they also continued to be depended upon to sustain law and order. 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 also

entailed the violation of human rights within the country and beyond its borders. The issue of dealing with the past in South Africa had therefore to take into account the need to secure the compliance of former leaders of the apartheid system who could otherwise threaten the process of democratisation.[30] That is why South Africa adopted a truth and reconciliation commission that carried a conditional amnesty for those who told the truth about their involvement in past abuses. Amnesty was granted only if such abuses were related to a political objective.[31]

It is indeed true that there are enormous difficulties in pursuing justice in a normal situation, but when one attempts to do this in a country undergoing transition, the problems are further intensified. Largely there can be various constraints to implementing the aims of transitional justice and these include, lack of capacity and the threat of a return to widespread violence There are also major costs involved in pursuing transitional justice programs and it may also be quite problematic to determine the 'right time' for implementing transitional justice measures given that incoming governments have to initially depend on institutions and personnel from the former regime. These mechanisms can also be undermined by legal challenges and accusations of witch-hunting (Freeman: 2001:113).

Efforts aimed at transitional justice face numerous challenges. In all cases accountability and justice mechanisms generate resentment and resistance among persons accused of past crimes while alternatives such as amnesties or abstention from pursuing any form of accountability may anger victims and increase the chances of them seeking revenge by taking law into their own hands. Even if political consensus on transitional justice is achieved at the national level, it may nonetheless result in tensions between communities and individuals. In South Africa, the formation of the TRC remained a source of considerable interest and controversy. Its work was condemned by political parties whose members were implicated in past human rights abuses while some victims got angered or disillusioned after discovering that they could not receive adequate compensation. In interviews with victims/survivors and ex combatants, most of the felt dissatisfied with the way the TRC and the South African government had 'abandoned them' in spite of their suffering and contribution to the liberation struggle.[32] Some victims like the family of the late Steve Biko were disappointed with the amnesty

provision and went to court to prevent apartheid killers from being pardoned if they confessed (Saunders: 1996). The process of seeking to establish a policy to provide for accountability and justice for past crimes is fraught with enormous dilemmas because it cannot satisfy all parties. It is most likely that any accountability mechanism adopted, will turn out to diminish the hopes and expectations of victims. For instance if victims develop hopes that they will be entitled to know the truth, get justice and receive certain forms of reparations, and these eventually are not adequately met, this is likely to diminish their trust in the government at a time where re- establishing this trust is vital to the state.

3.70 Conclusion

This chapter has observed that South Africa was characterised by various forms of conflict and human rights abuses between 1960 and 1994. These conflicts and human rights abuse were quite diverse and were not single-issue situations. The nature of conflict and human rights abuses were significantly complex and permeated various facets of society. It was observed that the social life of majority of the population was disrupted and this made the situation much more pronounced in terms of victimhood and agency. The chapter presents an analysis of the nature and character of the conflict and human rights abuse in South Africa by balancing historical accounts with theoretical expositions from conflict management and peace-building theory. It resists the familiar notion that conflict is always synonymous with overt violence by observing that conflict about incompatibilities in goals or issues while overt violence is that which is physically manifest. The broad framework was to provide an overall understanding of conflict while also creating a platform for appreciating the challenges involved in dealing with questions of past impunity. Broadly there is room for alternative interpretations within the South African context on how conflicts were perpetuated and with what effects. It is the specific intractable nature of the conflict in South Africa that dictated the direction of the political transition and the subsequent formation of the Truth and Reconciliation Commission. The next chapter critically analyses the process of transitional justice in South Africa and its relevance and implications in responding to the country's past protracted conflict and human rights abuse. It will broadly be argued that the nature and

dynamics of conflict and human rights abuse in South Africa meant that its needs and aspirations for transitional justice had to be understood and interpreted based on the country's past and the prevailing circumstances during its period of political transition.

CHAPTER 4: THE CASE OF SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (TRC)

4.10 Introduction

The question of accountability for past human rights abuses was one of the contentious issues in South Africa's transition toward democratic rule. The apartheid system in South Africa was ended through a series of negotiations between 1990 and 1993 and through unilateral steps by the De Klerk government. Negotiations took place between various actors. These included the then ruling National Party, the African National Congress, and various other political formations. The first important moves towards formal negotiations took place in February 1990 with the release of Nelson Mandela and other political prisoners and the revocation of statutes banning the ANC and other liberation movements. Then came the National Peace Accord (NPA) of September 14th 1991(See Speech by the State President Mr F W De Klerk:1991), which committed the actors, who included the civil society, representatives of communities and political organizations, to the eradication of political violence, the advocacy of plural democracy and the process of reconstructing and developing the country. The Accord intended to transform the culture of violence into peaceful coexistence through the establishment of peace committees at local, regional and national levels. The NPA was signed by representatives of twenty-seven political organisations and national and homeland governments, and prepared the way for the Convention for A Democratic South Africa (CODESA) negotiations which was one of the first public attempts by the major parties to seek a negotiated political settlement (Hatchard: 1993: 206-211).

Negotiations took place in an atmosphere of political violence, including allegations that the state was sponsoring some third forces to deliberately subvert any peace prospects. The debates initially focussed on the release of lower ranking political prisoners who were in jails within South African and guarantees for those returning from exile not to be prosecuted. These talks were often encountered stalemates over, amongst other things, the proposal by government that a general amnesty be provided for both members of the security forces as well as of the liberation groups. 'The government was under increasing pressure from the white right wing and from members of the security forces over the amnesty issue. While the debate over political prisoners and amnesty was

continuing, the ANC was facing criticism of its own human rights record outside South Africa in the camps it had maintained in Angola, Zambia and Tanzania. In response to these allegations the ANC instituted a three-person Commission of inquiry, chaired by Advocate Louis Skweyiya. It was appointed in March 1992 to investigate the allegations made by former detainees in the camps' (University of Pennsylvania: 1996). The report concluded that there had been serious acts of brutality against detainees and urged for measures to identify and deal with perpetrators. It also recommended some form compensation to the victims. As a consequence the ANC decided to establish 'an impartial and independent commission to document cases of abuse and allegations of disappearance and murder' (See, Further Submissions and Responses by the ANC to Questions raised by the Commission for Truth and Reconciliation: 1997). Nelson Mandela made a public statement in which 'he accepted the collective responsibility of the ANC leadership for the serious abuses and irregularities that had occurred, but insisted that individuals should not be named or held personally accountable '(Ibid).. The Commission's findings were however criticised on the basis that some of the allegations were unfounded since those accused were not given chance to defend themselves. Due to this public criticism, Mandela appointed another commission of inquiry chaired by S.M. Motsuenyane. Its other members were figures not associated with the ANC. The Motsuenyane Commission report published in August 1993 came up with similar conclusions to those of the Skweyiya Commission (Asmal: 1999). The Motsuenyane Commission went to the extent of naming some of those it found to be responsible for the abuses. The Motsuenyane report was accepted by the ANC which however denied that the abuses were part of organisational policy. It then called for a comprehensive truth telling process 'to investigate all the violations of human rights ... from all quarters' (Africa Policy E-Journal: 1996).

Meanwhile ANC leaders maintained that it would be inappropriate to take action against their own members when the National Party and security forces had engaged in no similar violations. The issue of accountability for past abuses remained one of the most contentious debates when multiparty constitutional negotiations resumed in May 1993 (Sisk: 1995). The National Party wanted the inclusion of a clause granting amnesty to the security forces, while the ANC argued that the issue of whether or not to grant

amnesty should be left to the incoming government. Ultimately, the interim constitution included as its last clause a post amble which stated the need for national reconciliation, stipulating that

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which amnesty shall be dealt with at any time after the law has been passed (South Africa-Interim Constitution: 1994).

The interim constitution outlined the doctrine to guide the process of dealing with past injustices. 'There need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not victimization' (Ibid). When the government of national unity led by the ANC took office in April 1994, one of the first acts of the government was to declare its commitment to the introduction of legislation for the establishment of a truth commission. 'Negotiations over the drafting of the legislation, however, proved just as contentious as the negotiations over the drafting of the interim constitution. The most difficult points surrounded the manner in which the truth commission would handle the question of amnesty' (University of Pennsylvania: 1996). Of particular concern were questions over the hearings of amnesty applications would be public, the cut off date after which no act would be eligible for amnesty, the level of disclosure required before amnesty would be granted, and the criteria to be applied in deciding whether amnesty could be granted in a particular case (Ibid).

The South African National Assembly passed the Promotion of National Unity and Reconciliation Act in May 1995. This set up the TRC with the mandate to establish 'as complete a picture as possible of the causes, nature and extent of the gross violations of human rights committed under apartheid from March 1960 to December 1993 (later extended to May 1994) by conducting investigations and holding hearings. The main commission was appointed through a transparent process. Its starting point was a selection panel, comprising members of the civil society and government, appointed to consider 299 nominations from different stakeholders. After interviews, the panel submitted a shortlist of 25 to the president. He in turn appointed 17 commissioners on

29th November 1995. The Amnesty Committee was appointed after and independently of the main commission. It was also appointed without a transparent process, the president appointed three commissioners and two judges to it on 24 January 1996' (Mamdani: 2000:176). The South African TRC captured a great deal of international attention and is today regarded by some as one the best transitional justice approaches to have so far been implemented (Shea: 2000, Marks: 2000). Coming up on the backdrop of a protracted conflict and the so called 'miracle transition' the TRC with its ambitious mandate was afforded extensive media coverage both in South Africa and internationally. It was one of the largest and well-resourced truth commissions so far and was hailed for its approach of pursuing restorative rather than retributive justice.[33](Although the extent to which the two were really distinct remains a matter of debate. At the procedural level, the TRC faced a number of legal challenges revolving around issues of testimonies and the constitutional right of those accused to defend themselves, and the tensions inherent in the Human Rights Violations Committee relating to adversarial and fact-finding procedure-bound processes). Nonetheless, to its proponents mostly from outside South Africa,[34] the TRC came to embody a viable response to dealing with questions of past conflict and past human rights abuses. The South African TRC has however also animated a wide range of debates on its various aspects, ranging from its process to its proclaimed goals. There are those who have questioned its propensity to grant conditional amnesty to perpetrators of human rights abuse and accused it of sacrificing criminal justice for political compromises. There also remain contentious issues about the TRC achievements and on whether the notion of reconciliation was even a legitimate goal of the TRC process. Broadly, the moral, political and legal questions generated by the TRC remain subjects of much debate.

This chapter examines the specific ways in which the South African TRC was organized and how it went about its business, exploring it strengths and weaknesses in responding to South Africa's past. The aim is to analyse the meaning and relevance of the South African TRC as a transitional justice approach. In subsequent chapters, the work of the TRC will be assessed against the conflict transformation models with the aim of establishing the relationship between the two.

4.20 Conceptualising Truth Commissions

One of the key aspects of transitions to democracy over the past two decades or so, has been the emergence of the truth commission mechanism. It has in most cases been designed as a response to dealing with a legacy of conflict and human rights abuse which occurred during a prior period of internal violent conflict or repressive rule. Truth Commission is a broad term that has come to represent bodies set up to investigate and report on a pattern of past human rights abuses. It is has emerged because of the limited reach of criminal justice processes in periods of political transition and out of a recognition that even successful prosecutions would not deal effectively with the effects of conflict and pain associated with past human rights abuses, especially in contexts where the affected individuals have to continue living in close geographical proximity. Priscilla Hayner (2001:15) observes that various transitional authorities around the world have increasingly turned to official truth seeking as an essential component in their strategy to respond to past atrocities and this truth seeking process has acquired the generic term of truth commissions. She states that the term implies a specific kind of inquiry, even while allowing for considerable variation between the different commissions (Ibid).

While there have been some considerable shared characteristics between previous truth commissions, their specific investigatory mandates and powers have differed considerably to reflect the needs and political realities of each country. There are countries that put in place commissions of inquiry at various points in time to examine certain specific crimes. Due to their narrow mandates however, they have not been referred to as truth commissions.[35] Hayner (1994: 558) states that truth commissions are generally understood to be bodies set up to investigate a past history of violations of human rights in a particular country. These can include violations by the military or other government forces or armed opposition forces. Hayner delineates four main characteristics of truth commissions, first, that they focus on the past. Second, truth commissions investigate a pattern of abuse over a set period of time rather than specific event. In its mandate the truth commission is given the limits of investigation both in terms of time frame as well as well as the type of human rights abuse to be investigated. Third, she says a truth commission is a temporary body, usually operating over a period

of six months to two years and completing its work by submitting a report. She observes that these parameters are established at the time of the commission's formation, but that often, an extension can be obtained to wrap things up. Fourth, truth commissions are officially sanctioned, authorized or empowered by the state. This, in principle, allows the commission to have greater access to information, greater security and increased assurance that its findings will be taken under serious consideration. Official sanction from government is crucial because it represents an acknowledgment of past wrongs and a commitment to address the issues and move on. Furthermore governments may be more likely to enact recommended reforms if they have established the commission (Ibid).

A number of other bodies have also been created to serve the similar function of investigating the past. In some instances non-governmental organizations have created their own versions of truth commissions where governments have failed to create one. For example, the Archbishop of Sao Paulo, with the support of the World Council of Churches, investigated human rights abuses under Brazil's military regime when the government refused their calls for formal inquiry (Brahm: 2004). Truth commissions also do not necessarily need to be national in scope. The Greensboro Truth and Community Reconciliation project in North Carolina created a Truth and Reconciliation Commission in May 2004, to examine racially motivated killings by the Ku Klux Klan and the American Nazi Party in 1979 (The Greensboro Truth and Community Reconciliation Commission: 2006).

Some observers having watched past commissions and the reports they produce are uncomfortable with the generic name of truth commissions. Some think they should be called 'fact and fiction commissions,' 'some-of-the- truth commissions' or even 'commissions of inquiry,' (Hayner: 1994:22)' which would then lift off the pressure to be both ideal and comprehensive. Overall the name truth commission has caught on and has now become a term with a generally understood meaning of an official investigation into a past pattern of human rights abuse. The increasing use of 'truth and reconciliation commission' as a generic term, largely influenced by the South African TRC, may be inaccurate since some of them like the National Commission on the Disappeared in Argentina (Nunca Más (Never Again): 1984) and the National Commission for Truth and

Reconciliation of Chile (United States Institute of Peace: n.d) did not hold reconciliation as a primary goal of their work, nor assumed reconciliation would result.

Bronkhorst (2003) argues that truth commissions can be set up for good or bad reasons and that frequently there is a mixture of the two. Ideally, a truth commission is an honest approach to deal with the legacy of past human rights abuses, and can act as a tool for pacifying a previous conflict. He observes that a bad reason for setting up truth commissions is that it might preclude trials of those responsible for flagrant and systematic abuse of human rights. Human rights and legal practitioners the world over often insist that justice, taking the form of criminal prosecutions, is an essential component of any response to human rights violations. There are however those who see truth commissions as deserving of their budding status. Those in support of truth commissions contend that despite their more limited legal nature, their broader mandates in focusing on a pattern of events including the causes and consequences of past conflict and human rights abuse allows them to go much further in their investigations and conclusions than is generally possible with legal measures against individual perpetrators. The breadth and flexibility of truth commissions are seen as their strength. Truth commissions are seen to be capable of outlining the full responsibility of the state and its individual institutions that carried out or condoned the human rights abuses. It is also argued that truth commissions' victim centred approach of collecting thousands of testimonies and publishing results of their findings in a public and officially sanctioned report represents for many victims the first sign of acknowledgement by a state body that their claims are credible and that the atrocities were wrong (Thakur: 2005/2006). Truth Commissions are also considered more likely to document practices that are largely unknown to the majority of the population and their reports can thus have a powerful impact despite the years that have passed.

Truth Commissions have however remained controversial processes and attracted mixed reviews. There are those who accuse them of often promising more amnesty than truth (Brody: 2001, Bronkhorst: 1995, Motala: 1995:338-362) and argue that they should not be considered superior measure to prosecutions. Nevertheless truth commissions often find themselves with very difficult tasks and usually insufficient time and resources to complete their work. They have to labour through widespread falsehoods and denials[36]

and sometimes they have to confront painful and horrendous memories of victims and while also wading through damaging cases of past atrocities whose influential perpetrators may not want revealed. At the end of the commission's work, a country may well find the past still unsettled and some key questions still unresolved. Nevertheless despite their inherent limitations both the process and product of truth commissions are regarded as significant in contributing to the course of transitional justice. They are seen to fundamentally change the way a country understands and accepts some of the most contentious aspects of its history (Thakur: 2005/2006).

Coming to terms with past conflict and human rights abuse can be such a painful and protracted struggle, legally, politically and ethically. Some people would prefer to consign such events to the past and try to forget about them,[37] even though in the recent past, there has been a growing trend toward dealing with such issues of past conflict and human rights abuse in an effort to understand what exactly happened and allow victims the opportunity to tell their story. It is this growing trend and interest in understanding the past that led to the formation of the South African TRC, which today, remains the most highly publicized internationally.

4.30 The South African TRC and Its Structure

The enactment of the promotion of National Unity and Reconciliation Act (No. 34) of 1995, or the Truth and Reconciliation Act (TRC Act) (Republic of South Africa: 1995), was the result of an elaborate consultative process, partly to comply with the constitutional requirements that amnesty should be granted to certain persons, and partly to pacify those who were advocating for trials and prosecutions.

When it came to writing a new constitution for post apartheid South Africa, the framers of that constitution were confronted with a dilemma, whether to deal with the country's painful past by responding to the demands for retribution of the many victims and critics of the apartheid system or to cultivate amnesia about the past in the interests of the future political stability (Hoffman and Reid: 2000, See also Lipton: 1999: 60). The outcome was an elaborate political compromise that rejected the outgoing regime's demands for a blanket amnesty and no retribution in exchange for a TRC that could grant amnesty on certain clearly specified terms. One significant challenge in the course of

formulating the South Africa's TRC was to establish which of the past human rights abuses to be investigated since apartheid involved a wide range of them. Initially, there was a lack of consensus on where the focus should be although eventually the TRC limited itself to human rights abuses committed in the period 1960-1994 and which were linked to political motive. Violations outside that period and those which could not meet that criterion were left out of the TRC's mandate and critiques suggest that this focus on gross human rights violation within the specific period contributed to the skewing of social memory (Traces of Truth. n.d).

Broadly, the TRC's mandate was carried out in three main committees, the Amnesty Committee, the Human Rights Violations Committee and the Reparations and Rehabilitation Committee. There was also an investigative unit working in collaboration with a research department, which conducted investigative inquiries. The mandate of the TRC was laid down in the Act as follows: to establish a complete picture of the causes, nature and extent of the gross violations of human rights committed from 1st March 1960 to 10th May 1994, by conducting investigations and hearings. Facilitating the granting of amnesty to persons who make a full disclosure of the all the relevant facts relating to acts associated with a political objective, establish and make known the fate or whereabouts of victims, restore the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violence and lastly, recommend reparation measures in respect of these violations. It was stipulated that the commission was to carry out its work by conducting investigations, holding hearings, and compiling a comprehensive report (Republic of South Africa: 1995, See also Burger: 1999: 280–281, Republic of South Africa: 2003: 55-57). The TRC was seen by the ANC leadership particularly by Nelson Mandela as a crucial component of the transition to full and free democracy in South Africa.

4.40 The Working of the TRC's Committees

a) The Human Rights Violations Committee

The task of the Human Rights Violations Committee was to investigate human rights abuses that took place between 1960 and 1994, based on statements made to the TRC. The Committee 'established the identity of the victims, their fate or whereabouts, and the

nature and extent of the harm they have suffered, and whether the violations were the result of deliberate planning by the state or any other organisation, group or individual' (The Committees of the TRC: n.d). Once victims of gross human rights violations are identified, they were referred to the Reparation and Rehabilitation Committee. During its two-year operational phase (1995-1997) the Human Rights Violations Committee held 140 hearings across the country, including victim hearings, event hearings, special hearings, institutional hearings, and political party hearings (Republic of South Africa: 2003: 570, 575-6, See also South African Institute of Race Relations: 1999/2000: 347-8). At the hearings about 2,400 victims of gross violations testified and the names of 27,000 victims were recorded. The Human Rights Violations Committee assisted by the TRC Investigation Unit, gathered a total of 21,519 victim statements containing evidence of 30,384 gross human rights violations. It made more than 15,000 findings, confirming that victims had been the subjects of gross human rights violations (Du Pisani and Kwang-Su: 2004). Still for a variety of reasons including the fact that the TRC could not visit all parts of the country, many people who wished to do so were unable to make statements. More than 8,000 statements were submitted after the TRC had stopped collecting statements. From all the evidence gathered, the Human Rights Violations Committee compiled a number of reports that eventually formed part of sections three, four, and five of the final TRC report.

It has been argued that the public hearings of the Human Rights Violations Committee had a healing effect on victims of past human rights violations (Hayes: 1998: 29-50). Individual evidence intimates that for many who addressed the commission, the value of telling one's story before a supportive audience was significant. Referring to the psychological value of testifying, one witness said, 'when the officer tortured me at that time in John Vorster Square, he laughed at me, saying you can scream your head off, nobody will ever hear you! He was wrong. Today there are people who will hear me' (Cited in Meiring: 2000). Mrs Nohle Mohape on her part expressed her happiness at just being able to explain who she thought were the killers of her husband (Cited in Boraine: 2000: 98). Mrs Nohle was the first witness to appear before the TRC, in Eastern Cape. Her husband Mapetla had been killed in detention in 1976. Alex Boraine agrees that the

process of public testimony in a reassuring environment and with empathy and appreciation had a beneficial healing effect for many survivors.[38]

Another significant aspect of the victim hearings was the ability of the Human Rights Violations Committee to conduct institutional and special hearings on various sectors of South African society and with respect to certain categories of victims (Republic of South Africa: 2003: Vol. 4). These special hearings enabled the TRC to make extensive recommendations for reforming these sectors of society and to provide special help for particular categories of victims.[39] Among the criticisms levelled against the Human Rights Violations Committee were that only a handful among the thousands of instances cited by survivors and perpetrators were fully investigated and that given the widespread violations of human rights abuses between 1960 and 1994, it devoted too much time and money on high profile public hearings, such as those of Winnie Mandela and the political parties, in the midst of the TRCs financial limitations. The TRC therefore, ended up devoting fewer resources to low profile cases and did not do enough for the countless 'ordinary' victims of apartheid who were in need of encouragement, counselling, support and legal representation (Garkawe: 2003: 334-380).

b) The Reparation and Rehabilitation Committee

The TRC's enabling act empowered the Reparation and Rehabilitation Committee to provide victim support to ensure that the Truth Commission process restores victims' dignity, and to formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families and communities at large (The Committees of the TRC: n.d). The envisaged overall function of all recommendations was to ensure non-repetition, healing and healthy co-existence. A President's Fund, funded by Parliament and private contributions, was established to pay urgent interim reparation to victims in terms of the regulations prescribed by the President (Ibid).

In order to determine its list of victims, the Reparation and Rehabilitation Committee relied upon the findings of both the Human Rights Violations Committee and the Amnesty Committee. However, in practice, the Reparation and Rehabilitation Committee had neither the resources nor the mandate to properly investigate the lists of victims provided by the two Committees and the claims by those wishing to be declared

victims.[40] The procedure under the Reconciliation Act allowed for the Reparation and Rehabilitation Committee to make recommendations to the President who then could make his or her own recommendations to Parliament, which then through a special committee, considered the recommendations in the context of the country's socio economic and political situation. It could then decide either to approve or disapprove President's recommendations. Then eventually the President had to make regulations enforcing the Parliament's decision.

The Reparation and Rehabilitation Committee put forward five principles for its reparations policies, redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition (Jenkins: 2000: 465). The Reparation and Rehabilitation Committee first recommended the making of urgent interim payments to victims who could show an immediate need. The immediate need included cases of subsistence needs of survivors who had lost their breadwinner, counselling services, urgent medical needs, support for terminally ill victims and survivors, access to social welfare benefits, and the issuing of civil documents such as death certificates.

The Reparation and Rehabilitation Committee emphasised that 'reparation' was a broad term and extended far beyond individual monetary payments for victims. 'Other types of reparations recommended by the Reparation and Rehabilitation included memorialisation programmes, establishment of monuments and setting up institutional reforms to guarantee non-repetition of the apartheid era abuses' (Republic of South Africa: 2003: 188–94). While some of these recommendations have been acted upon, the South African government has generally been slow to respond to many of the recommendations.[41] The limited progress in implementing the recommendations of the Reparations and Rehabilitation Committee has angered many victims and victim support organisations (Centre for the Study of Violence and Reconciliation: 2001). This is particularly the case with respect to the recommendations regarding final monetary reparations.

c) The Amnesty Committee

'The primary function of the Amnesty Committee was to consider that applications for amnesty were done in accordance with the provisions of the Act (The Committees of the

TRC: n.d). Applicants could apply for amnesty for any act, omission or offence associated with a political objective and committed in the course of the conflicts of the past (from 1 March 1960 to 6 December 1993). The cut-off date was later extended to 11 May 1994. For one to be granted amnesty the crime committed had to be proportionate to the political motive and more importantly, the applicant had to make full disclosure of the acts committed. The privileging of the political motives was aimed at restricting the TRC's investigations into intersections with criminal and local community patterns of violence. Some acts nonetheless crossed this divide (Coetzee: 2003: 115-120). The final date for the submission of applications was 30 September 1997. Being granted amnesty for an act meant that the perpetrator was free from prosecution for that particular act. The option of future criminal proceedings against perpetrators, however, remained possible where suspected perpetrators had failed to cooperate with the TRC or had been denied amnesty. The amnesty committee received 7,124 applications by perpetrators of such violations as of December 2000, and only 849 amnesties had been granted while 5, 392 were refused (Hendricks: 2003:25). This Amnesty committee was responsible for the main task of the TRC, which was to deal with the lot of past criminals.

The government initially showed some willingness to prosecute a number of former perpetrators connected with apartheid era human rights violations. One of the successful trials was that of Eugene de Kock, a member of the apartheid-era security forces. He was a commander under the previous government of the notorious and secret Vlakplaas unit of the security police. De Kock was found guilty in August 1996 of six murders and eighty-three other crimes following a trial that lasted eighteen months. In his plea in mitigation before sentencing, De Kock implicated senior members of the former regime in 'dirty tricks' against anti-apartheid activists and in the promotion of political violence by covert supply of weapons and other means. Among those named were former Presidents P.W. Botha and F.W. de Klerk, and a number of generals in the army and senior police officers (Amnesty International /Human Rights Watch: 2003). Other trials relating to apartheid-era crimes have been less successful. In October 1996, the trial of former defence minister Magnus Malan, former head of military intelligence Gen. Tienie Groenewald, and eighteen others, in connection with a 1987 massacre of fourteen family members of an ANC leader in KwaMakhutha in the former homeland of KwaZulu, now

KwaZulu-Natal, ended in acquittal or discharge for all defendants. The trial centred on allegations that the National Party government had at the request of Chief Mangosuthu Buthelezi trained Inkatha Freedom Party cadres, many of whom were later integrated into the KwaZulu Police, to carry out political assassinations or promote political violence against the Inkatha Freedom Party opponents.[42]

Another important trial linked to the activities of the former Defence Force involved Dr. Wouter Basson, head of the military's covert biological and chemical warfare program in the apartheid era. It ended in acquittal in on April 11, 2002 when the Pretoria High Court found him not guilty of forty-six charges including murder, and embezzlement. Among other findings the Court ruled that the state had not proved beyond reasonable doubt that Dr. Basson had been part of a conspiracy to supply deadly drugs to military agents to murder enemies of the government. Earlier on in 2001 another fifteen charges had been struck out at the close of the prosecution case (Amnesty International /Human Rights Watch: 2003). In august 2007, the South African government instituted a case against former security minister Adriaan Vlok and five associates in connection with an alleged 1989 plot to murder a former church leader. The trial renewed debate on the contestations of prosecuting alleged perpetrators of past human rights abuses with the associated threats of animating racial tensions. It however ended in a suspended jail sentence, which left a feeling of a compromise between the demand for punishment and amnesty, although some dismissed it as a charade and a public relations exercise that did nothing to build the faith of ordinary South Africans in the justice system (Khulumani Support Group: 2007).

Granting perpetrators of past human rights abuse amnesty in exchange for full disclosure was a very important part of the TRC process which has animated a lot of debate particularly from those who feel that it sacrificed criminal justice. There are observers who have considered the prudence of offering amnesty and question whether the ANC chose a more comfortable political expediency in promising amnesty to apartheid killers. Mamdani (2000: 177-178) argues that ultimately the TRC resulted in an institutionally produced truth, as the outcome of a process of truth-seeking, one whose boundaries were so narrowly defined by power and whose search was so committed to reinforcing the new power, that it turned the political boundaries of a compromise into

analytical boundaries of truth-seeking. The ANC however defended the amnesty agreement on the basis that its main preoccupation at the time was to ensure that democratic elections would go on and facilitate the transfer of power. If provision for amnesty could secure the support or toleration of members of the apartheid system who could threaten the democratic process, then according to the ANC the country had to pay the amnesty price.[43] The ANC clearly thought that this, rather than the continual uncertainty that would have resulted had the security forces not been placated by the agreement for amnesty, best served the interests of victims.[44]

Thus for South Africa, amnesty was never accepted as a blanket let off but rather conjured partly in legal terms so that those who did not meet the amnesty requirements could be liable for prosecution. It was given quasi-judicial powers[45] and this also meant that the Amnesty Committee was largely independent of the larger TRC. The 'truth for amnesty' stipulation was seen as engendering a more cooperative atmosphere for victims and perpetrators to integrate and restore dignity to victims. The South African Amnesty provision could be said to have contributed to achieving a degree of accountability since it was linked to perpetrators confessing their past atrocities. It also subjected perpetrators to some form of retribution because it entailed public confessions, which in itself carries a measure of public humiliation and moral censorship (McGregor: 2001: 38).[46] Had South Africa opted for a criminal trial approach, it is probable that most perpetrators would have had little incentive to come forward and tell the 'truth.' Coupled with the practice of destroying of apartheid documentation and evidence (Republic of South Africa: 2003: Vol. 1, chapter 8), it would have been very difficult to sustain convictions. Even if there would have been sufficient evidence to launch criminal prosecutions, a number of factors rendered actual convictions for the many human rights violations implausible. For instance the judges that were appointed during the apartheid era continued to serve as members of the judiciary and this created a legal system that was suffering from lack of credibility. Moreover, the likelihood of defendants getting access to high quality legal representation and the high burden of proof required for criminal conviction made the possibility of successful prosecutions very limited. The acquittal of the former Minister of Defence, Magnas Malan, together with 18 other defendants in a high profile criminal trial in 1996 is testimony to these realities.

In its administrative report the Human Rights Violations Committee rated its own work highly. It described the volume of victims as a major achievement, a 'living monument to those who suffered great pain and loss during the years of struggle that will endure in the nation's memory for many years to come' (Republic of South Africa: 2003: Vol. 7). The database of information collected by the Human rights Violations Committee now in the custody of the National Archives as part of the TRC archives, while accused for failing to cover atrocities committed outside the country and in the rural areas, is seen as a remarkable archival collection in South Africa (Republic of South Africa: 2003: 577, 578).

Anglican Archbishop Desmond Tutu chaired the 17-member body, which presented its provisional report to President Nelson Mandela in October 1998. The TRC was dissolved in 2001, but the final amended version of the report was not publicly disclosed until March 2003, when all disputes and legal action by interested parties had been settled.

4.50 The TRC Process

There was a lot of opposition to the establishment of the TRC from people who feared that investigating the past by holding public hearings could stir up hostilities and resentment and in the process impede rather than promote reconciliation (Adam: 1998: 11-16). Others like the family of the late Steve Biko challenged the constitutionality of the amnesty provision because they wanted perpetrators of past human rights violations prosecuted. The legal challenge was however rejected by the constitutional court (Lipton: 1998). There was also the fear that the TRC's narrow and legalistic terms of reference would result in a limited focus on a small group of victims and perpetrators of gross human rights abuses, such as torture and murder, while ignoring the much larger group of victims and beneficiaries of the whole apartheid system (Mamdani: 1996: 3-5). The domination of the TRC by commissioners sympathetic to ANC led its political rivals, especially the National Party and Inkatha Freedom Party to fear that the hearings would turn into a witch-hunt while sanctioning the position of the ANC. The 'White right' dismissed the TRC process as the 'crying and lying commission' that accepted untested

allegations and was out to discredit Afrikaners (Lipton: 1999: 60-65). Both the National Party and the Inkatha Freedom Party had argued that the TRC favoured the ANC and these suspicions gained ground when a blanket amnesty was offered to the ANC leadership even though amnesty applications were supposed to be done on individual basis. In an editorial, the *Economist* (1998: 44) argued that the evidence of preferential treatment could also be found if the treatment of Botha and Winnie Madikizela Mandela could be compared. It queried why Mangosuthu Buthelezi and the Inkatha Freedom Party were not forced to come forward, given the connection between the Inkatha Freedom Party and the apartheid regime in fomenting township violence. Implicit in the *Economist*'s editorial was the argument that the TRC was designed to go only after whites from the former regime.

South Africa's TRC nonetheless arguably remains the most prominent truth commission so far. While it was hoped that the TRC would help South Africa as a country to be reconciled, the TRC failed to provide a clear conceptual clarity on what was meant by reconciliation. Despite the TRC popularising the term, it never provided the country with a clear meaning of what reconciliation really meant. As a result, people ended up talking about the TRC leading to reconciliation when they were actually using the same term to mean different things.[47] Although the TRC's task was not officially framed in religious terms, the dominant role of Chairman Archbishop Tutu meant that his theological view of reconciliation often came out strongly. In fact Bishop Tutu is said to have brought to bear, his own religious convictions about forgiveness to those not entitled to forgive. Alex Boraine, the Vice Chair of the TRC says he often requested Archbishop Desmond Tutu not to ask individuals who appeared before the TRC to forgive the way it happens in Christian gatherings but that Tutu would respond on a light note, saying the President appointed him knowing very well, he (Tutu) was an Archbishop.[48] It has been argued that two features of South Africa's religious culture supported the TRC's emphasis on forgiveness, rather than punishment, the Christian theology and the traditional concept of ubuntu (Graybill: 2004: 1117-1130). The Christian teachings continue to retain a lot of significance to many South Africans (Walshe: 1995) and the concept of ubuntu, encompassing the notion of humaneness or humanness was used to validate reconciliation. Loosely translated Ubuntu means People are people through other

people.[49] It emphasizes the society over an individual. It resonates with John Mbiti (1969: 108-109) assertion that in African religion and philosophy whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. Ubuntu therefore engendered the willingness to forgive.

The TRC's hearings had a significant impact on public opinion, shocking scores of individuals, some who previously did not consider or believe that agents of the apartheid system inflicted extreme violations of human rights including torture and murder on many South Africans. Nonetheless, even after the TRC there still remained those who denied that they had known what was happening. This included former president De Klerk who testified that while his government had authorized unconventional methods against its opponents, these did not include aberrations such as murder and torture that were done due to 'bad judgment, over zealousness and negligence of individual state agents' (Krog: 1998: 105-6). Former President P. W Botha represented the unrepentant wing by insisting that he had nothing to apologize for and in fact refused to testify before the TRC (Ibid: 1998:267).

4.51 The Victim-Centred Approach

The quest for restorative justice in South Africa was fortified by the constitutional commitment to the need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization which are found in the Epilogue of the Interim Constitution (South Africa - Interim Constitution (Old): 1994). Similarly the TRC declared in its final report that it was a restorative mechanism of accountability that was victim-centred (Leman-Langlois: 2000: 146-165). Advocates of restorative justice regard it as benefiting victims of crime more than the traditional criminal justice system. It is asserted that victims have greater involvement in a restorative justice and that it is generally better for victims psychologically, socially and financially.[50] According to the TRC report, restorative justice sought to redefine crime by shifting the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings. Restorative justice was based on reparation whose aim was to heal and restore victims, offenders, their families and the larger community. It sought to encourage victims, offenders and the

community to be directly involved in resolving conflict, with the state. Restorative justice therefore is seen to have supported a criminal justice system that aimed at offender accountability, full participation of both the victims and offenders with the aim of making good or putting right what was made wrong by the apartheid system (Republic of South Africa: 2003:126).

Often law scholars and human rights activists point to the principle that there is a clear duty to prosecute gross violations of human rights under prevailing international norms (Robertson: 2000: Chap.4). Of essence in a domestic context is the notion that prosecutions facilitate the development of the rule of law through the punishment of impunity. Despite the affirmative obligation on states to investigate and prosecute gross human rights abuse, which exists in international law, for South Africa the route taken was to effect the discretion in the exercise of this obligation. My research confirmed that there are cases in South Africa where retributive understandings of justice are as rife as those of restorative justice. In one case Vusi, a student at the University of the Witwatersrand, told me that he greatly regretted Mandela's forgiveness and reconciliation approach. He said that if it were his wish 'all those behind the apartheid system would be send to jail to rot'[51]

The debate over whether South Africa could have achieved democracy through negotiations without an amnesty agreement will undoubtedly continue to provoke competing responses. The central paradox of the TRC was that it introduced the language of accountability while at the same contrasting it with the provision of amnesty, which to some constitutes insulating criminality.

4.60 Challenges in Assessing the TRC

Tristan Anne Borer (2004) has observed that most of the literature on the work of truth commissions has been plagued by two problems. The first problem she calls the aspiration to empiricism and the second, the constant reiteration of the causal claim that 'truth leads to reconciliation', to the degree that it has now taken on the quality of a truism. She states that often claims about the South African TRC are presented as fact, when, in reality, insufficient empirical work has been done to test them. To Borer when a statement such as, 'truth commissions provide healing for victims' is repeated often

enough over time, it takes on the quality of common wisdom, the evidence for which seems too obvious to mention. The problem, she says, is that in the absence of such evidence, people do not simply know if such 'statements of fact' are indeed true (Ibid). She is supported by Priscilla Hayner (2001:6) who observes that

> 'Unfortunately, many comfortable assumptions have been restated over and again in untested assertions by otherwise astute and careful writers, thinkers, and political leaders. . . Some of the most oft-repeated statements, and those that we perhaps most wish to be true, are due careful scrutiny.'

In the course of the South African TRC process, one example of the continuous repetition of the causal claim was the statement 'Truth the Road to Reconciliation'. It formed the banner at most of the truth commission's hearings in South Africa. In practice, it does not necessarily follow that the process of 'truth telling' will lead to reconciliation. In some cases the 'truth' can be ghastly and unbearable to the point of driving the survivors to seek revenge. Chris Ribeiro, the son of the murdered Florence and Fabian Ribeiro, for instance objected to anyone pushing reconciliation 'down his throat' (Cited in Villa-Vicencio: 1997). Marius Schoon, who lost his wife and a daughter in a South African army raid into Botswana, on his part complained about 'the imposition of a Christian morality of forgiveness on the TRC process' (Ibid). It is inaccurate to assume that the process of truth telling alone would lead to reconciliation as implied by the TRC slogan. In interviews with some of the ex combatants from Gugulethu in Cape Town and Soweto in Johannesburg, a running theme in their views was that 'total reconciliation' will not be realized unless the government addressed questions of social injustices and economic inequalities. A number of them expressed bitterness at the TRC process for allowing perpetrators to go and 'say before it what they want and walk scot-free while their victims continued to languish in poverty.'[52] Hamber (1997) observes that truth alone does not always lead to reconciliation. Some victims, he says, may be satisfied by knowing the facts, particularly in the case of relatives who had disappeared, but for others truth may heighten anger and calls for justice rather than leading to feelings of reconciliation. Truth commissions might exacerbate anger and pain. There is therefore a constant threat of a perpetuated cycle of revenge once the truth is out. Hayner (2001:30) states 'the goal of

reconciliation has been so closely associated with some past truth commissions that many casual observers assume that reconciliation is an integral, or even a primary purpose of creating a truth commission, which is not always true'. In cases where statements such as 'truth leads to reconciliation' are presented as if they are matters of fact, it is sometimes because people so badly wish them to be true, with the result that these statements tend to have a 'wishful thinking' and declaratory quality to them (Tristan:2004). In other words, aspirations are often taken for empirical facts. There has been little empirical research to ascertain whether truth commissions secure the benefits of healing, catharsis, disclosure of truth, and national reconciliation, as they are conventionally assumed to do by many observers. Jonathan Allen (1999: 316-17) argues that it is problematic 'to confuse aspiration with predictions, to justify truth commissions by means of what amounts to wishful thinking (or at least, not very thoughtful wishing).' In the end, Allen observes that some of the claims concerning the tasks of truth commissions are better understood as moral claims than as empirical statements. In South Africa, some individual victims reported experiencing feelings of catharsis. There are also, however, those who indicated feelings of anger and frustration because of the TRC process. Given this mixed evidence, it may be inappropriate to make general assertions about the facility of truth commissions to obtain the alleged benefits (Ibid). There is also the real risk in moving too quickly from an individual experience to the collective. In the course of the TRC, there were incidences of forgiveness between 'victims' and 'perpetrators'. These however, were not necessarily transferred to the collective groups from which those individuals came from. There are therefore multiple dimensions that need to be considered when assessing the TRC process. Assertions about what truth commissions can and cannot achieve are too often unsubstantiated assumptions that need to be critically assessed.

There are significant problems in assessing the contributions of the South African TRC, particularly whether it was successful or not. The primary challenge relates to the criteria to be used in determining the issue of 'success.' Among the TRC's objectives were to promote reconciliation, help foster a human rights culture and the rule of law. How to go about assessing the level of reconciliation or whether a human rights culture and the rule of law have been fostered in South Africa is quite problematic. Most of these goals are by definition intangible and difficult to measure. In fact terms like

reconciliation have multiple meanings and it is quite complex to judge if the TRC was able to realize the multiple facets of the reconciliation process. Given that no baseline studies were done at the beginning of the TRC process to determine the degree of 'reconciliation,' 'human rights culture,' 'national unity' etcetera.[53] It may be difficult to measure the TRC's contribution on any of these fronts. Moreover, the TRC operated within a key period of South Africa's political transition and it is difficult to divorce the achievements of the TRC from the contribution of the process of political transition itself. There were therefore, various variables operating simultaneously and collectively, and the very course of democratisation itself could have been as important as any other factor in the process of building national unity and reconciliation. In essence, the TRC may be seen as one of the several measures that collectively contributed to the process of social reconstruction in South Africa, rather the conventional assumption in most countries that have sought to follow the South African example, where it is assumed that it was the only or most crucial factor.[54] The question of assessing the actual contribution of the TRC to South Africa's transformation process is bound to remain problematic. It calls for more research and critical analyses to assess the various causal claims that prevail in other countries that have shown interest in replicating the South African example,[55] a task, toward which, this study hopes to make a modest contribution to.

4.61 The Dilemma of Meaning

The South African TRC process employed the use of various terms that remained ambiguous throughout the process. There were terms like 'truth,' 'justice' and 'reconciliation' that were used in ways that were not precise in meaning, yet these terms remained central to the assessment of the TRC's work. The next section discusses the possible multiple meanings of these terms with the aim of illustrating the often competing and contradictory understandings of the TRC's process.

a) Truth

The question of 'truth' was a very problematic area in the operation of the South African TRC. The TRC was beset by a deeper set of philosophical questions regarding the aspect of truth. It was for instance faced with the difficulty determining whether the constructed

nature of personal narrative constituted objective facts. The TRC sought answers to a series of questions in its effort to 'know what happened.' Such questions included, why the gross violation of human rights took place and who ordered them (Republic of South Africa: 1998:Vol.1,Chap. 1, Par. 28). Of central concern was the problem of ascertaining whether what was being said was indeed the truth. According to its report the TRC employed four different kinds of truth (Republic of South Africa: 1998: Vol.1, Chap. 5**)**, factual or forensic truth entailing the scientific notion of bringing to light factual, corroborated evidence in obtaining accurate information through reliable, impartial and objective procedures. Personal or narrative truth entailed the telling of stories by both victims and perpetrators, giving meaning to the multi-layered experiences of South African past. The social or dialogue truth is defined in the TRC report as the truth of experience that was established through interaction, discussion and debate. Lastly the healing or restorative truth was seen as the kind that places facts and what they mean within the context of human relationships, both amongst citizens and between the state and its citizens (Ibid). There are those who argue that the South African TRC only realized partial, subjective, and to some extent distorted truth. Mamdani rhetorically poses that given the various forms of truths outlined in the TRC report, which truth comes close to establishing what happened? (Cited in South African Press Association: 1998). To him the TRC obscured truth because it did not consider such significant issues as forced removals, pass laws, racialised poverty and racialised wealth that were at the centre of gross violations of human rights. The consequence was a report that reflected distorted truth (Ibid). Christie (2000:149) argues that truth may not emerge as a necessary outcome of a truth commission and that prosecutions are more likely to provide a greater measure of truth.

There were several cases where the TRC's accounts were met with opposition. Examples include the case of former National Intelligence Service (NIS) chief, Dr. Neil Barnard who contested virtually every finding of the TRC Report (Villa-Vicencio and Verwoerd: 2000: 9). Some members of the ANC leadership on the one hand and the National Party leader F. W. de Klerk on the other, sought to prevent the Commission from publishing some of its findings on the basis that some of the contents of its report were not true (Pityana: 1999). Nonetheless, it could hardly be expected for a truth

commission to establish in a short space of time 'absolute truth' that is acceptable to all. The TRC certainly was constrained by time and did not cover all the different parts of the country. Saunders (2002: 248) observes that rural areas, particularly in the former Bantustans, were neglected as compared to urban areas. Due to time constraints again the TRC could not adequately deal with local histories in the various parts of the country (Mooney, et al: 1999: 213-214). It is for these reasons that Posel and Simpson (2002:11) maintain that the TRC report and records contain a range of 'fractured, incomplete and selective truths' rather than 'the truth' about South Africa's apartheid past. It is probable that the witnesses who appeared before the TRC gave testimonies that reflected their side of the story. Given the passage of time since the occurrence of some of the events, it is also likely that some of those testimonies did not reflect what actually happened due to the failings of the memory or that they were coloured by emotions. With possible reparations and amnesty in mind, victims and perpetrators could have told their stories with varying degrees of honesty.[56] For the most part, the TRC testimonies were not corroborated to find out their truthfulness. Lerche (2000) observes that all sides in a conflict have their own versions of 'truth' of what really happened. Truth seeking then becomes a very complex process because it becomes difficult to distinguish between specific details about what actually happened and emotional versions and untruths about the past. These concerns about the nature and interpretation of truth in truth commission processes mean that the South African TRC's work and its report have continued to receive mixed and contested assessments.

b) Justice

The question of Justice has dominated discussions especially from legal scholars. For many, the proper response to a criminal act is to follow the due process of law, to render verdicts and punish criminals. Conventionally justice is understood as that meted out by a court of law, where if the accused is found guilty of an offence in accordance with appropriate procedures, the court has to determine and met out punishment proportional to the offence. There are those who have argued that after its 1994 political transition, South Africa needed to have pursued criminal justice not only because of the intrinsic worth of doing justice, but also because the enactment by the courts of the rituals of

criminal justice would have educated the society in the practices of the rule of law, and thereby contributed to creating a stable democracy (Dyzenhaus: 1999). There are however others those who contest this position maintaining that justice is not only about assigning rewards and punishments but rather seeking to do what is right given the circumstances.[57] The South African TRC is in this case seen to have neither sacrificed nor compromised justice. Instead justice was achieved, not through the punishment required by retributive systems, but through the practice of a different model, that of restorative justice. South Africa is therefore said to have moved away from retributive justice to what is regarded to restorative form of justice, that which according to Alex Boraine and Charles Villa-Vicencio, is much wider and richer.[58] Restorative justice essentially responds to past conflict and human rights abuse by seeking not only to repair the harm caused by the criminal acts but also to restore the balance in the community affected by the crime or conflict through such acts as reparations, memorialisation and counselling.

In restorative justice offenders are given the opportunity to acknowledge the impact of what they did and victims have the opportunity to have their harm or loss acknowledged and some form of amends made to their lives through such measures as reparations. The South African TRC avoided the criminal prosecutions except where the crime fell outside the conditions for the provision of amnesty. The form of justice pursued balanced somewhere between moral, political and emotional proportions.

Advocates of the TRC approach argue that the fragility of the transitional government in South Africa necessitated a precarious balancing between retribution and amnesty, lest perpetrators of past crimes ganged up for fear of punishment and sabotaged the new government's social renewal and reconstruction process. The choice of the South African TRC to focus on victims and effort of restoring their dignity through truth telling processes and reparations is seen as strength in redefining justice and accountability. Its proponents, like Archbishop Desmond Tutu, declare that it sought to repair, not revenge, it sought reconciliation, not recrimination. Andre Du Toit says to understand the relevant philosophical dimensions of justice in a given society calls for a clear understanding of the particular society's context and that South Africa required the restorative form of justice that it pursued.[59] Proponents of retributive justice however argue that South

African TRC sacrificed justice in the name of a spurious reconciliation and political expediency. They condemn the TRC for short-changing the mechanisms that most societies have established to right wrongs by punishing wrongdoers and thereby sacrificing justice as a goal for the sake of the country's future (Odendaal: 1997).

The consequence of the manifest tensions between the two poles of retributive and restorative justice is that it makes the assessment of the TRC's achievements relative. Those perceiving justice as retribution for instance argue that the TRC process failed to promote justice while those supporting the restorative form of justice may argue that it succeeded to some extent.

c) Reconciliation

The South African TRC declared through a banner at its public sittings that truth was the road that would promote the course of national unity and reconciliation. The TRC did not however initially clearly define the kind of reconciliation that it sought to promote. The question whether the TRC delivered reconciliation becomes quite ambiguous unless one understands what it means. Today, reconciliation remains a multifaceted and contested term. There are those who define it simply as coexistence (Villa-Vicencio: 1998: 407-428),others see it as the need for respect (Gutmann and Thompson: 2000: 22-44, Osiel: 1997), while there are those who understand reconciliation to mean mutual forgiveness (Shriver: 1995).

Various authors have advanced different variations of reconciliation. Kriesberg (1998: 329-31) puts forward four aspects to reconciliation: truth telling that leads to understanding of each other's interpretation of events, gaining redress as a means of putting the past to rest, forgiveness on the part of victims and expectations of peaceful coexistence. Borer (2004) on her part draws two models of reconciliation from the South African TRC, the Interpersonal or individual reconciliation, and the national unity and reconciliation. In Individual/interpersonal reconciliation, she observes that the TRC sought to promote the restoration of relationships between victims and perpetrators of gross human rights violations. Under this interpretation, reconciliation happens to individuals, usually between two people, but sometimes with oneself. Wilhelm Verwoerd shares a similar position on individual reconciliation and observes that under ideal

circumstances of this model, ‘a perpetrator comes forward, expresses remorse for his/her actions, and apologizes for them. The victim accepts this apology and forgives the perpetrator’ (Verwoerd: 1999). This model focuses on the need to restore the relationship between victims and perpetrators and in the South African TRC, the assumption is that it was promoted through the use of therapeutic language. Examples cited of this type of reconciliation include cases of victims reporting being literally healed by the process of storytelling before the TRC. A case in point is when one victim came forward and said, ‘I feel that what has been making me sick all the time is the fact that I couldn't tell my story. But now it feels like I got my sight back by coming here and telling you the story’ (Republic of South Africa: 2003**:** vol.5.p.352). But it is contentious the extent to which this individual reconciliation approach can be applied to some other cases of victims. It is not clear for instance how Nason Ndandwe who learned through the TRC’s hearings how his daughter Phila (South African Government Information: 2003), who died alone ‘naked, tortured, holding a plastic bag around her genitals’ would easily get over the death of her daughter. It is uncertain that Charity Kondile, whose son Sizwe’s body was barbecued, would simply move on (South African Government Information: 2003).[60] It is possible that knowing what happened can also lead to further tragedy. While it is conceivable to define the idea of reconciliation as acknowledgement and forgiveness at a personal level, there are problems about how this form of reconciliation being affected at an individual level can be promoted to the societal level.

The TRC’s promotion of National Unity and Reconciliation was intended to lead to the establishment of a democratic nation that enjoys peaceful coexistence. According to Borer (2004) this approach to reconciliation, unlike the individual/personal one assumes that former enemies are unlikely to agree with each other on all issues. The ‘best that can be hoped for therefore is to enhance peaceful coexistence.’ For James Gibson (2001: 12), one important aspect of National Unity and Reconciliation is the development of a political culture that is respectful of the human rights of all people. The language of the National Unity and Reconciliation approach is prevalent in the TRC report and takes the form of such phrases as

> At the heart of a democratic culture is a tolerance of divergent views and understandings of the past, present, and future... National unity and reconciliation

> is a society with its members relaxed, a nation democratically at peace with itself (Republic of South Africa: 2003: Vol. 5: 412).

Whether the TRC achieved or led to this form of reconciliation remains contested. Although there is more interaction at various levels in South Africa today compared to the apartheid era, there also remain apparent divisions socio-economically and politically. In any case, it is contestable whether any form of interaction in South Africa today is a result of the TRC rather than the democratisation process.

The TRC gave mixed messages to the public regarding its own understanding of reconciliation. Archbishop Desmond Tutu, the Commission's chairperson, more often invoked the individual reconciliation model, with his emphasis on perpetrators apologising and the victims forgiving them. For instance, in his foreword to Commission's final report, he writes, 'The key concepts of confession, forgiveness and reconciliation are central to the message of this report' (Republic of South Africa: 2003: Vol.1:48). However, it is apparent that the framers of both the Promotion of National Unity and Reconciliation Act had in mind a notion of reconciliation that more closely resembled the National Reconciliation Model. The Act does not lay out an expectation of individual apologies or acts of forgiveness. The influence and symbolism of Archbishop Tutu, seems to have (un)intentionally fostered an expectation of the TRC in which an individual sense of reconciliation could result, with its accompanying notions of apology and forgiveness. This becomes apparent in the TRC report itself. Like in Chapter nine of Volume five, there is an emphasis on the individual model of reconciliation. The introduction states that the aim of that chapter is to 'underline the vital importance of the multi-layered healing of human relationships in post-apartheid South Africa: relationships of individuals with themselves, relationships between victims, relationships between survivors and perpetrators, relationships within families, between neighbours….' (Republic of South Africa: 2003: Vol. 5:350-51).

In contrast, however, the framers of the Act seem to have had in mind an understanding of the TRC's potential contributions to national unity that relied not on an individual sense of reconciliation but on a national one (national unity and reconciliation). In the course of the actual TRC process, there was little attempt to define reconciliation besides stating that the Commission sought to promote National Unity and

Reconciliation. Borer (2004) states that the lack of clarity about reconciliation hampered the commission's work and affected the way it has been judged. In her view, the TRC was empowered to contribute primarily to national unity and reconciliation, but the greater popular expectation was for the TRC to foster interpersonal or individual reconciliation. The consequence of the multifaceted understandings of the meaning of reconciliation is that sometimes the TRC is judged differently on whether it has promoted reconciliation or not, depending on the assumed meaning. Those who link the success of the TRC to the 'reconciliation process,' are likely to differ depending on their interpretation of reconciliation. Silverman (2004: 19) however observes that there is nothing wrong with multidimensional or multilayered conceptualisations of reconciliation. To him reconciliation like most other concepts is 'multifaceted in its nature and the important thing is to navigate between the multiple understandings of reconciliation in such a way as to maintain conceptual intelligibility'. However, true or perfect reconciliation in whatever dimension or form is certainly an elusive goal that may never be achieved. To Albert Sachs 'to think of people hugging each other, saying, it is all over, let's march together into the sunset' is a banal notion of reconciliation that entails trivializing the degree of the trauma, the pain and the damage that was done (Cited in San Francisco Chronicle: 2006).

During its process, the TRC did not give clear meanings of its usage of these terms and whose understanding is significant in assessing its work. Clearly the answers to whether the TRC achieved justice, truth and reconciliation can only be relevant if one understands the sense in which these words are being used.

4.62 The Victim-Perpetrator Dichotomy

The notions of a victim and perpetrator have conventionally appeared clear and straightforward. A perpetrator has been seen as a person who commits an act that is held to be against legal or moral principles and who can be judged as guilty of that offence or crime (Forster, Haupt and De Beer: 2005: 2). In terms of the relatively narrow brief of the TRC Amnesty Provisions, a perpetrator was an individual who committed an 'act, omission or offence' which amounted to a gross violation of human rights, in turn defined in the Act as killing, abduction, torture or severe ill treatment (Republic of South

Africa: 1995). The term victim on the other hand was defined by the TRC Act as a person who 'suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as a result of a gross violation of human rights (Ibid). A victim of human rights abuse was therefore a person who had been subject to killing, abduction, torture or severe ill treatment. The TRC limited the meaning of severe ill-treatment to the violation of 'bodily integrity' rights (Mamdani: 1998: 38-41), thus excluding, for example, the victims of the policies of forced removal, deliberate inferior education, pass laws and the other apartheid policies that enforced systematic racial discrimination and oppression.

In considering the issue of victim-perpetrators dichotomy, there remain many grey areas. The first relates to the question whether victims may also be perpetrators. Boraine (2000: 254) grants that in the final analysis, Winnie Madikizela-Mandela was both a victim and a perpetrator. This was in regard to the TRC's evidence of her involvement in cases of murder and torture in the course her opposition to the apartheid system. Other examples of individuals whose acts did not fit into the simple collective categorisation of victims and perpetrators include the Askaris (former liberation movement operatives who were later recruited by the apartheid security forces) and who subsequently committed violations against their own people and former 'comrades.' At the wider reaches of the debate, some like Letlapa Mphahlele, an Azanian People's Liberation Army commander (1990-1994) and who was the overall commander in the St James Church attack on 25th May 1993 in Kenilworth, Cape Town, where APLA operatives opened fire killing 11 congregants and injuring 58, could be considered both a victim as well as a perpetrator. But Letlapa objects to what he perceives as the TRC's adoption of a legal equivalence between gross human rights violations committed by liberation movements and those perpetrated by the apartheid government. He argues that doing so, criminalizes the struggle against apartheid which he equates to a lady hurting an assailant in defence against potential rape.[61] To Letlapa, the attacks against innocent civilians were intended to take the 'battle to the doorstep' of the apartheid system so that 'they could feel the pain of burying their loved ones too' (Ibid). So to him, those acts committed in the course of the freedom struggle could not be categorised as perpetrations of human rights abuse. Although Letlapa was generally critical of the TRC, which he

accused of having several flaws, he acknowledged its effort to bring out what actually happened.

In principal, while the TRC Act implies that the distinction between victims and perpetrators is alive and should be emphasized, in the actual South African context and perhaps in many other comparable contexts the dichotomy is far much blurred and intricate than it is assumed.

4.70 The Question Responsibility

Relating to the difficulties in making a distinction between victims and perpetrators is the problem of assigning responsibility for past human rights abuses. In South Africa the problem encompassed the ambiguities abundant in the apartheid era of collaboration and complicity in human rights abuse that involved spies, those who crossed over and joined other parties and informers, and the role of bureaucratic functionaries in a long chain of authority (Forster, Haupt and De Beer: 2005: 3). In South Africa the lawmakers made the laws, the lawyers executed them assisted by other institutions such as the security apparatus. This created a normative structure that legitimised the human rights abuse. It can therefore be argued that in some cases individuals such as those belonging to the security machinery, did not have absolute free-will in deciding to or not to engage in human rights abuse because their roles were much more defined by the apartheid ideology and the administrative-executive system that protected and directed them to commit crimes in defence of racialised privileges

In the TRC process itself, it was difficult for individuals to accept responsibility. Accepting responsibility for past crimes was invariably not in the interest of alleged perpetrators even if they were protected from prosecutions by an amnesty agreement. Doing so would challenge their standing and potential roles in the new political order as well as their own self-regard. Even in ordinary life, those who have committed crimes usually tend to be defensive and in the case of South Africa, leaders such as PW Botha and FW De Klerk claimed that they were not even aware of the human rights abuses that occurred during their rule. In criminal justice systems, one problem with dealing with individuals who have committed crimes under the explicit or implicit orders of

governments is that the law focuses strictly on the question of individual responsibility and on particular individual crimes rather than on the structure or nature of the system.

In the TRC however, its Act defined responsibility to include those who gave orders or commands, those who created a climate to incite acts and those who failed to prevent acts that constituted gross violations of human rights (Republic of South Africa: 1995). The Act opened up the possibility of linking up command and leadership structures to acts of human rights abuse. But the question that arises is where to locate responsibility, among foot soldiers who commit the deeds or among leadership who authorise both policies and the overall climate for violence? A middle way would perhaps be to assign responsibility across the board. Regrettably, despite the wider definition, the TRC did not sufficiently nail accountability to proper echelons, not least due to procedural requirements of individual applications for amnesty (Forster, Haupt and De Beer: 2005: 3). If an individual did not admit liability for a particular act of violation, the amnesty application was rejected. In many ways the TRC was heavily shaped in terms of simple binaries of 'victim' and 'perpetrator' associated with unambiguous judgements of right or wrong (Posel and Simpson: 2002: 10). This permitted only a restricted view of those responsible. The TRC therefore failed to deal adequately with questions about the producers of doctrines, ideas, plans and policies that led to racial discrimination and conflict.

It should however be noted that if South Africa was to prosecute every person who committed gross violations of human rights during the apartheid era, its courts would have remained busy for decades. There would also be very complicated defences raised relating to obedience to orders from senior officials and this would make the process of establishing culpability across the various levels of society very complex and difficult.

Carlos Nino (1996: x) observes that there are fundamental theoretical and practical problems posed by what he calls the diffusion of responsibility in punishing massive human rights violations. He questions whether it is right to inquire about the responsibility of all individuals who belong to a collective arrangement in whose name a crime has been committed and whether the reference to the concept of collective responsibility after a period of mass atrocity can be justified. Bridging between the

question of individual and collective responsibility, are studies which point to three levels of responsibility, criminal, political, and moral (Dimitrijevic: 2006). Criminal responsibility assumes that crimes violate unequivocal laws and are acts capable of objective proof. Jurisdiction rests with the court, which in formal proceedings can be relied upon to find the facts and apply the law. Criminal responsibility is therefore established in a procedurally correct manner in which those found guilty are punished proportionately to their share in the crime and its consequences. It embodies the retributive system of justice where both individuals and the system are seen to have repudiated the rule of law. The new regime has therefore to come up with answers as to the individual's role in the crime and also the need to change the character of the structure of the system. The aim of criminal responsibility is not to merely punish perpetrators but also to demonstrate the commitment to values and procedures on which a very different relationship between individuals and political authority should be based in the future (Teitel: 2000: 66).

Political responsibility on the other hand applies to the members of the old regime's political elite, primarily to those whose actions cannot be legally identified as criminal (Dimitrijevic: 2006). It embodies collective responsibility for past abuses. The goal of assigning political responsibility is to prevent the members of the old regime from taking part in the political life of the new government. This form of responsibility is necessary first because many state officials participate in making political decisions that decisively shape the character of the regime. Second, even those who engage in seemingly neutral bureaucratic duties far from where decision-making takes place, express their loyalty by the very fact of staying in office, which equals tacit support for the regime's criminal actions (Ibid). Political responsibility is therefore assigned according to the degree of participation in the former regime.

For moral responsibility every individual is held to be morally responsible for his/her deeds including the execution of orders. Here one cannot argue simply that 'orders were orders,' (Jaspers: n.d), as crimes, even though ordered, remain subject to individual moral judgment. Moral responsibility points to the fact that those who take a leading role in knowingly perpetrating or supporting injustices are morally guilty. This is because they renounce or ignore valid and accepted standards of distinction between right

and wrong, just and unjust. Hence, the task of transitional justice should consist not in creating new or better standards of moral behaviour but in bringing to everyone's attention a sense of the type of condition in which basic civilized values were all of a sudden rendered irrelevant (Waldron: 1992: 5). Moral responsibility can therefore be both individual and collective particularly when it involves whole institutions. Dealing with moral responsibility necessitates mechanisms that help people rethink how it became possible to participate in, support, or tolerate the worst kind of crime. It requires that the society in transition focuses on the re-affirmation of the sense of justice lost in the preceding period (Allen: 1999: 335).

While theoretically these distinctions of guilty appear useful in clarifying responsibility, in practice they do not come defined in such clear parameters of criminal, political and moral. Criminal failings for instance cause conditions out of which political and moral transgressions arise and vice versa. The endemic nature of conflict and human rights abuse mean that violations are made possible through a perverted value system, the complicity or collaboration and passive support of many, ranging from those at the top of government to ordinary people (Dyzenhaus: 2000: 473). If responsibility is understood in Dimitrijevic's etymological meaning of criminal, political and moral senses, the practical challenge becomes how to construct a transitional justice framework that responds adequately to those various levels of responsibility. In actual practice that is insomountable and what most approaches including the South African TRC have done, is to simply focus on individualising criminal esponsibility and accomodate the political and moral responsibilites in their final reports.

In South Africa, the quasi-judicial nature of the amnesty process in the TRC focussed on facts of the incident and excluded a deeper examination of psychological dimensions, structural arrangements and the political history and thereby contributed TRC's failure in accounting and explaining the motives and perspectives of persons responsible for past violations as laid down in the TRC Act (Posel: 2002: 147-172). The TRC generally avoided dealing with issues of social structures and processes of the apartheid system. Issues such as poverty and social deprivation among black communities primarily contributed to the outbreak of revenge violence and human rights abuse. The TRC's emphasis on assigning responsibility to individuals who committed

certain forms of human rights violations meant that only those directly involved in the said crimes were the ones to bear the burden of responsibility at the expense of the wider system that provided incentives and justification. Therefore while the TRC approach made considerable effort in consolidating a common condemnation of the individual atrocities of apartheid system, it did considerably less in exposing the evil inherent in the system itself.

4.80 Ten Years After the TRC

Ten years after the establishment of the TRC, there still remain a number of uncomfortable issues in South Africa. The problem of accusations and denial of past responsibility continues to occupy public debate in South Africa and plays itself out in such matters as symbolic renaming of geographic locations and in graffiti on buildings.[62] The country continues to struggle with the legacy of apartheid with much of the structural inequalities still in place. Although the overt hostility and human rights violations have subsided, South Africa cannot be said to be enjoying social cohesion or a shared identity. In a number of conversations with several young people from previously disadvantaged groups at the University of the Witwatersrand, there was evident annoyance and exasperation directed toward their 'white counterparts' for the past oppressive rule.[63] Mamphela Ramphele[64] observes that South Africans should not be surprised at the anger and brutality that was sweeping the streets when they continued to refuse to acknowledge the socio-economic inequalities in the country (Cited in Maclennan 2006) She observes that the drafters of the TRC's terms of reference had been timid in limiting its mandate to crimes against humanity defined solely in political terms.

> Excluding crimes perpetrated in socio-economic terms in South Africa had been a great mistake, because the majority of the people in the country continue to bleed. Their wounds were unrecognised, and their pain was totally unacknowledged. These people, who were materially poor, but spiritually rich, had given so much to the TRC process and we can't even say thank you by providing dignified reparations (Ibid).

Speaking at the same session of the conference, Maria Ntuli of Mamelodi, whose son Jeremiah was one of a group of ten would-be exiles kidnapped and killed by

apartheid security police in 1986, called for the TRC to be brought back to life. She told the former chairperson of the body, Archbishop Desmond Tutu 'Please reopen the TRC, because there are still some people outside who haven't been in the TRC. Some of them, even now they do not know what happened to their beloved ones' (Ibid).

According to Gibson and Gouws (1999: 501-517), those who are today happy with the TRC process are only those who received amnesty. In South Africa today, there exists little dialogue across the racial divide on such sensitive questions like the prevalence of racism in many of the South African institutions. A national survey conducted by the Institute for Justice and Reconciliation in 2000 found out that one in five whites would rather go back to apartheid system than live in the new South Africa (Institute for Justice and Reconciliation: 2000). Du Toit (2003: 11) describes the pattern of interaction amongst South Africans as one of 'daytime integration and nocturnal withdrawal.' Relations across racial lines seem not to have changed fundamentally other than in relation to a small elite of economically empowered individuals from previously disadvantaged groups (The Henry J. Kaiser Family Foundation: 2004).

On the question of the TRC and its work, there are South Africans who continue to hold the view that it was neither balanced nor did it promote reconciliation. In part due to the example set by political leadership,[65] some sections of the South African population have not felt the need to engage with the TRC process or support it toward its objectives. Many white right-wingers and IFP supporters have continued to regard the TRC as a partisan body that represented the interests of the ANC and whose aim was to discredit its enemies. Dave Steward, spokesperson for the F W de Klerk Foundation, says many former members of the security forces did not apply for amnesty because they feared they would not get a fair hearing and would not be afforded the full spectrum of rights they would enjoy in a court of law (Jolly: 1999). De Klerk, himself who was president from 1989 to 1994, argues that although the apartheid rule remains morally indefensible it would be appropriate for black South Africans to give more recognition to the contribution whites have made to the new South Africa. He observes that 'it required considerable courage... to overcome their reasonable fears and put their trust in their erstwhile enemies' (Cited in Biles: 2006). Yasmin Sooka, a former TRC member observes that dealing with the past in South Africa has mainly focused on foot soldiers

rather than the big fish and that by and large, the politicians in a sense got away with it (Conference on Marking the 10th anniversary of the first sitting of the TRC: 2006). To Christie (2000: 115, 160-171), the TRC did not investigate violations by members of the liberation movements with the same zeal as those committed by the security forces. He also observes that amongst the black population, the indirect victims of apartheid were not really heard. Archbishop Desmond Tutu on the other hand believes the white community has failed to respond to the enormous generosity of the black community (Cited in Biles: 2006). One major frustration with the South African TRC was the chasm between its wonderful mandate to develop detailed recommendations directed at all sectors with respect to major societal reforms that were to be undertaken plus the wonderful recommendations that it developed on reparations and the non implementation of these recommendations by the government. Tutu expresses disappointment at the lack of generosity by the government toward victims of the apartheid era crimes and observes that in retrospect, he thought the TRC should have refused to operate in the way it did, and should have instead had a budget for reparations that would have allowed it to make awards with the same immediacy that amnesty was granted to perpetrators (Mail and Guardian: 2006). The reaction of Mbeki government to the TRC's findings has remained lukewarm with little desire to meaningfully engage with the TRC's recommendations. On the issue of reparations for instance Mbeki's government continued to insist that the struggle was not for monetary gain (Centre for the Study of Violence and Reconciliation: 2001).

On the question of prosecutions, the ANC government reiterated, following the 1998 release of the TRC Interim Report, the intention to prosecute those who did not seek amnesty in the course of the TRC process, in keeping with the legal agreement that underpinned the conditional amnesty process. Much like the issue of reparations, however, the government claimed at the time that it could not embark on prosecutions prior to the publication of the final report and the conclusion of amnesty proceedings in 2003. Nonetheless since the submission of the TRC Interim Report and later the Final Report in 2003, the ANC government has done little to prosecute those who failed to seek amnesty. In fact there were persistent anecdotes that the government was considering a general amnesty, although it denied that it ever considered such a move. The TRC

handed over more than eight hundred cases for further investigation and possible prosecution when it closed and in 2004 the National Prosecuting Authority established a special unit to investigate these cases and begin the process of prosecutions (Traces of Truth: n.d). When Gideon Nieuwoudt, former police colonel, was arrested for the disappearance of the Pebco three later that year, it gave the impression that the government would follow up on post-TRC prosecutions. Indeed the National Prosecutions Authority (NPA) released a policy to guide it on the prosecution of perpetrators who were not granted amnesty during the TRC process and warned at the time that the arrest of Gideon Nieuwoudt was a sign of things to come and that future high profile cases would follow, including the possible prosecution of an apartheid-era generals who were under investigation (Terreblanche: 2005). However, the only case that came up related to former security minister Adriaan Vlok and five associates in connection with an alleged 1989 plot to murder a former church leader, which ended in a suspended jail sentence (Khulumani Support Group: 2007).

There have been very few prosecutions since the end of the TRC. Besides the case of Gideon Nieuwoudt, the only other high profile trials that have taken place include those of Eugene de Kock, Magnus Malan and Wouter Basson. Two of those three cases however failed miserably due to what the judges regarded as lack of conclusive evidence, although there were accusations that the trials were a travesty of justice given that they were handled by judges inherited from the Apartheid era (Farmer: 2002).

Today, there remains doubt over whether any more prosecutions would be pursued and whether they would uncover evidence that would prove beyond reasonable doubt that suspects had committed particular crimes. Archbishop Tutu expresses reservations on the extent to which the prosecutions would be successful given the lack of sufficient evidence that is likely to be adduced. He says

> I have to say, I have my doubts. I mean these guys were very adept at hiding evidence, incriminating evidence. And you've got all of these years that have gone ... there's a lot of documentation that disappeared. I worry that we ... could quite easily set ourselves up where you have cases that go on for a long time, that evoke all kinds of emotion, then the people are acquitted (Mail and Guardian: 2006).

To Tutu, the possibility of failure in realising successful prosecution may end up causing trauma to victims who would see most of the suspects walking free from prosecutions (Ibid). The National Prosecuting Authority deputy director, Torie Pretorius, concurs to an extent with Tutu and says prosecutions depend on evidence, which in turn requires good investigators and South Africa does not have good investigators (Ibid).

Despite the dissatisfaction with the South Africa's TRC, there were various people interviewed in the course of this study who observed that it was useful for South Africa to have the commission. In interviews with individuals in Soweto and at the University of the Witwatersrand in Johannesburg and in Langa and Khayelitsha in Cape Town, black South Africans in particular observed that the work of the TRC was useful but not enough. This position was shared by one taxi driver who said that although he appreciated the work of the TRC in revealing the 'bad things' of the past, he was disappointed because perpetrators of apartheid crimes were easily granted amnesty while on the other hand their victims continued to suffer.[66] Dr Alex Boraine emphasizes that one major contribution of the TRC was the public hearings which helped shed light on South Africa's past and on key controversial issues in South Africa's history.[67] Michael Ignatieff (1996) feels truth commissions do not find the complete truth but narrow the opportunity for permissible lies about the past. He states that truth commissions can provide a frame for public discourse and memory. One important thing about the South African TRC was that it set in motion and facilitated a large-scale public debate on how to come to terms with South Africa's violent past. In the process, it gathered together many voices that might not otherwise have been heard.

Ten years after the formation of the South African TRC, it can be credited for creating public space for debate. Cases like the details of the 1992 Steyn Report which was released in 1997 by the TRC and which revealed that De Klerk knew about the training of a 'third force,' a network of security and ex-security operatives acting with right-wing Inkatha Freedom Party elements to foment violence, long before he relinquished power among other activities (Bronwyn: n.d), could not have otherwise been known. The TRC conducted a special investigation into South Africa's Chemical and Biological Warfare Programme which also revealed that under the leadership of Dr. Wouter Basson, and with the sponsorship of the military, the Chemical and Biological

Warfare Programme was responsible for numerous individual poisonings with toxins such as anthrax, paroaxon, and botulism (Ibid). The TRC conducted special hearings on South African institutions, such as the media, businesses, and legal institutions, to determine the extent and nature of their complicity with apartheid. The TRC report vindicated apartheid as a crime against humanity and acknowledged that while the African National Congress and Pan African Congress had launched a just war they were also guilty of human rights abuse in the course of the liberation struggle (Laurence: 1998: 41). Parties including the African National Congress and the National Party accused it of shortcomings in implicating them but the TRC proponents see that as a strength and a sign of impartiality.

The TRC process and its report have emerged as a chronicle of moral wrongdoing. Archbishop Desmond Tutu observes that although the TRC was thoroughly flawed in many ways, it is today the benchmark against which every other truth and reconciliation commission in the world is measured (Mail and Guardian: 2006). He also observes that the TRC made the world say there are different ways of dealing with post-conflict situations and that because of the TRC, other countries now believe that the South African TRC carried some kind of magic wand.[68] Boraine, however states that the 'TRC process will not be complete until all South Africans who benefited from apartheid confront the reality of the past, accept the uncomfortable truth of complicity, give practical expression of remorse, and commit themselves to a way of life which accepts and offers the dignity of humanness' (Cited in Thelen: 2002: 8).

Generally, ten years after the establishment of the South African TRC, opinions about it contribution to the society remains mixed. The TRC was presented to the public as a necessary compromise for the democratic transition and can be credited with several contributions. It primarily played a significant role in producing new information and knowledge about previously repressed atrocities. The accounts that were presented before the TRC's hearings contributed toward discomforting some of the perpetrators of past human rights abuses and it can be argued that this functioned to limit their continued influence. Dr. Charles Villa-Vicencio observes that it is because of the exposure of extreme violations of human rights in the course of the TRC process that the likes of P. W Botha decided to lead a quiet life.[69] In the course of this study, there was no one who

was willing to come out publicly either in interviews or in the media to say that apartheid was a good policy. Likewise there was no one willing to deny that thousands of people were killed as a result of the apartheid system. The TRC therefore vindicated apartheid as a moral wrong.

Another significant contribution of the South African TRC was to help broaden the parameters of what constitutes justice. The legal understanding of justice that closely equates justice to retribution has remained dominant as a foundation of justice. But the South African TRC widened the understanding of justice to include processes of public acknowledgement and reparation programs. Situated in this expanded vision, the TRC helped in understanding questions of justice not only in narrow legalistic terms, but also broadly to encompass other complementary approaches that help to promote the course of justice. The TRC embodied the aspiration, which though perhaps not fulfilled, of a new society, one that embraces standards and values that are different from those of the apartheid era. Its investigation of South Africa's past conflicts and the grave human rights abuses had the effect of placing the TRC on the hallmark of South Africa history. The TRC relied heavily on religious values to promote acceptance of its mission of forgiveness and reconciliation. This religious discourse did reverberate with a wide range of participants and provided the TRC with persuasive powers over victims particularly those who subscribed to it and who may initially have been reluctant to engage in a reconciliation process. The religious approach was used to significantly create an atmosphere that gave the TRC a moral authority. Gibson (2004) has tested the 'truth leads to reconciliation' assumption by drawing on a large survey of thirty-seven hundred South Africans. Through a sophisticated and subtle analysis, he begins by giving both 'truth' and 'reconciliation' clear conceptual and operational meaning and then provides a fascinating explanation of how both white and black South Africans understand the country's historical failures and the attempts to rectify them. He reports empirical evidence that the South African TRC's 'truth' is fairly widely accepted by South Africans of all races, that some degree of reconciliation characterizes South Africa today, and that the collective memory produced by the process of truth telling contributed to reconciliation. He concludes that the TRC did indeed succeed in convincing a majority of South Africans across the political spectrum that all sides were guilty of human rights

violations and in turn suffered from violations. However, he adds that the process of reconciliation is far from complete because political tolerance, one of Gibson's measures of reconciliation, remains scarce in the South African political culture (Ibid).

The TRC, however, had its shortcomings. It for instance carried an explicit mandate to promote truth and reconciliation but the process generally lacked a clear understanding of reconciliation and the mechanisms to promote it. In fact the TRC's name appears to be inappropriate since it gives the impression that it could commission truth and reconciliation.

4.81The TRC and Structural Injustices

As mentioned earlier under the section on the TRC process, the commission put a lot of emphasis on human rights abuses and failed to capture the structural conditions that led to and supported the violence. It failed to capture the essence of economic crimes (the relationship between apartheid and economic exploitation), which though not as prominent as torture, killings and abductions, was a significant human rights violation. As will be observed in chapter six, the question of economic crimes in particular, centrally governs the terrain of transitional justice in other countries. Looking at the TRC report, it is clear that it failed to capture the relationship between individual experience, collective action, and societal structures in the perpetration of economic inequalities. The way in which the outcomes of the TRC have been handled by the government has also been wanting. In the view of critics such as Mamdani (1996) the TRC's narrow, individualistic, and legalistic orientation meant that it saw apartheid's victims only as those who were physically abused, rather than the millions who suffered economically as a result of the day-to-day workings of the exploitative system. The orientation also meant that the TRC's final report was bereft of a coherent historical context or overview. To Mamdani the greatest achievement of the TRC was to discredit the apartheid regime in the eyes of its beneficiaries (Ibid).

4.90 Conclusion

This chapter examined the South African TRC as a transitional justice response to the country's past conflict and human rights abuse. It was observed that while the TRC made

significant contributions in giving fresh insights into South Africa's past, a good number of South Africans remain ambivalent about the TRC particularly given that the past remains very present in their lives in the form of structural inequalities and crime.

This study maintains that is not possible to measure the TRC's contribution in realising its key concerns of truth, justice, reconciliation and national unity because these are intangible questions whose success or failures remain difficult to gauge. The TRC process also operated mutually with the political transition and democratisation process and it becomes difficult to distinguish its contributions from those of the other processes. Indeed many of the considerations of success or failures of the TRC have remained a matter of individual judgement. Eventually, as Mary Burton observes in the film *Long Night's Journey into Day* (Reid & Hoffman: 2000), the fuller picture of success or failure of the TRC cannot be judged by the feelings at the moment. The moment is rather the beginning of a long process of dealing with the legacy of South Africa's brutal past. It is reasonable to assume that victims of gross violations of human rights can almost never be returned to the situation they occupied prior to the occurrence of the violations. But one thing that cannot be taken away from the architects of the TRC is that they had positive intention albeit sometimes unrealistic of uniting South Africa.

One key concern that arises from this chapter is the need to consider the role of the South African TRC in the country's transformation process. This is all the more important given the way the South African TRC has been uncritically espoused as a measure that was central to transforming the country away from its apartheid past toward 'peace'. This is despite the fact that some of the changes that have taken place in South Africa, with specific reference to the notions of transformation, have had to do with different forces, beyond the TRC itself. Moreover, in structural terms, some aspects of post apartheid South Africa are not very much different from the way they were during the pre 1994 period. The next chapter considers these issues with the aim of establishing the assumed nexus between the South African TRC and conflict transformation.

CHAPTER 5: THE SOUTH AFRICAN TRC AND CONFLICT TRANSFORMATION: A CRITICAL ANALYSIS.[70]

5.10 Introduction

The growing interest in transitional justice, particularly in the truth and reconciliation commission approach is linked inter alia to the perceived role that it plays in the process of conflict transformation (Ziswiler: 2006: 5). The South African TRC is for example credited for having helped not only to promote national unity and reconciliation but also with transforming the country away from its past conflict toward a stable and peaceful society. There is literature full of broad and unsubstantiated assertions linking the South African TRC with South Africa's transformation away from its past conflict and human rights abuses toward 'peace' (See for instance Jose Alvarez, cited in Reddy: 2004, Tutu: 2000). Often, the relationship between the TRC and conflict transformation is located in its objectives of commissioning the truth, giving victims a voice, promoting democracy, a culture of human rights and the rule of law and helping people to come to terms with their past in order to forge national unity and reconciliation. Its approach of emphasizing restorative rather than retributive justice has drawn interest in many other countries undergoing political transition. While establishing a truth commission can be seen as part of the effort to deal with historical injustices, it has to be realised that transforming a country away from conflict toward peace necessitates processes that go beyond the truth commission process. There are other institutional changes and government action that are required to transform a country and promote peace. In practice, the South African TRC may have been useful but it hardly realised all the positive outcomes its proponents claim. Indeed there remain fundamental questions that challenge the linkage between the South African TRC and conflict transformation. There are debates about the TRC's competing understandings on aspects such justice and reconciliation, and the non-implementation of most of its recommendations. The question that emerges is whether the South African TRC fostered or hindered the transformation process. Even more basically how does 'dealing with the past' effect the transformation of a society toward peace?

This Chapter contextualises the South African TRC process within the broader frameworks of conflict transformation and peace-building.[71] It identifies what is

distinctive about conflict transformation as well as its key dimensions. The chapter draws together a number of critical debates and experiences inherent in the practical and theoretical understanding of transitional justice and peace-building broadly, and the South African TRC and conflict transformation in particular. It interrogates the various assumed cross cutting aims and shared objectives of the two processes including the attempt to prevent future conflict and violations of human rights, the strengthening of the rule of law and the effort to address the legacies of past conflicts and human rights abuses. The aim is to formulate and assess South African TRC and within the conflict transformation.

The chapter will broadly argue that the process of transforming conflict in order to build sustainable peace, calls for both short term measures of normalizing relations between the various parties to the conflict and long-term structural and institutional changes to ensure not only the rebuilding of relationships but also improvements in people's way of life. While transitional mechanisms aimed at dealing with the past may contribute toward the process of social pacification, transcending past conflicts calls for more transformative processes that contribute to collective socio-economic and political development.

5.20 Transitional Justice and Peace-building: Locating the Link

The body of literature on the theory and practice of transitional justice, and the South African TRC in particular, suggests that these mechanisms are intended to fill the function of peace-building (Bloomfield:2006: 57). The report of the United Nations Secretary-General of August 2004 on *The Rule of Law and Transitional Justice During Conflicts and in Post-conflict Societies* (United Nations Security Council: 2004), reinforces this thinking. The report locates transitional justice and especially the process of reconciliation within the broad matrix of building sustainable peace where societies have suffered protracted conflict and human rights abuse. The running theme throughout the report is the idea that transitional justice, by turning the spotlight of investigation on to issues of truth-seeking, justice, institutional reform, reparations, etcetera, contributes to the development of a richer framework within which to position peace-building efforts.

5.30 Conceptualising Peace-building

The realisation that the end of a conflict or repressive rule does not necessarily lead to a peaceful and stable society has led to a variety of efforts to help such societies to create institutions and procedures for resolving their problems in a non-violent way. Such efforts have been referred to as peace-building. Kofi Annan in his United Nations reform announcements of 1997 observed that peace-building involves the 'various concurrent and integrated actions undertaken at the end of a conflict to consolidate and prevent the recurrence of armed confrontation' (Conflict Resolution Monitor: 1997). The international development community has sometimes used the concept peace-building as a generic term to encompass activities such as early warning and response efforts, violence prevention, advocacy work, humanitarian assistance, ceasefire agreements, and the establishment of peace zones (Maiese: 2003, Boutros-Ghali: 1995). In the scholarly literature, Lederach (1994: 14) for example characterizes peace-building as an attempt to address the underlying structural, relational and cultural roots of conflict, which encompasses the full array of stages and approaches needed to transform conflict toward sustainable peaceful outcomes. Luc Reychler (2001: 12) maintains that peace-building refers to all efforts required on the way to the creation of a sustainable peace (imaging a peaceful future, conducting an overall assessment, developing a coherent peace plan, and designing an effective implementation plan). Reychler (n.d) also uses the metaphor of peace architecture to draw attention to the principles and considerations that have to be addressed in building sustainable peace. He emphasizes the need to identify the necessary preconditions or building blocks for different types of conflicts and states that peace-building is not only about construction but also about deconstruction. He argues that despair, ignorance and political inefficiency, historical falsification, stereotyping, dehumanisation, distrust and indifference usually distort the behaviour of actors in a conflict situation. And that to analyse and transform conflict, more attention needs to paid to the political and psychological variables (efforts to identify and dismantle the sentimental walls, which according to him refer to concepts, theories, attitudes, habits, emotions and inclinations, that inhibit democratic transition and constructive transformation of conflicts) (Ibid). Galtung (1990: 291-305) on his part distinguishes

between negative peace, meaning the mere cessation of direct or physical confrontation and positive Peace, implying the removal of structural and cultural violence.

This study is attracted to Henning Haugerudbraaten's (1998) approach to peace-building which is conceptualised in two broad ways, those concrete actions taken to support and promote peace, and as an aggregate process which involves the modification of social structures (political, economic, social, cultural, psychological) through a number of broad initiatives notably democratisation, economic development and demilitarisation. Haugerudbraaten uses the adjective 'aggregate' to highlight the fact that peace-building is an outcome that depends on the combined effect of a number of actions occurring at different levels. Peace-building in this sense includes constructive change processes that increase social justice and reduce structural violence.

The primary task of peace-building is not only to find quick solutions to immediate problems but also to generate creative platforms that can simultaneously address surface issues and help transform the underlying structures that generate conflict. Peace-building in societies that have suffered conflict or repression becomes an overarching inclusive process that incorporates key instruments of democracy, justice, truth and reparation by which a society seeks to move from a divided past to a shared future. Peace-building is without doubt a difficult process and has in the recent past witnessed the emergence of competing conceptual approaches from theorists and practitioners about the best way of realising it. As will be observed later in this chapter, one such competition has pitted the idea of conflict transformation, against that of conflict resolution, with a number of theorists and practitioners increasingly preferring conflict transformation as the best way of understanding and promoting lasting peace. The underlying argument is that conflict transformation emphasizes the building of sustainable structures and long term relationships as opposed to conflict resolution, which aims at finding quick solutions to a conflict.

5.40 An Overview of Theoretical Debates

a) A Structural Approach to Peace-building

The structural dimension to peace-building focuses on the social conditions that foster violent conflict. Peace must be built on social, economic and political foundations that

serve the needs of the society (Haugerudbraaten: 1998). In South Africa, the conflicts and human rights abuse arose out of systemic conditions that included politics of exclusion, unfair distribution of resources, repressive rule and uneven political competition. In order to establish stable peace in such contexts, there is need to initiate societal changes to promote inclusive processes and fair competition. This typically involves building institutions and initiating reconstruction programs to help communities ravaged by conflict to revitalize their economies and promote avenues for legitimate political competition and fair distribution of economic resources. Peace-building in this case involves mechanisms that eliminate the various structural sources of violence, foster societal arrangements that meet basic human needs, and maximize public participation. Some arguments point to democratisation as a key way to create this society and to help build peace.

b) Democracy and Peace

Since the advent of the 'democratic wave' in the early 1990s, democracy has been promoted especially on the African continent as an ideal instrument for producing the socio-economic and political conditions necessary for building sustainable peace in societies ravaged by protracted conflict or repression. It is on this basis that most peace-building initiatives in intrastate conflicts have predominantly included democratisation as a central tenet. Democratisation is understood to cultivate legitimate and stable political institutions and civil liberties that allow for meaningful competition for political power and broad participation in the selection of leaders and policies. In societies that have suffered conflict or repressive rule, democracy is seen as necessary in building structures and institutions such as political parties, creating the legal infrastructure to provide procedures and mechanisms for handling and resolving conflict, and establishing mechanisms to monitor and protect human rights. This approach is reasonable given that most of the conflicts involve a struggle over sharing of economic resources, power and influence in society. Democratisation is a way to bring together and engage majority of actors that were previously suppressed or excluded from influence to give them space in a new dispensation. Democratisation however, need not in itself be seen as a quick fix but a multi dimensional process. It is not only a matter of arranging an election, it also relates

to an underlying balance of forces in society where parties have to be made to realize that they cannot monopolize power. Sometimes, after an election, parties to a previous conflict have to withdraw some of their demands in accordance with their electoral strength.

Democracy also means that the incumbent government may actually lose power sometimes through previously agreed negotiation processes as happened in South Africa. This notwithstanding, a newly created democracy is likely to remain fragile. An important question that arises is whether a democratic system can simultaneously solve basic societal incompatibilities and move the society away from conflict or sharp repressive rule? There are cases where governments that are said to be democratic continue to suffer internal wrangles perpetuate corruption and are responsible for sizable inequalities and structural conflicts in the society. Examples include Kenya and Nigeria. Hence, although democratic development may be envisaged as an ideal instrument to produce the socio-economic conditions to improve people's lives and to help manage conflicts, it is conceivable that conflicts can still emerge and consolidate where there are no strong democratic pillars. In any case, democracy alone may fall short of addressing the socio-psychological dimension of conflict and fail to deal with the propensity for fragile societies to relapse into conflict. In Kenya, for instance the democratic change in political leadership in 2002 was certainly a turning point, but did not by itself eradicate the structural problems that had been at the centre of the country's repressive rule and economic mismanagement. An effective social reconstruction process needs to be built on a dual foundation of a set of fair structures and procedures for handling sources of previous conflict and a set of working relationships. If the structures are not fair the conflicts will persist and, conversely, the structures will not function properly, however fair they are, if there is no minimal cooperation in the relationships between the citizens. South Africa is a case in point where despite the democratic gains after the 1994 elections, the country continues to witness criminal violence which can partly be explained by the social inequalities in society.

Peter Burnell (2004:4) argues that not all democracies are stable democracies and attempts to build a democracy cannot guarantee political stability, especially in least developed countries after periods of conflict. He observes that there are democracies

where the government has persistently mismanaged the nation's financial and economic affairs, where rapacious profit-seekers have wreaked havoc, and where sizeable inequalities of income and wealth increased further during periods of sustained economic growth.. While some might envisage a democratic dispensation as the ideal instrument to produce the economic conditions for durable peace, Burnell argues that it is conceivable that in some places such economic conditions can emerge and consolidate under a semi-authoritarian developmental state (Ibid).

Economic reconstruction on its own will not end social conflict. Ryan (1995: 141) notes that there is little evidence that economic development promotes peace. He points out that this theory tends to overstate the power of economic development to change identity and underestimate the attachment to ethnic identity, whatever the economic situation. Ryan cites the example of Northern Ireland where he says standards of living were rising when violence erupted. He argues that inequalities in the distribution of new wealth may simply reinforce existing divisions, or may spark new conflict. It is possible that if much of the previous social conflict was about access to resources, especially for impoverished communities, the injection of more resources into such a society can fuel the existing conflicts, rather than do the reverse (Ibid: 129-152). Economic growth also fails to deal with the residual issues of identity, which have often been central to most forms of social conflict. If, however, economic development is sensitive to social fissures and helps to fulfil societal needs, it can make a valuable contribution to the process of building sustainable peace.

The prospect of democracy leading to sustainable peace goes beyond the variables that encourage sound economic growth. While democracy can help to build institutions that promote the rule of law, and to implement rules and procedures that constrain and make leaders accountable (Kritz: 1996: 587-605), there is need to establish mechanisms to deal with social inequalities, prejudice and inter-group tensions, otherwise the society will remain polarized. In South Africa the democratisation process has certainly yielded various gains in area of promoting fairness in socio-economic and political processes, but there still remain various challenges relating to social differences and inequality. These have had specific implications for inter-group perceptions and interaction. Despite the establishment of democratic structures and institutions, South Africa continues to witness

infrastructural and social deficiencies, including poverty and social inequalities, violent crime and racism and its related intolerances.

Eventually, peace-building in societies that have witnessed conflict, calls for an integrated holistic approach that helps among other concerns, to promote democracy, enhance socio-economic development and ameliorate socio-psychological differences.

c) Political Transition as Peace-building

Adam Przeworski (1991: 51-99) has argued that a transition from an authoritarian rule to a democratic one takes place when the threshold beyond which no one can intervene to reverse the outcomes of the political process has been crossed. Elections have generally been regarded as an important aspect in most political transitions. They are seen as a legitimate means of distributing political power in a society and this can be helpful in addressing those sources of conflict that relate to skewed distribution of political power. But again there is need for caution because elections can also be a source of new conflict particularly in deeply divided societies where ethnic and cultural loyalties are exploited for votes. This can aggravate existing tensions especially where winners fail to consider the interests of losers. In such circumstances elections can be a source of frustration that motivates the minority to challenge for power in a violent way. Nonetheless, if the initial conflict was about the absence of a democratic dispensation, a free and fair electoral process can be a powerful symbol indicating the beginning of a new democratic era. A change in leadership can itself be an important element in the process of social reconstruction. Leadership change in most cases heralds into office a new leader with a fresh mandate and high public expectations but not yet with consolidated authority in manipulating state institutions for personal whims or to perpetuate oppression or mismanagement of state resources. Like was the case in South Africa where the political conflict drastically reduced after the 1994 elections, a political transition can act as a conflict settlement mechanism on which to consolidate the social reconstruction process in a society. Nonetheless, it is possible for previous problems to still emerge after a transition period and deepen with time as leaders stay in office and sometimes engage in entrenching their personal interests and in acrimonious conflicts with opponents. Generally, navigating a sharp turn away from a dominant regime and changing the socio-

economic and political structures especially where the spoils system exists and re engineering the state have always proven difficult. Stephen Ndegwa (2003: 550) says even in stable countries, it has taken at least a decade to achieve any palpable change.

Broadly, conflicts are an intrinsic, inevitable and unavoidable aspect of human interaction. They can play a negative role in causing widespread destruction and loss of human life but there are also cases where conflicts that are not destructive, play a positive role in acting as a springboard for social change. Conflict refers to a state of disharmony that results from actual or perceived incompatibility of goals, ideas or interests. A conflict turns violent when it leads to actual damage or violation of a person, property, rights or interests. Sometimes non destructive conflicts are necessary for the stability of a democratic society, notably where oppressed groups oppose discriminative and unfair structures to spark social change (Pong: 1989: 59-76, Bash: 1994: 247-284). Nonetheless where social conflict turns violent, it can be destructive because it has the potential to create circles of hostility that can persist for generations, resulting in many victims, including innocent ones and causing irreparable damage to the society.

d) The Socio-Psychological Dimension to Peace

Conflicts usually have a life of their own and they do not simply go away with the end of physical hostilities. In South Africa, there has been a serious concern about previous political violence shading into criminal violence in the post apartheid era. Graeme Simpson (1997: 475-478) observes that there is need to recognise the subtle shifts in the ways in which social conflict mutates and manifests itself otherwise the social deficits that generate it will be left intact. Simpson also notes that one reason why economic reconstruction alone does not lead to sustainable peace is because it does not necessarily address socio-psychological feelings of past injustices (Ibid). Violent conflict may have more tangible physical impact but often its effect on the psychology of individuals and a society are as profound. In most intra state conflict especially, history, perceptions and identity are inherently present in the escalation of conflict. Efforts to mitigate such conflicts need to place emphasis on the social psychology of conflict and its consequences. There is need for effective means to deal with these less-visible consequences of violent conflict.

Most conflicts and human rights abuse often engender destructive social and psychological legacies on the society. Hugo Van der Merwe and Vienings (2001: 345) observe that after an experience of violence, an individual is likely to feel vulnerable, helpless, and out of control in a world that is unpredictable. Building peace in such circumstances requires attention to these socio-psychological and emotional layers of the conflict. The social fabric that has been destroyed by conflict and repression needs to be repaired, otherwise some of the victims of past violence risk becoming perpetrators of future violence (Ibid: 344). It is out of this concern that the concept of reconciliation has gained currency as a peace-building technique that helps to cultivate a process of socio-psychological healing and repair of brokenness relationships. Van Der Merwe (1999) argues that reconciliation is often relegated to a secondary role in the larger picture of peace-building. To him, this has been a symptom of the various peace-building approaches that only focus on the structural sources of conflict. He observes that while this focus has served a central role in highlighting the issues of inequalities, structural violence and institutionalised bases of conflict behaviours, it has relegated the understanding of the issue of social and psychological relationships to a marginal role in peace-building processes.

The Social and Psychological dimension to peace-building emphasises relational aspects such as trust building and envisioning strategies for future coexistence. It seeks to minimize poorly functioning human interactions and to maximize mutual understanding between the previous conflicting groups (Lederach: 1997: 82). Du Toit (1998) regards truth as one essential component of the needed antiseptic which could cleanse the social fabric of the systematised habits of disregard for human rights but adds that it needs to be thought about, debated and digested and metabolised by individuals and by society. His contention is that in South Africa there has been far too little genuine debate about the nature of social healing and what surely promotes it. Unhealed social losses and psychological trauma usually continue to dominate societies that have suffered conflict and to Montville (1998) real politik has to recognise that creating sustainable peace can only succeed if the circumstances that originally produced a group's sense of victimhood are recognized and dealt with. He explains that those who have suffered unjustified violent attacks have an enduring fear of their trauma re-occurring, a fear that undermines

the possibility of developing renewed trust in their victimizers and inhibits any true negotiation or eventual reintegration with them (Ibid). Time therefore does not heal all wounds in societies that have experienced long drawn out conflict and human rights abuse. In some cases, grievances associated with past wounds are passed down generations, creating a widening gap of estrangement, fear, hatred, which aggravates the likelihood of renewed conflict.

The essence of reconciliation then is the initiative of the conflicting parties to acknowledge their responsibility and guilt (Maiese: 2003). Parties are expected to reflect upon their own role and behaviour in the conflict, and acknowledge and accept responsibility for the part they have played. As parties share their experiences, they learn new perspectives and change their perception of their enemies. In the process, there is recognition of the difficulties faced by the opposing sides and of their legitimate grievances, and this leads to the development of a sense of empathy. Reconciliation hypothetically proceeds with the parties making a commitment to let go of anger, and to refrain from repeating the previous injury (Ibid).

While addressing the social psychological effects of past conflicts and human rights abuse is a crucial part of transforming conflict, there are usually no guarantees that reconciliation, with its multiple meanings, will always occur in clear and definite terms. The South African TRC for instance proceeded nominally on the assumption that truth telling will lead to reconciliation, without recognising the possibility of renewed pain and suffering that can result from such processes. That the TRC was limited in its reconciliation agenda was portrayed in the numerous legal actions it attracted including writs from the ANC (which tried too injunct the report), Chief Buthelezi and F W De Klerk.

Embedded within the reconciliation discourse are foundational ideals that do not always accommodate the complex experiences and circumstances of the practical world. Amy Guttman and Dennis Thompson (2000:32) observe that reconciliation is a utopian and illiberal goal because ‘moral conflict in politics is a condition of a healthy democracy.’ Often, reconciliation is conceived of as a process involving two types of actors, victims and perpetrators as underscored in the South African TRC process. This in essence ignores other parties of complicity such as beneficiaries and bystanders. The

question then becomes, was the reconciliation agenda in South Africa premised on a limited order that did not accommodate the complex realities of the past conflict? The South Africa TRC ultimately failed to see apartheid as a system which was multi-layered, and multi-dimensional. By not properly addressing the socio-economic context in which human rights violations had taken place, the TRC was limited as an institution that that promoted transformation.

Nevertheless the South African TRC's public hearings certainly did change the frame of public discussion and public memory in the country at the time. The function of the public hearings was that the society was engaging in discourse with itself. The social psychological dimension of conflict transformation can be seen in terms of efforts to foster shifts in attitudes and the lessening of feelings of hostility. But a holistic approach to transformation also necessitated processes to change the socio-economic conditions of the vast majority of people. South Africa's TRC was primarily meant to restore relationships between victims and offenders. Howard Zehr (2001: 331) says it sought to engage both victims and offenders in dialogue and make things right by identifying their needs and obligations.

Ultimately, a particular focus on the psychological and emotional relations alone among people, can be limited in promoting peace if it neglects other needs such as the economic well-being and political participation. An integrated holistic approach is required to link political, socio-psychological and economic measures in conflict transformation. This draws attention to a combination of both immediate and long-term measures. Transforming conflict is not a simple process, and there is need to appreciate the difficulties of blending principle and pragmatism.

5.50 Conflict Transformation

The conflict transformation approach has recently been offered as the best way to promote sustainable peace. A distinction is made between the process of transforming and resolving conflict implying significant differences between both processes and their respective outcomes (Mitchell: 2002). Conflict resolution implies a process of finding a solution to a conflict, while conflict transformation is perceived to involve bringing about major changes in the characteristic of the conflict or the socio-economic and political

relationships within the system in which the conflict is embedded. Transformation is a more recent concept and is seen to be a more comprehensive and adequate process than resolution. Rupesinghe (1995:6) observes that the notion of being able to resolve conflict 'once and for all' has been superseded by an understanding that such dynamic and deep-rooted processes call for dynamic and sustained responses. Galtung (1993: 53) argues that conflicts are generally not solved. He states that what survives after a conflict has disappeared from the agenda is conflict energy reproduced by the conflict, that energy does not die, it attaches itself to one or more conflicts possibly also the old one. Clements (1997) on the other hand outlines several promises and essential ingredients of conflict transformation; that it should be aimed at channelling the energy generated by conflict in constructive non-violent way rather than in destructive and violent directions. He argues that its aim is not to eliminate conflict but to utilize conflictual processes for generative positive change, which may be relatively spontaneous or directed. For Clement, conflict transformation occurs when violent conflict ceases and / or is expressed in non-violent ways and when the original structural sources of the conflict have been changed in some way or the other. The conflict therefore, can be transformed by normal socio political processes (incremental changes through time) by the parties acting alone, by expert third party interveners and parties acting together and/ or by judicious advocacy and political intervention (Ibid).

The core effort in conflict transformation is the attempt to engage in constructive change initiatives that converge in the building of desirable structures and healthy human relationships. The South African TRC is promoted as one such intervention that was aimed at contributing to the transformation of South Africa. Questions however remain about whether the TRC has actually influenced the transformation process in South Africa. The next examines this debate by casting the South African TRC within the conceptual framework of conflict transformation.

5.51 The Case of South Africa

In South Africa, the political transition to democracy in 1994 was certainly a turning point at the level of decreasing violence, but did not in itself eliminate the structural and institutional bases of the conflict. The political transition can be seen as a significant

starting point for the promotion of institutional capacity to deal with certain forms of conflict. It led to the introduction of new structural and institutional mechanisms such as a new constitution that has been employed in the regulation of political competition and the rule of law. The move away from authoritarian rule towards democracy can therefore in itself be seen as a transformation since it marked a change in the nature of the relationships between previous conflicting groups and a reduction in conflict and human rights abuse. But the immediacy of structural inequalities, the legacy of racial segregation, hatred and prejudice as primary factors and motivators of the apartheid conflict and human rights abuse meant that their transformation needed to be rooted not only in legal and political structures but also in social-economic and psychological terms.

The attempt to deal with the legacy of the apartheid past through a TRC was a positive attempt to engage in constructive change, although the question whether that attempt succeeded in building desirable structures and human relationships, defies a quick and straightforward answer. As observed in earlier chapters, some of the structural and institutional changes recommended by the South African TRC, including questions of security sector reform, were part of the political transition process since 1994. It therefore becomes difficult to distinguish between the contributions of the TRC and the larger democratisation process to the process of transformation in South Africa.

Nonetheless, by attempting to acknowledge and deal with the needs and interests of victims, the South African TRC can be viewed as an effort to help them return to their normal relations, which is one of the legitimate goals of conflict transformation. The TRC also sought to cultivate dialogue between victims and perpetrators through its hearings. The idea of offering amnesty was not only essential to facilitate compromise and transition, but also as a social necessity indebted to the African tradition of ‘ubuntu,’ which connotes humaneness, caring, and shared community. The TRC placed emphasis on understanding one another rather than on revenge, a need for ‘ubuntu,’ but not for victimization (Graybil: 2002). It reflects Lederach's (1995) emphasis on relationships and reconciliation in the process of conflict transformation. It conveys the view that an environment of correct relationships is one in which people recognize that their humanity is inextricably bound up in others' humanity. However, while ‘Ubuntu’ was regarded as emphasizing the priority of restorative, rather than retributive justice, Van Binsbergen

(2002) argues that ubuntu was misused from its original African meaning of a quality that one could have or not, to something that one could generously extend to those who had shown to have too little of it in the past. He argues that unlike the traditional origin of Ubuntu, the TRC treated those wronged as having no freewill to define the terms under which they would be prepared to leave the past behind them. To him this was a contemporary condition of ubuntu that was pressed into service at the centre of national political affairs, in mystifying ways that denied or perverted time-honoured African values, under the pretence of articulating those very values. Eventually, he states, there was massive and manipulative repression of resentment and anger caused by the historically ungrounded use of ubuntu in the context of the TRC (Ibid). Nonetheless the understanding that Ubuntu underlined the priority of restorative and the essence of shared humanity, rather a recourse to retributive justice, is regarded to have produced a capacity for forgiveness and reconciliation. Evidently the TRC was guided by the principles of establishing relationships that recognize the humanity of both the victims and perpetrators, and recognizing the importance of reconciliation for sustainable peace.

5.52 The TRC's Psychological Dimension

During apartheid, the South African society was marked by extreme levels of violence. This resulted in direct and indirect violence to victims who suffered and continue to suffer from a range of psychological related conditions. One of the major goals of the conflict transformation approach is to transform relationships and psychosocial conditions. On a psychological level the impact of the TRC on individuals and the society as whole has been highlighted by a number of authors including, Hamber (1995), Asmal (1992), Boraine, Levy and Scheffer (1994), Simpson (1994), Simpson and van Zyl (1995). These authors underscore the ability of the TRC to contribute to reconciling with the past through the truth recovery process. The South African TRC is seen to have operated as psychologically rehabilitative mechanism as evidenced through the numerous traumatised individuals who expressed feelings of catharsis before the TRC.

On its own, however, the TRC was not a sufficient process of promoting individual and collective psychological rehabilitation. This is why a range of psychological structures and strategies outside of the TRC were established during and

after the TRC process. There is no doubt, however, that the TRC, by attempting to create a picture of the past, helped bring to public, hitherto, unknown information about past human rights abuses, which helped individual and collective recollection and in some cases acceptance what happened to them or their relatives. Danieli (1992), Miller (1991) and Scott and Stradling (1993) observe that the process of acknowledging and uncovering the traumatic past can help absolve feelings of guilt and personal causal responsibility that survivors often experience after traumatic events. Conversely, the TRC also did unearth painful memories or caused people to re-live difficult times (although in various cases there were counselling services).

Rituals, symbols, commemoration and reparations have also used in South Africa as a form of psychological healing. In various parts of the country where I went including Langa (Cape Town) and Soweto (Johannesburg), there were a variety of symbolic representations of trauma[72], which served some of the functions of healing rituals, through representation of a collective symbolic will to deal with the past. To address the legacy of conflict requires an awareness of its psychological and social dimensions. A psychosocial approach recognises that trauma work following political violence requires the socio-economic and political need be addressed as well as the individual psychological needs. The TRC could be viewed as one of the mechanisms that contributed to addressing the psychological aspects of past, but it role in the execution of a broader justice and reconciliation agenda was limited. In the absence of this broader agenda to deal with the structural injustices of the past, the catharsis afforded by the TRC was often short-lived for the majority who remain underprivileged.

5.53 Expectations of economic transformation

The TRC may have marked a significant contribution in sensitising the public about the extent of past impunity, the transformation process requiring fundamental changes in the structures, institutions and even social life may have well been beyond the TRC's scope and capacity. Hamber and Kibble (1999) state that the TRC could bear the weight of transformation only in legal and moral areas, which could be helpful in laying the foundation for others to build on. However, they observe that, tragically, so little transformation appears to be occurring elsewhere that the foundations of reconciliation

and openness are in danger of being undermined (Ibid). Boraine, the vice-chairperson of the TRC observes that unless economic justice, including the provision of homes, health, water, electricity and, most critically jobs, was put first on the national agenda, the quest for reconciliation in South Africa would be difficult and the society would continue to be deeply divided (Cited in Hamber and Kibble, 1999). Given the present high crime rates and accusations that the criminal justice system is inefficient and corrupt, it is unlikely that many people will for instance feel that the TRC helped to establish the rule of law. Indeed there are a number of South Africans today who remain sceptical about the contribution of the TRC toward the country's transformation process. In several of the interviews conducted by this study, it was apparent that the TRC did not fulfil particularly the expectations of economic transformation of victims.

The TRC's role in the transformation process was limited partly because it did not have the capacity to address the structural sources and consequences of past conflicts and human rights abuse other than to make recommendations to the government for implementation. In fact, its biggest limitation seems to be its lack of involvement in social and economic transformation. Even with its final recommendations, there remains a gap between the report and the actual implementation. Tutu has argued that with hindsight, the reparation programme should have formed part of the TRC's mandate and regrets the logic of the TRC's arrangement which meant that there was always going to be an unfinished business.[73] The Commission made recommendations some of which were not followed up and some survivors have remained frustrated (Biles: 2006). Jacob Mzumkhulo Ramokonopi, who was shot in politically-motivated revenge violence in Katlehong township in South Africa's East Rand in 1992, for instance says 'I'm not happy, because what the government promised us, they didn't do'(IRIN News: 2006). In November 1990, Florina Mkwena's husband was murdered in political violence in their neighbourhood of Zonkizizwe, in the East Rand. She says 'It is still a pain in my heart even today, I still want to get the truth about what happened. I want to know what the government is doing to investigate, and what it will do about the situation (Ibid). Critics such as Mamdani (1996: 3-5) argue that the entire approach to reparations, focussing on victims of political human rights abuses, rather than those who bore socio-economic costs of apartheid was inadequate and very limited.

So while the South African TRC continues to be cited as one of the best examples of transitional justice in the world, for a good number of people in South Africa its effort to confront the horrors of the past has not delivered the healing it promised. Van der Merwe (1999) says that despite all of its flowery language around reconciliation, it really had very limited impact in terms of providing healing and justice for survivors and providing reintegration into communities for perpetrators.

The debate about the South African TRC representing one of the pillars of transformation that was required to help South Africa move from a deeply divided past of manifest inequalities to a future founded on a human rights culture and mutual respect has animated various viewpoints with some arguing that attempting reconciliation without transforming the socio-economic and political conditions of society is a meaningless since the priority of victims is to live in conditions that are better than those of the past (Lax: 2001: 61-75, Lipton: 1999: 64). In this case the process of reconciliation has to go hand in hand with aspects of development and economic empowerment. Christie (2000) however argues that the question to be asked is not whether the TRC did or did not have a healing effect, but how the society could have been without pursuing the TRC process and experience. For Lax (2001: 61-75) the TRC made considerable progress in exposing and confirming the truth about horrific deeds in South Africa's past. He states that although most observers deny that the TRC achieved much in terms of reconciliation, at least in the short term, eventually the exposure of the effects of apartheid will provide a firmer basis for a new national identity within a shared society. To him the process of replicating truth commissions must be rooted organically in the transformation required in the relevant country or conflict scenario.

The challenge of devising measures to transform a society away from past human rights abuses is highly contentious. Hamber (2003: 229) observes that it is tempting and sometimes necessary to measure transformation or the amount of change in a society solely by delivery targets (e.g. the number of houses built, the level of inequity) and performance of the economy, things which the TRC was not able to convey. He cautions that such an approach can easily lose sight of the fact that other levels exist within society for instance individual subjectivity, identity and emotionality. In this sense understanding whether change has occurred, whether what societies may call transformation has taken

place and estimating the degree to which society is considered to have resolved its conflicts are psychological processes that rest on how citizens understand their relationships to others, themselves and institutions in that society. He however concedes that this understanding obviously needs to be placed within the parameters of the socio-economic context although he adds that the said psychological processes are not necessarily wholly influenced by the social memory of the past (Ibid).

There are multiple needs in the process of transforming a society and there is need to understand that a truth commission cannot satisfy all these needs on its own. This calls for measures that combine instruments that address the socio-psychological factors linked to the conflict, as well as structural and political dimensions to bring about fair and inclusive processes. Conflict transformation entails bringing about societal as well as institutional changes to encourage socio-economic and political development, equitable social structures that meet human needs, and building positive relationships

5.60 The Challenges of Institutional Reform

During periods of conflict and repressive rule, most of the institutional infrastructure often collapse or is destroyed by the years of misrule and conflict. The legal and security apparatus are in such cases administered for political ends with little protection of the rights of individuals. After periods of political transition, countries need to establish new institutions that curb the perpetration of past impunity and structural inequalities.

A major obstacle that can hamper the progress of transformation is the question of retaining the same old order with its inherent potential to animate new forms of conflict. Exposing the role of institutions in perpetrating past violations and formulating recommendations for future reform can be a key area where transitional justice can provide a meaningful impetus toward building sustainable peace. If neither the structures nor the personnel have changed, the society retains the same old institutional vestiges that are likely to impede change and the social reconstruction process. Unfortunately transitional justice mechanisms often focus on the role of individuals in perpetrating past conflicts and rights abuses, and not institutions. The one area where the South African TRC did attempt to tackle the broader structures of apartheid was through its institutional hearings. The TRC oversaw hearings from various institutions including media, business,

the medical profession, and religious organisations. For Boraine (2004), this was useful because it helped the country to debate about the types of institutions that it required to bridge its transition.

The impact of the South African TRC's work and recommendations regarding institutional transformation was, however, limited. There were several reasons for this. There were, for example, only a handful of institutional sector hearings convened and these were generally cursory examinations that did not carry out adequate research. They lacked robust analyses and interrogation of the presentations of those who appeared before it. While providing some basis for engaging in matters relating to the structural and institutional roles in perpetrating past abuses, much more might have been done in this regard. In addition, as the hearings were entirely voluntary, participation was low and contributions generally thin. This was particularly the case in the hearings on the legal sector where judges refused to come before the Commission, and the media hearings, where some Afrikaans medium newspapers allegedly threatened to fire any employee who made a submission to the Commission (Traces of Truth: n.d).

In its final report, the TRC made recommendations to transform the institutions inherited from the apartheid era, including legal and judicial institutions, prisons, the health system, and the security forces (Republic of South Africa: 2003:Vol.5: 305. The report made extensive recommendations to the government for measures to ensure reforms, although some of these measures covered ground which had already been covered elsewhere, mainly in government's programmes after the 1994 political.[74] Unfortunately, many other recommendations by the TRC relating to reparations, institutional transformation, prosecutions and legal and administrative restitution remain part of the TRC's unfinished business today. South Africa also did not undertake the process of screening and vetting, often seen as a key measure of governance reform essential to overcoming legacies of past conflict and rights abuse. With the exception of the retrenchment packages targeting senior members with problematic histories,(Bruce: 2002), no re-selection or vetting process was followed partly because the new government did not have enough manpower and had therefore, to depend on individuals it inherited from the former regime.

In the final analysis reforming institutions during a country's political and social transition is crucial to ensuring that the violations of the past are never again permitted to occur. By exposing and removing the structural features that facilitated the conflict or oppression, institutional reform can be an integral component of the transformation process. In a strict sense, however, institutional change in South Africa was beyond the direct reach of the TRC because there was typically little to compel the government to act. While truth commissions' recommendations for institutional reform can be abandoned because of the fear of putting the transition in jeopardy by antagonising powerful elements of society, it is also possible that recommendations could serve as a rallying point for those pressing for change. In South Africa, Desmond Tutu has been at the forefront in urging for the implementation of the TRC's recommendations and for reforms linked to the TRC to support the poor (Mail and Guardian: 2006). The TRC's report also underscored the element of business in sustaining the apartheid system and as a result, there have cases filed against companies such as Anglo-American for alleged unjust enrichment, torture and enslavement of its employees (Valji, 2003). Nattrass (1999: 373-391) observes that the Commission's main findings in this regard were that 'the business had been central to the economy that sustained the South African state during the apartheid years' and that 'most businesses benefited from operating in a racially structured context'.

5.70 The South African TRC: A Conflict Transformation Framework?

The Act establishing the South African TRC states that the TRC process was set up to promote national unity and reconciliation (Republic of South Africa:1995). The designers of the TRC hoped that the practice of public truth telling would help majority of South Africans to understand the gravity of the suffering that the past conflict and human rights abuse had wrought on their society and thereby engender the need for peace. The TRC Act outlines some of its main short-term objectives to include the restoration of human and civil dignity of the victims of past violence by giving them an opportunity to relate their own accounts of the violations, the granting of amnesty to those giving full disclosure of politically motivated crimes and make recommendations to Parliament on reparation and rehabilitation measures, including measures to prevent the future

commission of human rights violations. The long-term goals on the other hand included, to help heal the victims of apartheid and to help heal the society and create a new culture of respect for human rights, where similar atrocities would never happen again (Republic of South Africa: 1995).

In theory the South African TRC was an attempt to ensure that South Africa moved away from a repressive state with institutions that had perpetuated violence and inequality. In practice, however, there remain a number of contentious issues about whether the TRC actually realized its conflict transformation objectives of crafting national unity and reconciliation. Transformation is a long term, multi-level process that seek lasting positive change and this should not be mistaken with one time events such as the TRC hearings.

Truth commissions are an increasingly common feature of countries undergoing political transition. Their ascendancy has been premised on the assumption that conflict and human rights abuse leave fractures on the affected societies in the form of ruined relationships, divided communities, suspicion and hatred. And since the end of physical conflict or repressive rule does not eliminate the sources and effects of the previous conflict and human rights abuse, truth commissions are seen as a tool that can be used constructively to transform those sources of past conflicts into sustainable peace. Looking at the case of South Africa, there were many other institutions that were set up to facilitate the transition. These included bodies such as the Land Claims Court and the Human Rights Commission, which were set up to serve a similar purpose of transforming institutions that perpetrated conflict and human rights abuse during the apartheid era (Rauch: 2004). But it is the TRC that encompassed the symbolic role of promoting healing in South Africa.

Conflict Transformation in transitional contexts ultimately calls for a number of complementary processes aimed at dealing with the effects of the past as well as reconstructing the socio-economic and political structures of the society. It is a positive step that truth commissions are being constructed in an attempt to contribute toward shaping societies emerging from periods of conflict and rights abuses. Jenkins (2003: 9) argues that in comparison with an overwhelmingly disappointing record of failure to investigate and acknowledge human abuses in the histories of countries such as Uganda,

Chad, Namibia, Nigeria and Mozambique, the South African TRC was a real advance especially for Africa for introducing the language of accountability. While acknowledging their inherent limitations, it is conceivable that truth commissions can be carefully woven into essential ingredients of societal transformation. A holistic approach to transformation means a multilevel process of anchoring measures such as criminal prosecutions, truth telling, reparations, reform of state institutions, economic reconstruction and meaningful dialogue between various parties in order to relevantly deal with the multiple dimensions of a given society's transitional challenges.

It is increasingly obvious that the real challenge for most countries emerging from political transition is to build a society that is truly participatory and that fulfils the basic needs of its people. Truth commissions can, if well structured and their recommendations implemented, act as a bridge toward that form of society. They can constitute points of departure for a process of transformation that seeks to fulfil rather that frustrate the enjoyment of human needs. Hayner (1994: 225-226) in a comparative study of fifteen truth commissions argues that these commissions have in most cases played an important role in the process of political transition, 'either by affirming change in the human rights practices of the government and a respect for the rule of law or by helping to legitimize or strengthen the authority and popularity of the new head of state, or both'. Citing the examples of Chile, South Africa, El Salvador, Uganda, Chad, Argentina and Uruguay, she argues that in no country did the truth commission cause a situation to become worse. While acknowledging that not all truth commissions have been so successful, she observes that in most of cases their investigations were welcomed by survivors of the violence and by human rights advocates alike and their reports widely read (Ibid).

It has, nonetheless, to be realised that truth commissions are not an end in themselves because if structural inequalities continue to prevail in society, new fissures will be generated which give rise to alienation and new forms of conflict. In South Africa, there still remain far-reaching challenges on structural inequalities that have yet to be met. The lines of division that were most starkly contrasted by the violent conflict of the past still exist and new divisions have emerged or been given a different profile. These divisions, particularly in relation to structural inequalities, can be fundamentally threatening if the society does not envisage constructive ways of dealing with them.

Conflict transformation is not designed to eliminate conflict, but merely to develop effective mechanisms by which a state can manage the inevitable rival claims, grievances and competition over socio-economic and political resources. Reychler (2001: 3-15) observes that achieving sustainable peace requires at least two steps, knowing what tools are effective in which circumstances, and also knowing how to devise and implement multi tooled and place specific strategies. Conflict transformation is a process that is simultaneously dynamic, adaptive and changing. It is not an end state, it is an evolving process that continuously seeks to develop quality relationships to meet basic human needs, provide access to resources and decision-making.

5.80 Conclusion

The South African TRC has increasingly been regarded as instrument that helped the country move away from its past conflict. This chapter has observed that while truth commissions can make a meaningful contribution toward dealing with a legacy of past conflict and human rights abuse, through their processes and recommendations, they, in themselves remain insufficient instruments in transforming societies toward sustainable peace. The complexity of dealing with questions of past conflict and human rights in South Africa demonstrates the difficulties in transforming a society toward sustainable peace. Given the present social and structural differences in South Africa, the degree to which the South African TRC can be said to have contributed to the transformation process and consolidating peace can, at best, be described as part of a long and ongoing process. It is true that the success of conflict transformation depends, at least in part, on assisting antagonists to put the legacy of the past behind them, but there is need for caution against being overly optimistic with expectations about the degree to which truth commissions can transform a society toward sustainable peace. Conflict transformation must be rooted in both the tangible and subjective realities that shape people's needs and perspectives. Transcending such states requires frameworks that not only promote reconciliation and institutions that protect individual rights but also structural changes that help to meet the basic human needs of the society. Conflict transformation requires a wide variety of efforts to address the socio economic and political functions of the society

in transition. There are however, no hard and fast rules for building sustainable peace. Any strategies to be adopted need to be situated within a given specific context.

All in all, the South African TRC should be seen mainly as a handmaiden and building block rather than the ultimate end in itself. It has to be realized that there will be incompleteness and inescapable inadequacy of any transitional justice measures in promoting sustainable peace. Moving beyond past atrocities and rebuilding the affected societies is a multidimensional process that can take generations and different constitutive elements to realize. It requires various simultaneous measures of restorative and social justice and meaningful institutional and normative frameworks in order to improve people's lives.

CHAPTER 6: THE SOUTH AFRICAN TRC: A PARADIGM? DRAWING LESSONS FOR OTHER CONTEXTS

6.10 Introduction

South African is heralded across the world as a model of democratic transition. Much of the credit is often vested in the institution established to 'deal with the past' – the Truth and Reconciliation Commission. As observed in earlier chapters, the South African TRC has often been elevated to the level of a standard practice or paradigm to be followed. This has been evident in a number of countries including Afghanistan, Bosnia-Herzegovina, Burundi, Cambodia, Indonesia, Jamaica, Kenya, Morocco, Philippines, Uganda, Ghana, Sierra Leone, Somalia, Sudan, Liberia and the Democratic Republic of Congo and Nigeria, which have in the recent past, established or attempted to establish truth commissions similar to that of South Africa. The question then is whether the South African TRC is a paradigm that can be followed in other contexts? This chapter assesses this question and advances tentative arguments on the South African TRC's paradigmatic assumptions and the lessons that other transitional societies can learn from it.

6.11 Clarifying Paradigm

Etymologically, the word paradigm comes from the Greek word paradeigma which means 'pattern' or 'example.' The word was originally an obscure academic term that has undergone many changes in its meaning over the centuries (Breton and Largent: 1996). The classical Greeks used it to refer to an original archetype or ideal. When it appeared in English in the 15th century, it carried the meaning of 'an example or pattern,' and to an extent it still bears this meaning today. The term also came to be prominent in grammar where Ferdinand de Sassure used it to refer to a class of elements with similarities (De Saussure: n.d). In linguistics, paradigm came to represent patterns of inflections used to sort out verbs, nouns, and other parts of speech into groups that are more easily studied (Breton and Largent: 1996). The word paradigm has also been frequently used in other professions such as Design to mean functional precedents for design solutions(Wake: 2000, Petroski: 1994), and in cybernetics[75] to refer to a conceptual protoprogramme for reducing the chaotic mass to some form of order (Search.com Reference: n.d).

In the early 1960s Thomas Kuhn (1996: 175) wrote a ground breaking book, *The Structure of Scientific Revolutions* in which he maintained that science does not progress in an orderly fashion from lesser to greater truth, but rather remains fixated on a particular dogma or explanation – a paradigm, which is only overthrown with great difficulty and then a new paradigm established. A paradigm in this case represented a constellation of beliefs, values and techniques shared by the members of an intellectual community. Later, in the same book Kuhn revises his earlier sense of the term paradigm, stating that it denotes one sort of element in that constellation, the concrete puzzle-solution which, when employed as a model or example, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science (Ibid: 175). Paradigm therefore represented a specific conceptual way of viewing reality. Kuhn writes that 'a successive transition from one paradigm to another via a revolution is the usual developmental pattern of mature science.'(Ibid: 12). Science thus came to be seen to consist of periods of conservatism ('normal' Science) punctuated by periods of 'revolutionary' science. Thus, within normal science, the paradigm is the set of exemplary experiments that are likely to be copied or emulated. Breton and Largent (1996) develop on this conception of paradigm by stating that

> When anomalies or inconsistencies arise within a given paradigm and present problems that we are unable to solve within that given paradigm, our view of reality must change, as must the way we perceive, think, and value the world. We must take on new assumptions and expectations that will transform our theories, traditions, rules, and standards of practice. We must create a new paradigm in which we are able to solve the insolvable problems of the old paradigm. When one paradigm looses influence and another takes over, there is a paradigm shift. Knowing in advance how a paradigm shift might occur gives you an advantage over others.

Social scientists have adopted the Kuhnian phrase 'paradigm shift' to denote a change in how a given society goes about organizing and understanding reality. A dominant paradigm refers to the values, or system of thought, in a society that are most standard and widely held at a given time. Dominant paradigms are shaped both by the community's cultural background and by the context of the historical moment. According

to Harman (1988: 10, See also Pfeffer: 1993: 599-620), the following are conditions that facilitate a system of thought to become an accepted dominant paradigm:

- Professional organizations that give legitimacy to the paradigm
- Dynamic leaders who introduce and purport the paradigm
- Journals and editors who write about the system of thought. They both disseminate the information essential to the paradigm and give the paradigm legitimacy
- Government agencies who give credence to the paradigm
- Educators who propagate the paradigm's ideas by teaching it to students
- Conferences conducted that are devoted to discussing ideas central to the paradigm
- Media coverage
- Lay groups, or groups based around the concerns of lay persons, that embrace the beliefs central to the paradigm
- Sources of funding to further research on the paradigm

Other authors like Michel Foucault (1966) use the terms episteme or systems of knowledge and discourse to amplify on Kuhn's original definition. Paradigm in this case refers to a social conception of discourse, an institutionalized way of thinking or a social boundary defining what can be said about a specific topic.

This chapter employs the term paradigm because of its relevance in nature and scope to social science. It is used to refer to an example or thought pattern in a scientific discipline or epistemological context, an example or framework of thought that can direct actions. The South African TRC has been presented in the same way as an example to be followed by other countries interested in transitional justice and as pattern of thought that illustrates how past conflict and human rights abuse should be dealt with. Given the various challenges that faced the South African TRC, this chapter considers the assumptions about the South African TRC as a paradigm to be followed and extrapolates lessons for other relevant contexts.

In order to develop a more focussed discussion and support the overall arguments on what lessons and challenges can emerge in treating the South African TRC as the standard practice to be followed, this chapter adopts Kenya as its experimental context,

although it also draws illustrations from a number of other contexts. The choice of Kenya is due to a number of reasons, first it is a context which the researcher is quite conversant with, and second, is the fact that Kenya was interested in establishing a truth commission based on the South African model after its widely praised political transition of 2002. This was despite the two contexts being distinctively different. This chapter will therefore assume a comparative trajectory, using the distinctive differences in contexts to raise numerous questions and considerations that will illuminate the assumptions about the South African TRC being treated a paradigm to be followed and the lessons that the South African TRC can offer in area of transitional justice.

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6.20 South Africa and Kenya: Overview of Contexts

The South African TRC featured prominently in Kenya's political discourse before and after the 2002 political transition.[76] To Kenya, the South African TRC had acquired the level of an example or pattern of thought to be followed. But the two countries had witnessed distinctively different conflicts and human rights abuse. While for example South Africa had experienced widespread volatile conflicts underpinned by racial cleavages, Kenya witnessed only intermittent cases of violent conflict that were often labelled by media as political disturbances or ethnic clashes (Mulli: 1999, Human Rights Watch: 2002). The focus of the analysis on Kenya is one the post independent era and precludes the colonial period during which British forces and policies and Mau Mau fighters[77] contributed to widespread human rights abuses in Kenya.[78] One significant question in establishing transitional justice frameworks is to establish how far back in history these mechanisms should focus. Since it is not possible to address the whole gamut of all past crimes, transitional justice mechanisms are often given time frames that exclude the distant past. In Kenya, debates on transitional justice have largely excluded crimes and human rights abuses committed during the colonial period. This analysis therefore confines itself to the post independent era (1963 onwards) since it has formed the timeframe within which the transitional justice debates have been located in Kenya.[79]

Unlike South Africa, one crucial dimension in Kenya's transitional justice debates has been the question of economic crimes. The country suffered from economic mismanagement and mega corruption stemming from the misuse of official positions and

political power. Corruption has remained pervasive in Kenya and has served to perpetuate structural inequalities and enormous injustices as those who engage in these activities often gain privileged access to resources and services to the exclusion of others. Due to corrupt practises national resources were largely allocated not on merit or priority of need, but through preferential treatment. Added to this were the repressive legislation and systematic violations of individual rights, which provided the broad basis of structural violence in Kenya. Like South Africa however, opposition to government in Kenya arose out of sections of the society feeling they had been excluded from political participation and access to national resources. In both cases, the systems generally attempted to deal with conflicts by suppressing them through coercion and legislation or simply by physical elimination.

6.21 Theorizing Kenya's Transition

In South Africa, it is the politics of negotiation that steered the protagonists toward a compromise and a constitutional settlement. This was followed by the first democratic elections in 1994. In Kenya, on the other hand, the tumultuous events before the electoral victory by a coalition of opposition political parties, the National Rainbow Coalition (NARC) in 2002, illustrate the argument by O'Donnell and Schmitter's (1986: 19) that political transitions can sometimes be unanticipated, uncertain processes, highly contingent on numerous factors and events that do not follow a linear path or clear pattern. Daniel arap Moi's[80] decision not to run in the 2002 elections, having served his mandatory two terms in office, coupled with his mistake of designating Uhuru Kenyatta, the son of a former President, as his preferred successor rather than choosing a more acceptable candidate or allowing for secret balloting by party members, led to the Kenya African National Union's (KANU)[81] implosion. Many of its members joined the opposition coalition, NARC that eventually won the elections.

To O'Donnell and Schmitter (1986: 19) individual politicians' strategies and errors can greatly influence political outcomes. They observe that 'authoritarian breakdowns are not fatalistically bound to occur and that in countries where they have occurred, they could as well have been avoided if some strategic decisions had been made and especially if some crucial mistakes had not been committed'. It is conceivable

that had KANU not lost part of its membership to the opposition due to Moi's mistakes in choosing the party's presidential candidate, it would still be in power today.[82] O'Donnell and Schmitter define a transition as the interval between one political system and another. To them, the beginning and end of a transition are relatively easy to trace. The transition begins with a split in the authoritarian regime, after which regime elites who believe in the necessity of electoral legitimacy become dominant. They observe that 'softliners,' typically negotiate a pact with moderate opposition elites to provide for elections under clearly defined rules and procedures. The transition ends when new political elites assume power or, in rare cases, the old elites are newly legitimized (Ibid:1986: 19). Applying O'Donnell and Schmitter's definition of transition to Kenya is problematic. According to their definition, the transition process begins with a split in the authoritarian regime and in Kenya, this would mean the period leading to the 2002 general elections when the then ruling party KANU was abandoned by some of its members who joined the opposition party NARC. But limiting the beginning of 'political transition' to that period is problematic because there were a number of contingent factors that played out long before the events of KANU's implosion and the subsequent change in political leadership in 2002. In fact it is the highly centralized system of government since independence that interacted with the end of the Cold War politics in the early 1990's, to put domestic and international pressure on Moi's regime to consent to multiparty politics. It is in this window of multiparty politics, that the opposition parties managed to organise themselves, benefiting from KANU's implosion and subsequently going on to win the 2002 general elections. Like in most other contexts, it becomes difficult to determine when Kenya's political transition began and, significantly, when it ended or will end. While the famous statement by O'Donnell and Schmitter that 'there is no transition whose beginning is not the consequence - direct or indirect- of important divisions within the authoritarian regime itself' (Ibid), can partly be true for the case of Kenya, it nonetheless fails to be extended to other cases of transitions where the split never occurred. O'Donnell and Schmitter's generalisations were based on the study of military regimes in South America, when in Kenya, Moi's regime and that of Kenyatta before him, were characterised by a neo patrimonial rule. Godwin Murunga (2002) observes that a transition must entail a fundamental and perceptible change in the lives of the people.

He observes that Kenya has so far only witnessed superficial transition to pluralist politics and that it has not been possible to make a conscious and sustained reform of the state using the local mass of Kenyans as the driving force of reformse.[83]

The political transition in Kenya in 2002 nonetheless prompted comparisons with South Africa's much more ramified processes of negotiations toward the first democratic elections in 1994 and later the establishment of a truth commission to deal with the country's past. Both countries had shown signs of emerging from phases of human rights abuse although South Africa's case was more profound. South Africa had experienced a more protracted conflict that involved many actors leading to many casualties. Kenya on the other hand went through authoritarian systems that contributed immensely to plundering and running down the economy. One commonality was that, in both cases there was internal and external pressures that contributed to moving the two countries toward their political transitions

Given that there were no immunities granted to members of the former regimes in Kenya after the democratic elections of December 2002, it technically left the door open to bring to account those who had been responsible for past human rights abuses. The then Minister of Justice and Constitutional Affairs, Kiraitu Murungi expressed support for a truth commission similar to that of South Africa, and in April 2003 established an 18-member Task Force to consult with the public and propose terms of reference for such a possible commission. At various workshops and consultative meetings individuals and human rights organizations joined in the call for a truth commission. The Task Force submitted its report to the president in August 2003, recommending the establishment of a Truth, Justice and Reconciliation Commission (TJRC), along the South African model. However ever since the submission of the Task Force's report, the government has remained non-committal on the implementation of its recommendations.[84] With time the government suffered from internal wrangling over a dishonoured Memorandum of Understanding, the formulation of a new constitution and accusations of high-level corruption, all which took away much of the public and political attention from 'dealing with the past.' There however remain voices in Kenya today campaigning for the establishment of a Truth, Justice and Reconciliation Commission.

6.30 Extrapolating Lessons from the South African TRC

The challenge of assessing whether the South African TRC offers any lessons or can be replicated by other contexts like Kenya is quite subtle. At a superficial level, the common theme of human rights abuse may make the need for a truth commission similar to that of South Africa quite relevant in many of the transitional societies. A closer scrutiny of these transitional societies will, however, reveal that no two countries experience similar forms and levels of human rights abuse. This should not mean that the need for a truth commission in these countries should be dismissed because they are not comparable to South Africa. Rather, the potential contribution of a truth commission process should be critically examined. In Kenya, the general theme of human rights abuse and the celebrated 'political transition' of 2002 are what motivated debates for a South African type truth commission. A critical review of the two countries demonstrates that they went through different political transitions and afterwards faced diverse political, ethical, legal, and economic challenges. This means that the needs and aspirations for transitional justice in the two contexts may not necessarily be the same. Negotiating the political transition in South Africa for instance entailed the provision for conditional amnesty for alleged perpetrators of past human rights abuse. The country was confronted with a situation where 'victims' were seeking retributive justice and 'alleged perpetrators' seeking for amnesty. The negotiation process had to tread carefully in accommodating the objective of retributive justice and amnesty for the sake of national unity. Justice in the sense of trials and punishment was rejected in favour of the restorative form that carried some threats of retribution.

While the amnesty compromise for the sake of national unity was credible in South Africa, it cannot be assumed to be necessary or appropriate for the case of Kenya. Kenya's political transition was not through a negotiated settlement but rather through a purely electoral process. In South Africa, amnesty was necessary to minimize the potential damage to a fragile peace process by the leaders of apartheid system, most of whom still welded considerably influence and power. In Kenya there was no similar threat and amnesty for the sake of facilitating a peaceful transition would therefore not be necessary. As will be argued later, it is however feasible for Kenya to have an amnesty

provision for other pragmatic reasons. Kenya could for instance use amnesty to facilitate the recovery of looted funds.[85]

Nonetheless the South African TRC offers several significant lessons to societies interested in dealing with their pasts. The TRC's innovations including the provision of conditional amnesty can be credited with developing a new model for dealing with state criminality in a way that went beyond the extreme of full-scale prosecutions. Other countries can too embody a degree of innovation and discretion in dealing with their own pasts. Inherent in this discretion however is the risk that new governments can decide to formulate a truth commission merely as a routine rather than as a meaningful way to deal with a country's past injustice. The challenge for other relevant contexts, therefore, is to first establish whether they actually need a truth commission and secondly what form it should take. The lesson offered by the South African TRC experience is the need to moor any transitional justice framework so that it is relevant to a given context.

The South African TRC was regarded as the best conceived, best funded as well as the best staffed compared to the truth commissions before it (Shea: 2000: 5). A wealth of information on the apartheid era emerged from its process and some of it fed into a range of other national institutions including the security sector reforms. By revisiting the past, the South African TRC mobilized South Africans to engage in debating their history. The framers of the South African TRC understood that the country had been deeply divided and required healing, not through legal punishments or the mere forgetting of the past but through formal engagements with those injustices in a way that could encourage understanding. The lesson offered here is that the TRC process, with its inherent limitations, can if well managed serve to bring out unique insight and opportunity to develop a clearer picture about the past. Public disclosures can provide an opportunity for a country to engage in national debates about its past and integrate some of the lessons learnt into its human rights discourse. In that sense, the South African TRC can be seen as a meaningful idea but other relevant contexts will need to weigh whether their unique interests can best be served through a similar process.

There is no doubt that the South Africa TRC offered significant contributions such as public recognition of previously repressed accounts, which in turn opened parameters for discussing the past. This helped to create awareness and a certain degree

of shared knowledge between the previously conflicting groups as few people can today, publicly claim pride in South Africa's past conflict and human rights abuses. If well implemented in other contexts like Kenya, a truth commission similar to that of South Africa can, in the words of Ignatief (1996:110-122) serve to narrow the range of permissible lies about the past. Those in Kenya whose relatives disappeared or were assassinated during the past repressive rule would certainly welcome the knowledge of what happened to their loved ones. In South Africa, the addition of the truth telling process to the transitional agenda is widely seen to have made important contributions to strengthening the reconciliation case. A number of victims, who came before the TRC to narrate their accounts, eventually acknowledged that the process had helped recognize and vindicate their suffering (Picker: 2005). To Boraine, one of the achievements of the TRC was the way it galvanized the country with regard to past human rights violations to the extent that nobody could say the violations did not happen.[86] Similarly even in other contexts like Kenya where similar abuses occurred, the exposé of past human rights abuses can serve to negate the moral status of the violators.

The South African TRC nonetheless had to grapple with the controversies surrounding the amnesty provision. Added to the TRC's truth telling and amnesty controversy, was the commission's ambitious mandate which generated a false sense of expectations. The TRC's limited period of time in which it operated, the very broad and multifaceted mandate, the inclusion of the words 'truth' and 'reconciliation' in its title, and its promise of a 'victim-centred' approach relying on restorative justice principles, all meant that the TRC was inevitably going to disappoint some people. Moreover, promoting some of the objectives outlined in the TRC, required fundamental policy initiatives such as implementing recommendations and granting reparations, which was outside the TRC'S authority. Other countries interested in a similar process face the risk of being frustrated by challenges similar to those experienced in South Africa. In any TRC process, it is therefore prudent to engender a realistic mandate to level out public expectations, significantly so, given that many of the societies in transition particularly in Africa, function in environments constrained by limited resources compared to the experience of South Africa. The argument here is not to discourage the implementation of

a truth commission similar to that of South Africa, but to add sobriety about the gap between reality and expectations.

On the question of reparations, the ANC government has been widely criticised for the failure to fulfill the TRC recommendations. From my discussions with most of the victims and survivors of human rights abuse, it was apparent that the failure to pay reparations has resulted in grave disappointment and bitterness about the TRC and the government. Countries attempting similar transitional justice mechanisms need to pay attention to victims' expectations. In South Africa, most of them ended up disappointed because they expected significant changes and improvement in their lives, not only after receiving the reparations recommended by the TRC, but generally after the 1994 political changes. Making compensations to victims for their suffering can be useful in helping to limit the stigma of victimhood and also validate the truth telling process and the findings. This effort can help forge an important relationship between the new government and the victims by demonstrating the government's commitment to the victims' welfare. The compensation of the victims can also help to pacify their demands for retribution. It can help the successor government to engender a reconciliatory atmosphere in the country.

Unfortunately, new governments that emerge from periods of repression and economic mismanagement, like was the case in Kenya, are usually cash strapped and may argue that the funds available are better spend on rebuilding the state's infrastructure rather than on transitional justice processes. It may well be true that reparation payments may be burdensome on a country in transition, but it is necessary that some form of restorative justice be made if the objective of reconstructing the society is to be strengthened.

While reparations or restorative justice broadly may not undo the damage done by past human rights abuse, it does serve some form of official acknowledgement that a wrong was committed. It can help improve lives and remove some of the bitterness and allow a degree of normalisation. Further, most countries around the world including Kenya, are signatories to the International Human Rights Conventions that oblige the provision of fair and an adequate compensation to victims of human rights abuse.[87]

One significant dimension in the South African TRC process was the critical role played by the civil society in engineering and catalysing the TRC process. The agitation

and eventual establishment of the TRC drew heavily from the civil society. In fact most of the staff of the TRC were recruited from the civil society. Transitional justice can be very problematic to pursue without the active participation of the civil society. Civil society produces a sense of public ownership in the process, it engenders dialogue and a degree of leverage on the government to allow the process to take its course and also on the implementation of recommendations. In Kenya, the prospects for the establishment of a truth commission process were jeopardised when most individuals who had previously served in civil society were incorporated into the NARC government This weighed down on the civil society's bargaining power as those 'left behind' seemed reluctant to confront or put pressure on their 'colleagues' in government. Indeed the civil society in Kenya has since remained dilapidated and weak in cushioning the government to maintain the pressure to implement some of the reforms promised during the 2002 campaign including questions of fighting corruption and dealing with the country's past. Civil society engagement is therefore essential for the success of transitional justice. The involvement of civil society is not only helpful in designing more satisfactory transitional justice programs, but also in their implementation. In countries where government institutions have repressed the population, people have little faith or experience in cooperating with them. Civil society in consultation with the government is therefore often well placed to deliberate on, design, implement and monitor some of the transitional justice programs.

6.40 Economic Crimes as a Human Rights Abuse

In most African Countries including Kenya, corruption has, since independence, served to seriously hinder the growth and realisation of people's economic rights, which in turn has affected the promotion and protection other broad human rights. By diverting public resources from their intended use to private benefit, those in public offices deny members of the public their legitimate rights and cause them hardship. Those who are seriously affected in most cases are the poor who always remain most vulnerable. Corruption in most African countries including Kenya has lead to the infringement of civil and political rights by tilting the scales of justice in courts, undermining the electoral process and access to public service. During Kenyatta's and Moi's regimes, and even to some extent in the current Kibaki government, corruption has resulted in widespread patronage, big

man syndrome, sycophancy, inefficiency in the civil service and the loss of confidence in the state institutions by the citizenry. It is for this reason that some have called for the inclusion of economic crimes among the most serious crimes of concern to the international community as a whole (Mwaura: 2006). In poor countries, the consequences of economic crimes are as damaging as many other gross human rights violations. Misappropriation of public funds has resulted in the starvation and death of hundreds of people in such areas as the North Eastern Province of Kenya, who would have otherwise survived had the money been rightly used.

Under international law, the most serious crimes of concern to the international community as a whole include crimes of genocide, war crimes, crimes of aggression and crimes against humanity. Such crimes can be tried anywhere, in any country, regardless of where the crime took place. There have been suggestions that cases of economic crimes should also be declared an international crime (Dicklitch: 2004). The United Nations has in fact initiated the *Convention Against Corruption* that has been signed by more than 100 countries, including Kenya (United Nations General Assembly: 2003). The declaration of corruption as a crime against humanity has created the hope that it will help in combating corruption because those who participate in it would have to think about the consequences that would now include not only domestic prosecutions but also international trials. The declaration would also make money laundering, which greatly informs cases of corruption more arduous and daunting to pursue. The rationale behind the campaign to consider corruption a crime against humanity is that economic crimes has been one of the greatest causes of deprivation particularly in third world countries. Corruption is seen to threaten the rule of law, democracy and human rights because it undermines governance, fairness and social justice. It distorts competition, hinders economic growth and endangers the stability of democratic institutions and the moral foundation of society. Corruption is universally viewed as a major cause of poverty in Africa as well as crippling the growth of on African economies

One challenge that faces the effort to declare economic crimes as a crime against humanity is the difficult in proving that the perpetrators of such crimes set out with the intent of harming others. This aspect of intent is a central consideration in criminal justice

processes, the act of *mens rea*, or guilty mind, the state of mind or intention of the defendant to cause harm that a prosecutor must prove in a criminal case

6.41 Truth Commissions and Economic Crimes

Most of the past truth commission including the South African example have generally not dealt with questions of corruption and economic crimes in their mandates. In South Africa, the economic effects of apartheid were not centrally considered as part of the gross violations of human rights.

However there have been a few exceptions including cases like Chad, Ghana and Liberia where a range of economic crimes formed part of the investigative mandate of truth commissions (Hayner and Bosire: 2003). In Chad in 1990 the then newly installed President Idriss Déby decreed the creation of a Commission of Inquiry into the Crimes and Misappropriations Committed by ex-President Habré, his accomplices and/or accessories. The commission's mandate included an attempt to audit the financial operations and bank accounts of those who were to be investigated as well as take inventory of all their goods and properties, both in the country and abroad with the view to determining the extent of the misappropriations of public resources (USIP Library: 1999). The commission carried out a comprehensive investigation into the violations committed under Habré and made a public a report in which it recommended, among other things, that judicial inquiries should be conducted and that those responsible for violations should be brought to justice. The economic crimes for which testimony was given included the stealing of the houses and other personal property belonging to persons who had been arrested. The commission determined in its final report that the orders to plunder came from higher officials of government. The report published the names of plunderers and listed the items they stole. The Commission made recommendations including ending illegal confiscation of private possessions and restitution of such properties, confiscation of property belonging to persons deemed guilty of plundering the state, vetting of public officials charged with abuses of office, and prosecuting the accused perpetrators (Amnesty International: 1996). Unfortunately, none of the recommendations were ever implemented. In 2000, some lawyers wanted to

launch legal proceedings in Senegal in an attempt to recover some of the money that Habré embezzled, but the Chad government was not ready to finance that operation.

In the case of Ghana, the drafting of the legislation for the creation of the National Reconciliation Commission (NRC) (Government of Ghana: 2004) had earlier included a provision for prosecution of corruption. At the time, the International Centre for Transitional Justice (ICTJ) recommended against including such a provision (in a memo to the Attorney General, in response to his request for comment on his draft bill) (Hayner and Bosire: 2003). ICTJ based this recommendation on the skills and resources that would be needed to undertake both inquiries by one commission, and the risk of distracting from the serious civil and political human rights abuses that took place. Ghana proceeded to exclude the economic aspect from the NRC mandate, and instead turned to a Serious Fraud Office (SFO). However, despite the clarity of the NRC mandate, the public hearings of the Commission included a fair share of economic crime hearings, partly because there was a significant amount of politically motivated property seizure that was accompanied by harassment and unfair arrest.

In Liberia, a Truth and Reconciliation Commission created under a comprehensive peace agreement signed in August 2003 by Liberian warring parties and civilians in place of a war crimes tribunal and subsequently enacted into law by Liberia's past power-sharing transitional parliament in June 2005 came into force in June 2006. Among its objectives was to receive and collect information on human rights violations of any kind whether as witness or victim including massacres, killing, looting, rape, arson and also on economic crimes and corruption. This commission is still underway (Pantesco: 2006). Generally in all the above cases the final reports did directly address aspects of economic rights particularly in their recommendations.

In general, the idea of including corruption or economic crimes in truth commissions provides an example of a possible approach that was not taken in South Africa. In a case like Kenya, economic crimes have been as prominent as the violations of civil and political rights. There is therefore the possibility that such crimes can be pursued through a truth commission process. There are however, various potential risks involved in including economic crimes within a truth commission’s mandate. The methodology and timing required for investigating corruption and economic crimes are

quite different from those required for investigating individual or systematic practices of torture or killings. There is need to take into consideration the issue of logistical barriers and organizational challenges presented by one body investigating both numerous human rights violations and complex issues of economic crimes and corruption. In addition, there is the likelihood of focusing too much on one dimension while leaving the other under-attended or expanding the mandate of the commission so broadly that it may be impossible to reasonably complete its task. One option is for the truth commission to develop an economic crimes division within the structure of the truth commission, which can take on a largely separate investigation into the problem of economic crimes. Given the complex nature of corruption and economic crimes in Kenya, it would appear that investigations could be served better by separating the broader questions of economic crimes from those of civil and political human rights.

There is no doubt that in a country like Kenya, addressing economic crimes is central to dealing with the problem of past impunity. The economic crimes have directly affected the people and limited them from realising their potential. The country has witnessed blatant looting of public funds, grabbing of public land and property, besides violations of civil and political rights (arrests, torture and politically instigated ethnic clashes). There have been a number of commissions of inquiry in the past examining certain specific cases of these economic crimes and human rights abuse but their reports have rarely been made public. It is out of the South African TRC that Kenyans borrowed the idea of agitating for a comprehensive truth and reconciliation framework to investigate past human rights abuse and economic crimes. It is apparent that if Kenya were to deal with both questions of past human rights abuse and economic crimes through a truth commission, then it will have to deal with the particular challenges of defining precisely the parameters of its investigations given the extent to which economic crimes permeated the society.

Generally, there are both challenges and benefits in going beyond the South Africa TRC to include economic crimes within the scope of a truth commission. The challenges include the prospect of considerable increase in the commission's work and costs. It is possible too, that a detailed examination into the vast levels and forms of economic crimes may distract the commission's attention from other human rights abuses

like torture, killings, illegal detention, and politically-motivated ethnic clashes or vice versa. It is also apparent that investigating questions of economic crimes and corruption would require an entirely different pool of investigators, who would have the skills, experience, and means to look into the shady world of economic crimes and the international dimensions to these crimes. The typical approaches of past truth commission of taking individual statements and holding public hearings may not necessarily be appropriate for the dealing with economic crimes, which in some cases involve the secret hoarding of money in foreign bank accounts and property. The other question that would arise if one follows the South African example is who should be compensated for these economic crimes given that they affected majority of the population. One approach is to perhaps limit the compensation to victims of civil and political rights only.

6.50 Prospects for Criminal Prosecutions.

Some legal scholars and human rights activists have challenged the notion of truth and reconciliation and its restorative justice approach and argued that this idea is increasingly being used by the emerging political elite to manufacture legitimacy for truth commissions, and that this is sacrificing the principle of human rights and accountability with the language of political compromise (Wilson: 2002). This argument is fortified by the belief that retributive justice can in itself lead to reconciliation, in the sense of peaceful coexistence and the legal, non-violent adjudication of conflict. The question that arises from Kenya context is whether pursuing prosecutions and civil claims for compensation can have more advantage in fortifying the rule of law and respect for human rights? Carlos Nino (1996: x) has argued that some measure of retroactive justice for massive human rights violations helps protect democratic values. He states that an aggressive use of criminal laws can counteract the tendency towards unlawfulness, negate the impression that some groups are above the law, and consolidate the rule of law. In his view some degree of investigation and prosecution of massive human rights violations is necessary. Orentlicher (1991: 2537 -2548) adds that there is an international law imperative to prosecute and therefore it is the method of choice in dealing with the past

which necessarily ranks above all other methods such as truth telling, which to him, salutary as they may seem, cannot be a substitute for enforcement of criminal justice.

In Kenya there have been campaigns grounded in similar convictions advocating for prosecutions and the punishment of past human rights abuses. Kiraitu Murungi, Former Minister for Justice and Constitutional Affairs fell into to fall into this category earlier on when the NARC government took over power. He had remarked at the time,

> It is now an internationally recognized fact that transitional justice is an inescapable imperative for countries emerging from decades of gross misrule, abominable human rights violations, and large-scale plunder of public resources, shameful graft, and theft of public wealth…We must also understand and accept the fact that no one is above the law, whether in the government or outside of it. The question is not whether we will confront our past. We are already doing that…in the anti-corruption crusade, with new measures to prevent and punish the theft of and plunder of public resources by the state and those who served in it (Murungi: 2003).

There have been arguments in Kenya that since some of the cases of corruption and economic crimes are documented, what the country requires is not a public truth telling process but rather immediate and dramatic criminal prosecutions. An opinion poll commissioned in late 2003 by one local newspaper showed that an overwhelming majority of 70% of Kenyans were demanding the arrest and prosecution of those implicated in torture, political murders and other human rights abuses as well as those involved in the theft of public funds (Cited in Kiage: 2004: 112). Only a minority of about a quarter of those interviewed were willing to forgive and forget or to grant amnesty to the perpetrators (Ibid). John Githongo, a permanent Secretary in the Office of the President in charge of Ethics and governance (from 2003-2005) and former Executive Director of Transparency International-Kenya, however argued for the need to avoid prosecutions of perpetrators of past crimes.[88] He stated that the government had made a 'hard political decision' not to pursue or target former president Daniel arap Moi personally for such a strategy would have been counterproductive as it would only provide a transient media frenzy but will not help in the recovery of the billions of shillings (estimated at $1 to $4billion) stolen during Moi's rule. He also said that the government recognized Moi as 'a unique democratic commodity for having handed over

power peacefully…a unique example, not only for Kenya, but for Africa as a whole' (Nation Reporter: 2003). The question that emerges is what are the prospects for prosecutions in Kenya?

In South Africa, there have been very few successfully post TRC prosecutions. Critics have attributed the limited number of successful prosecutions to the lack of political commitment, although such a process is also likely to face other challenges like assembling competent and impartial resource manpower, (there was no process of lustration in South Africa, which meant that the old judiciary remained in office and the vast majority of members of the security forces and civil servants remained in their jobs) and given the number of cases that are likely to be prosecuted, the costs of sustaining such prosecutions with no guarantee of success may sound prohibitive. Moreover, the passage of time has led to the disappearance of dockets and evidence, fading memories, the death of witnesses and indeed the death of perpetrators themselves (like the case of Gideon Nieuwoudt who died in 2005) making prosecutions much more difficult.

Kenya's post 2002 situation was largely informed by a continuation of the status quo, where some of the perpetrators of past human rights violations and their sympathizers continued to occupy crucial positions in the new political dispensation making possible investigations and prosecutions likely to be very problematic. It may be indeed the case that criminal justice plays a significant role in furthering the objectives of the rule of law. Proponents of criminal justice would argue that prosecuting perpetrators of past crimes would serve as an institutional response to enhancing the prospects for establishing the rule of law and signalling that no individuals are outside the reach of legal accountability (Human Rights Watch Publications: 2002).

There is, however, a broad range of factors arising out of Kenya's past and present contexts that make it difficult to pursue prosecutions successfully. Prosecutions are by their very nature expensive. They will require judicial infrastructure and resources: judges, courtrooms, security, lawyers, investigators, detention facilities, so that the process and cost of embarking on criminal prosecutions would itself be tedious and sizable. In any case the backlog of cases in the Kenyan judiciary is a matter that has been well known in the public domain. There are just not enough judges and magistrates to handle the many cases, both civil and criminal, that would arise out of past human rights

abuses and economic crimes, which would otherwise create enormous pressure on the court system and make it almost impossible to succeed. In some cases the evidence has been destroyed while various witnesses have passed on and others eliminated. Some of the perpetrators of past human and economic crimes still wield influence, and besides the possibility of them using their leverage to hamper court processes, they are also capable hiring very good lawyers who would have enough ammunition to punch holes in the prosecution strategy by challenging it on a multitude of legal grounds ranging from bad faith, abuse of discretion, discrimination, limitation, all manner of estoppels, unconstitutionality to violation of international law (Kiage:2004: 114). Moreover cases of asset-tracing and recovery of looted resources are much more complex as attested by the NARC government's initial to efforts to recover money that was illegally acquired and taken out of the country. The government spent well over 20 Million Kenyan Shillings (approximately 273 973 US Dollars) to track the stolen billions stashed in foreign accounts with little sign of success (KBC Reporters: 2005). The perpetrators of such economic crimes are able to hire top lawyers and transfer money to other accounts once they realise their accounts are being tracked. Albert Mumma, a lawyer, says that in Kenya's case, assets allegedly acquired by means of corruption can only be confiscated once a myriad of legal processes has been followed and that the state needs to prove beyond doubt that the cash or property concerned was obtained through graft. He adds, 'This would take a long, long time to prove, we would be sitting in court hearings for years' (Cited in Taylor: 2006).[89] Kiage (2004:14) observes that during Kibaki's time in power there has been no flood of cases dealing with the past being filed in the Criminal Division because there is just 'not enough time or resources to re-open files long-closed or open new ones in pursuit of trails long cold and dead.' He adds that were the Kibaki Government to attempt to uncover the past through criminal prosecutions, the government may long have been shunted out of power before the first batch of cases are complete. To Kiage, a responsible government would be hard-pressed to commit scant investigative and prosecutorial resources 'on exhumations while warm corpses abound with current culprits within reachable grasp' (Ibid). Kiage was alluding to accusations about the various cases of corruption that have been levelled at the current regime. From the South African experience, we know that an in depth investigation and prosecution of

crime in order to establish a person's guilt beyond reasonable doubt is time consuming and resource intensive. No criminal justice system can function if, as a result of a change in power and policy arising from a political transition, it is suddenly required to prosecute tens of thousands of crimes committed in the past (Van Zyl: 1999: 647). While the public may want perpetrators of past human rights abuse and economic crimes in societies undergoing political transition to be prosecuted, it appears the chances of success for such a strategy are quite restricted. Countries in transition are unable, due to a combination of factors, to prosecute most of the perpetrators of human rights violations in a past regime. Van Zyl argues that in South Africa, the amnesty provision, apart from being an absolute desideratum for a smooth handover of power, which rendered prosecutions undesirable, was inevitable due to the 'impracticality, indeed impossibility, of prosecutions due to systemic incapacity, probative difficulties as well as monetary and time constraints with the spectre of uncertain outcomes' (Ibid). While in principle Van Zyl appears to support prosecutions, he observes that the struggle for human rights dare not be confined to one set of institutions or one approach to dealing with the past (Ibid).

One of the reasons why general prosecutions could not be pursued in South Africa was because of the fear that it could threaten the peace and stability of the country. It worth noting that Kenya could actually pursue prosecutions without animating similar national fears. In South Africa it was felt that some elite from the former regime would not allow themselves to be dragged through criminal or civil proceedings without fomenting violence. In fact, the National Party categorically refused to allow the political transition and the first democratic elections without a constitutional guarantee that amnesty would be granted (Simpson & Van Zyl: 1995: 394-407)**.** In Kenya the threat of national reprisals by members of the former regime would have been quite remote given the new government's control over the country's security system. Moreover, in Kenya unlike South Africa, it is mainly the politicians and their associates rather than members of the security system who have been responsible for most of the economic crimes and human rights abuse. This is not to deny the role played by some sections of the security system especially the Criminal Investigation Department (CID) in acts of human rights violations such as torture and political assassinations. But it was mainly the politicians

and their cronies who capitalized on their political influence to manipulate sections of the national security into violating the human rights of those opposed to them.

Despite the potential contributions of prosecutions, various governments that have attempted to deal with past human rights abuses, have typically ended up emphasizing a blend of truth telling, amnesty, reparation and prosecutions. Ultimately, the absence of functional institutional infrastructure and coupled with deep societal divisions in transitional contexts renders criminal justice measures less appealing as a transitional justice framework.

For other societies interested in dealing with their past, it calls for a delicate balance between various policy options. The most recent development has been the approach of complementing truth commissions with judicial mechanisms. Examples include the truth commissions that have supportive judicial processes like in the two cases of East Timor[90] and Sierra Leone,[91] where special courts were established to prosecute the perpetrators, while the truth commissions provided the victims with a forum where they could narrate their experiences and make sense of their lives during the past conflict. These commissions adopted a more forward-looking approach and made extensive recommendations for peace-building and reintegration into society of those accused of less grave crimes. These examples show that while the South African TRC was responsive to South Africa's past, other relevant societies cannot be limited to it, but they should rather aim to draw from it and other transitional justice cases while taking into account their own unique needs.

Juan Mandez (1997: 15) states that truth commissions can complement prosecutions and adds that societies that are in a position to provide both truth and criminal justice should be encouraged to pursue both objectives as much as they can. Similarly for other societies in transition, there is need to situate any likely transitional justice framework within an expanded vision that considers not only legalistic concerns but also other complementary avenues through which a more practical and purposeful process of accountability for past crimes can be pursued. There is need not only to think about the South African TRC approach, but rather what is necessary and possible to their contexts.

6.60 Economic Crimes and Amnesty Provision

Given the difficulties in a context like Kenya in pursuing corruption and past economic crimes through criminal justice processes, the challenge then becomes how to deal with these types of crimes in a more productive way? Eventually one overriding consideration may be to secure the stolen assets. Corruption in Kenya has remained the single largest contributor to structural inequalities, extreme levels of poverty and the decayed state of the economy. According to Julius Kiplagat Kandie, Kenya's ambassador to the United Nations agencies in Vienna, Kenya has lost between US$3 billion and US$4 billion to corruption (United Nations Office on Drugs and Crime Newsletter: 2005). One meaningful approach to dealing with corruption and economic crimes would be to help recover stolen property or public funds and either return them to their rightful owners or to the state to help rebuild the economy.

There are, however, various obstacles that are likely to confront any framework that seeks to recover proceeds of corruption in a country like Kenya. Some of the practical challenges relate to difficulties in making a connection between the property and funds to the alleged act of crime. Given the likelihood of corrupt individuals concealing their identities in such deals or transferring their looted funds to other countries and using third parties to sign off on their accounts, any effort to trace the funds and proof the link between the origins of funds with the crime alleged is likely to be either difficult or long and tedious. Generally the process of tracing, seizing and repatriation of proceeds of corruption, as witnessed by one attempt earlier on in Kenya,[92] can become so expensive to the extent that it becomes necessary to consider whether the estimated costs associated with the recovery process are worth commencing the process at all. An official of Kenya Bankers Association Joseph Wanyela asserts that it would be difficult to trace illegally acquired money deposited particularly in Kenyan banks, as there is currently no law that supersedes the confidentiality clause binding these banks to their customers (Cited in Taylor: 2006). In addition, legislation is required to define how persons, who unknowingly bought property from those who obtained it through graft, should be treated. Wanyela adds that the government cannot act without thinking of the consequences lest it opens itself up to possible costly lawsuits (Ibid).

Can the provision of conditional amnesty be meaningfully applied to recover stolen property or public funds and under what conditions? Recovery of stolen assets would certainly be a problem if it is directly connected to criminal prosecutions. This has been quite evident from one of the Commissions of Inquiry set up by the Kibaki administration to investigate the 'Goldenberg scandal' that entailed a fake gold export compensation in which the government lost billions of Kenyan Shillings during Moi's rule. The Commission's inquiry was held in public and did uncover the intricate web surrounding the looting of public funds from the Central Bank of Kenya. In the Commission report, the Chairman Justice Samuel Bosire however observed that a lot of money had been siphoned out of the country by the Goldenberg scheme, but that the Commission was unable to trace it (Taylor: 2006). It would indeed be difficult to recover such money through criminal justice. A way out is to probably carry out detailed investigations in order to gather sufficient information about those past corrupt practices and if possible freeze the assets. Then with a damaging dossier ask the suspected corrupt individual to voluntarily return the money and receive amnesty or be prosecuted. This way, corrupt individuals are more likely to cooperate.

What Kenya can learn from the amnesty provision of the South Africa TRC is to use it as a leverage or credible threat to have individuals cooperate in the truth telling process or in the repatriation of stolen national assets. Those who fail to cooperate should then be threatened with prosecutions and such other measures like prohibition from holding of public office. Otherwise, considering the legal and political challenges in countries like Kenya, it may be counterproductive to merely embark on criminal prosecutions.

6.70 Revisiting the Question of Responsibility

One crucial challenge in most transitional justice contexts is the problem of assigning responsibility for past human rights abuses. In South Africa the TRC Act defined responsibility broadly to include both the command and leadership structures although regrettably the actual TRC process did not sufficiently nail down responsibility to these command and leadership structures. Instead it focused on individuals and this failed to incriminate the structural arrangements in perpetuating conflict and human rights abuse.

Just like the case of South Africa, the ethical challenge of assigning responsibility in other societies undergoing transition is bound to be complicated. In a case like Kenya for instance, corruption and economic crimes have typically been fostered through patronage and Clientele networks to the extent that most of the individuals in government institutions have inevitably been drawn in (Githongo: 1998). Corruption has become deeply embedded in the law enforcement system and in the weak political and administrative structures. This has in most cases, served to blur the distinction between individual and collective responsibility.

6.80 Lessons on Non-implementation of Recommendations.

A major concern over the South Africa has been the non-implementation of its recommendations particularly on reparation programs. The South African TRC recommended several forms of non-monetary reparations including the provision for symbolic reparations and community rehabilitation programs to facilitate the communal process of remembering and commemorating the past, improving schools, providing mental health and medical services, and providing housing. It is however monetary payments to victims of gross human rights abuse that has remained largely unfulfilled.[93] While the state has taken effort to promote symbolic and communal forms of repartitions, victims of apartheid's worst abuses today still wait for the payment a greater share of the financial reparations from the South African government. The government paid out approximately 2000 Rands (then approximately $300) to each of 17,100 victims (Amnesty International and Human Rights Watch: 2003), but it has since failed to pay the final reparations grants. As observed earlier in Chapter Four, this failure is partly attributed to the government of President Thabo Mbeki, which has argued that the freedom struggle was not for financial gain. It is also possible that the staggering financial obligations in meeting such needs as medical care, housing and education have become urgent in competing with other obligations such as reparations. Nonetheless, the non-implementation of the TRC recommendations has had a negative perception about the whole TRC process especially by victims of past human rights abuse. It has led to a feeling of betrayal toward the political elites who benefited from the political transition.

Reflecting on the possibilities of a similar scenario happening in other transitional contexts that are interested in following the South African TRC, it would similarly confound the need for similar processes if the recommendations were not going to be implemented. The challenge for other countries considering similar processes is to be clear about what they want and to assess what socio-economic and political resources they can draw upon to develop an intervention process that is sustainable, one which will not create tensions of non implementation of recommendations later.

6.81 Leadership Styles

Beyond the limitations of the TRC comprising such concerns as victims receiving poor administrative treatment, limited reparations and psychological support, (Hamber: 2001). The TRC embodied a restorative and reconciliatory spirit. It was a period in which a new democratic ethos gripped the country and values such as reconciliation found their way into the body politic. More than anything else, the TRC initiative was a mark of Mandela's presidency, the creation and consolidation of what is sometimes called the democratic 'software' (Lever and James: 2000: 198). This initiative was reinforced by Mandela's concern with reconciliation between the former enemies and the peaceful coexistence of South Africa's different population groups. Lever and James observe that under the presidency of Thabo Mbeki, the national agenda has taken a different turn, which may partly due to differences in political leadership styles, but also due to the fact that South Africa may be stabilizing democratically (Ibid). Concerns of the general public have therefore shifted away from a focus on ending years of active political conflict through compromise to concerns about delivery of services and changing the fundamental structures of inequality in South Africa.

It is apparent that leadership, both symbolic and real can influence the direction of a given social intervention process. Tom Lodge (1999: 10) writes that in new democracies, the quality of political leadership matters more than in established political systems. He observes that 'however carefully scripted the constitutional safeguards may be against the abuse of power, institutions are still fluid and susceptible to being shaped by dominant personalities'. Thus Mandela's reconciliation agenda brought South Africa through the transition with relative political stability. The Mandela and Tutu approach of

emphasizing reconciliation and forgiveness animated humanity and compassion in an extremely brutalized country (Lever and James: 2000: 198). Despite the horrors revealed by the TRC, glimmers of compassion and forgiveness underpinned the aspiration for a shared future. It made the vision of a new society seem attainable.

The example and the stature of both Nelson Mandela and Desmond Tutu therefore contributed immensely toward the TRC process. Both gave the TRC a moral bearing through the insistence on forgiving. Without Mandela's example of forgiving his perpetrators after twenty-seven years at the hands of the apartheid state, it is possible that many would not have found the TRC a constructive idea and it would not have carried the great weight that it had. Archbishop Tutu too gave the hearings moral leadership with his emphasis on forgiveness and reconciliation. He brought to the process his own religious beliefs, which, though criticized by some, made the process very much about 'ubuntu' or 'humanness.' Political and moral leadership were central to the operation of the South African TRC process and other relevant contexts that are interested in a similar process, will equally need individuals with the political and moral capital to deal with the potential challenges to the process. Looking at the example of Kenya, the TRC process aborted largely because of lack of moral and political leadership. The new government had many individuals who had served in previous regimes including the head of state. The quest for a truth commission in Kenya suffered not only because of the NARC government's internal wrangling, but also because the head of state did not want to give the truth commission process leadership for fear of incriminating many of the members in his government.

6.90 Conclusion

The South African TRC is bound to continue drawing interest in other societies undergoing political transition in the near future. This chapter highlights some of the prospects and possible challenges in replicating the South African TRC in other contexts like Kenya. It underscores the need to promote transitional justice approaches that take cognisance of the unique context of each situation. While the South African TRC can be considered as an illustration of how to deal with issues of past conflict and human rights abuse, it cannot be promoted as a one-size-fits-all to other contexts.

Ultimately, the precise mix of the various transitional justice policy options to be pursued by any given country, depend on the needs of the given context and the ability to pursue those needs. At the heart of this analysis is the belief that there is need to move beyond the assumption particularly by other African countries that the South African TRC is the standard approach which should be adopted in other contexts. What other relevant societies can do is to draw relevant lessons from the South Africa TRC but the specific nature and mandate of the transitional justice framework should take into consideration the distinctive differences in contexts.

Samuel Huntington (1991: 215) observes that those who want to deal with the past should recognize that on the issue of prosecute and punish versus forgive and forget, each alternative presents grave political, ethical and legal problems, and that the least unsatisfactory course may be 'do not prosecute, do not punish, do not forgive, and above all, do not forget'. The conclusion that follows from this chapter is that the South African TRC offers useful lessons about how to deal with conflict and human rights abuse, but is not the final word. Ultimately, other countries' transitional responses should be contingent upon a number of factors, including the legacy of their own pasts, the nature of their transition and socio-economic and political resources at their disposal.

CHAPTER 7: CONCLUSION

7.10 Introduction

This study examines the South African TRC from a conceptual framework of conflict transforming. It was motivated by the propensity by individuals and countries around the world that espouse the South African TRC as the central framework which moved the country away from its past conflict toward 'national unity.' This assumption raises significant questions about the role of the South African TRC in the transformation process. The study's previous chapters cover several thematic areas to this debate. This conclusion will review and integrate the insights developed in all the preceding chapters and draw some tentative conclusions regarding the theoretical and practical implications of the study.

7.20 Retrospect

The value of this study lies in its assessment of the South African TRC from the conceptual framework of conflict transformation. It sought to answer the following questions,

- What is the nexus between the South African TRC and conflict transformation?
- Does the South African TRC vindicate the conflict transformation model?
- An added goal and secondary concern will be to underscore the implications for treating the South African TRC as a normative example to be followed by other countries.

To answer the above research questions, the study inquired into and assessed a broad range of issues that were systematized into six chapters namely, the setting of the study, theoretical and conceptual debates on the conflict trajectory in South Africa, theory on transitional justice, the case of South Africa's TRC, the South African TRC and Conflict Transformation, and the South African TRC Paradigm: Drawing Lessons for Other contexts. The thematic areas that each of the above chapters cover are wide and the fundamental aspect was to identify and discuss themes that were relevant to the study's questions and objectives. Although each of chapters introduces a different theme for debate, there are frequent overlaps and linkages.

Several specific conclusions were arrived at. While chapter one provided the introductory debates on the study's setting, chapter two reflected on the variety of theoretical discourses on transitional justice policy options available for countries that are moving away from periods of protracted conflict and human rights abuse. It observed that in transitional contexts, the challenge of dealing with the problem of past impunity constitutes a grave practical problem. In making choices for dealing with the legacy of past impunity, societies in political transition face an array of challenges including competition between the various forces of power that represent the quest for amnesty and those that represent the desire for retributive justice. Eventually, it is this balance of forces that in most cases determine the type of transitional justice policy option that the new government adopts. The chapter underscored the need for each transitional context to critically examine its own needs and moor policy options, so that they are relevant to that context. In conclusion, the chapter discouraged the one-size fits it all approach but emphasized that developing a transitional justice strategy is an enormous political, ethical and legal challenge that calls for a balancing of a variety of competing and legitimate interests.

Chapter three examined the patterns of conflict and human rights abuses in South Africa and outlined the context in which they found expression. It observed that conflict is an intrinsic, inevitable and unavoidable aspect of human interaction, and that while it can play a positive role in acting as a springboard for social change, social conflict can be dangerous when it turns violent. Violent conflict can cause widespread destruction of property and the loss of human life. The broad aim of the chapter was to provide an overall understanding of conflict while also creating a platform for understanding the challenges involved in dealing with the problem of 'past conflict and human rights abuses.' Conflict and human rights abuse take on an entirely different dimension, when parties that have been violating each other live in close geographical proximity and have a shared history. Such conflicts are particularly difficult to handle because tangible issues such as the unfair distribution of national resources are embedded in the larger set of social values, beliefs, identities, and cultures. There is, on the whole, room for alternative interpretation within the South African context on how the conflicts and human rights abuses were perpetrated and with what effects. As a conclusion, the chapter emphasized

the relevance of the specific nature of conflict and human rights abuse in South Africa, dictating the meaning and direction of the transition and transitional justice process that was adopted.

Chapter four examined the specific case of the South African TRC and the way it blended a variety of policy options in the effort to deal with the country's legacy of the apartheid past. The chapter critically assessed the contribution of the South African TRC against its own stated objectives and also from the prism of some of the victims, perpetrators, officials of the TRC and other knowledgeable people on the subject. The aim was evaluate the TRC's theoretical and practical relevance in dealing with South Africa's protracted past. The chapter delineated some of the challenges in assessing the TRC's contribution towards questions of justice, the rule of law, reconciliation and national unity. The bottom-line was that these targets constitute intangible issues whose success or failure is difficult to quantify. It was also observed that TRC process coincided with the larger democratisation process and it is difficult to divorce the two processes and their contribution toward the conflict transformation process in South Africa. On the whole, the notion promoted by the TRC of a reconciled rainbow nation may have unwittingly induced in the public mind a false sense of hope and ideal unity given that over ten years down the line, the South African society, albeit having moved away from the past conflict, still suffers from social and economic divisions. But one thing that cannot be taken away from the architects of the TRC is that in principle they may have had well-meaning intentions of 'promoting national unity and reconciliation.' This however ran into problems when it came to actual practice.

Chapter five examined the nexus between the South African TRC and the process of conflict transformation. The chapter observed while the South African TRC is increasingly being regarded as a critical instrument for conflict transformation and building sustainable peace, in itself it remains insufficient. The complexity of dealing with questions of past conflict and human rights in South Africa demonstrate the difficulties in transforming a society toward sustainable peace. The theme running through the chapter is that conflict transformation needs to be premised on a clear understanding of the linkage between social, political and economic dimensions. To seek to transform conflict in a manner that detaches these inter-linked components from one

another, will merely create a recipe for new sources of conflict. In the absence of an integrated approach, the process of reconstructing the economy will for instance remain vulnerable to social and political conflict and vice versa. Conflict transformation therefore encompasses processes that go beyond truth commissions to involve fundamental changes at all levels of society. They need to target all aspects of the state. In the end conflict transformation becomes a continuous process that seeks to establish a stable and fair socio-economic and political equilibrium in society.

Chapter six examines the assumptions about the South African TRC being the standard practice and paradigm to be followed. This question is all the more critical given the way in which the South African TRC has been espoused and used to justify the demand for similar process in other countries around the world undergoing political transition. Yet this is despite the fundamental and distinctive differences in the contexts of these countries. The chapter highlighted some of the prospects and problematic areas in transferring the South African TRC across varying contexts by extrapolating it into the Kenyan context. The chapter concluded that while the South African TRC can be considered as an example of how deal with issues of past conflict and human rights abuse, its framework cannot simply be transferred to other contexts. It is one example, among others, from which transitional societies can draw lessons in dealing with their own unique needs

In the next section of the conclusion, the study makes analytical judgements about the South African TRC from the data collected and weighs it against the conflict transformation framework. It treats inferences that run contrary to those predicted by conflict transformation as falsification while those in agreement are taken as corroborating the assumed relationship between the two. The study analytically compares the explanatory value of the competing sides to the debate and then makes interpretations and tentative conclusions on the assumed relationship between the South African TRC and conflict transformation.

7.30 Overview of the Research Findings

To complement secondary data, the study gathered primary data from which a number of issues and running themes emerge. It is apparent that there were various understandings

of certain questions relating to the TRC. A number of TRC officials including Tutu maintained that TRC played a powerful role in healing the post-apartheid South Africa because those who came to confess contributed hugely to the process of 'healing and reconciliation' because they accepted moral and political responsibility. The South African TRC was seen to have widened the conception of justice away from the narrow legalistic lenses of retribution toward restorative justice. Punishment is this case was seen as one instrument for dealing with questions of crime but not the only or even most important one. The TRC was seen as 'a necessary evil' because the other policy options of prosecution or general amnesty would have been politically problematic. The other view that came through from the TRC officials was that the TRC played a significant role in placing the record of past atrocities and the need for reparations to victims and survivors on the national agenda (although it was regretted that the recommendations were not implemented in full). It was also evident from TRC officials that the South African TRC is seen in many countries as some sort of magic wand for solving problems of past conflict. It was however cautioned that while the South African TRC can inform and influence other contexts, it is neither possible nor desirable to impose the South African model on other distinctively different contexts. A number of TRC officials argued that to promote sustainable peace and reconciliation in South Africa, there was need to address the prevalence of structural inequalities.

For victims (used loosely in the simply binary division as adopted by the TRC), the concept of reconciliation had diverse meanings. Some saw it as forgiveness, others as measures to better their lives (there were several cases of victims/survivors and ex combatants arguing that they could not reconcile with 'perpetrators' (in this case seen in simplistic terms of 'whites') given the social inequalities which the victims/survivors and ex combatants continued to view as social injustices. While the TRC pursued a restorative approach, there were cases where victims/survivors and ex-combatants favoured criminal justice and punishment over the amnesty provision as a way of dealing with the 'perpetrators' over amnesty. (For instance one victim Vusi observed that he serious regretted Mandela's and the TRC's amnesty and reconciliatory approach arguing that 'perpetrators' needed to be subjected to harsh criminal punishment). A running sentiment expressed by most victims/survivors was that reconciliation and reparation

were integrally linked. A number of victims felt that the TRC largely raised the hopes and aspirations of the people but failed to realise tangible results (seen here in economic terms). Most respondents felt that the TRC process had not overcome the divisions that were created by the past conflict, race was seen as an issue that was continuing to perpetuate divisions. A perception came through that the different races in South Africa to a large extent still live in separate worlds. Other however acknowledged that participation in many national institutions had changed, although they argued that others like the 'big universities' still retained the image of the past. The TRC was considered by the victims/survivors as a process that rewarded 'perpetrators' through the amnesty process because they were left to go 'scot-free' while their victims continued to suffer from the effects of apartheid. Another view that came through was that the TRC discriminated against 'ordinary people' in rural areas while favouring high profile individuals.

A number of ex-combatants accused the TRC of deliberately criminalising the actions of the 'liberation struggle' by equating their activities to the apartheid crimes. This was especially captured by Letlapa Mphahlele, the former Director of Operations of Apla (Azanian Peoples Liberation Army), the military wing of the PAC, who equated his group's activities to 'a lady defending herself against rape.' He does not regret, neither would he apologise for Apla's operations that led to the death of innocent lives. But he argued that he was willing to 'reconcile' with those whose relatives he harmed by 'meeting face to face in order to mend relationships.'

From a number of individuals knowledgeable on the subject, and from my interactive sessions at seminars and conferences, a number of running themes were apparent. These include the argument that to understand the South African TRC, its dynamics, challenges and prospects, one has to look not only at the actual TRC process, but the entire course from the political negotiation to its actual implementation. The TRC arose out of a negotiated compromise and was initially intended to address the whole gamut of past atrocities. It however confined itself to the physically and repressive dimensions of apartheid rule and did not address the more structural sources of violence. This narrow focus on 'violations of the body' ignored the implicit wider mandate of the TRC Act, which included the wider structural violations of apartheid. The TRC was

nonetheless seen to have contributed to bringing to the public domain new information about past atrocities which was previously unknown and that this served to pre-empt sectional mobilization. The TRC is also said to have facilitated the process of acknowledgement for those with living memories of past atrocities. The other contention was that while the TRC is accused of not bringing about reconciliation as understood by various people, it nonetheless did not bring about trouble either as anticipated by others. While some of the victims believed that alleged perpetrators were not interested in reconciliation because they did not show remorse, the Act establishing the TRC and the amnesty clause did not include the condition to show remorse. It was also apparent from my interactive sessions that while the South African TRC is taken as a model elsewhere, ordinary South Africans remain skeptical and even sometimes cynical about it. They do not take it seriously because it is no longer central to current South African politics. As mentioned earlier in the methodology, a number of individuals approached were simply not willing to talk about the TRC and one of them curtly put it that 'that that was for other people to talk about.'

The question that emerges is to what extend did the South African TRC help the country in its transformation process? Or was it merely a euphemism for compromises made during the negotiations? From the study, it is apparent that while the TRC achieved certain objectives of conflict transformation, it was also limited from realising others. The TRC was set up to deal with gross human rights violations, to collect and make public such violations, to provide victims with a public space to talk about these violations, to address the legal standing of the perpetrators, to provide an understanding of the circumstances under which these violations occurred, to make recommendations that would address victims' needs and suggestions on how to prevent similar violations from occurring in future. The TRC mandate could be seen in two ways, inquiring into both the specifics of South Africa's past conflict and human rights abuse that were immediately apparent to the society, including the desire by victims to be acknowledged, as well as the potential for broader structural and institutional changes that were later suggested in the TRC's recommendations. In essence the TRC process sought to deal with the multiple perspectives and complex dimensions of the country's past conflict and human rights abuse. Its adoption of the conflict transformation approach sought to demonstrate that the

key to dealing with a country's past is to develop creative change processes that address both tangible and intangible aspects of the past conflict and injustices. The TRC embodied in its reconciliation agenda the need to deal with 'the aftermath' or 'residue' of conflict which is in line with the conflict transformation approach of addressing the traumas, fears, physical pain and hatreds that arise from conflict lest they poison the future of a country through revenge missions.

The South African TRC began on a positive orientation of willingness to deal with the country's past in order to promote 'National Unity and Reconciliation.' In principle, its conceptualisation was relevant to conflict transformation since it underscored the need to engage in innovative processes that would assist in transforming the country away from its past experiences of conflict and human rights abuse toward 'national unity and reconciliation.' The conditional amnesty represented an innovative idea of responding to South Africa's unique negotiated settlement. The critical point for South Africa was to find a way of dealing with the past without getting locked into a vicious cycle of generating more rifts and exclusiveness. The TRC with its amnesty provision was seen as the most viable option under the circumstances. This amnesty played an important contribution to the stability of the country as it ensured a level of cooperation from the right wing and prevented the derailment of the transformation process by conservative forces within the military and the police force who could possibly have violently resisted any attempt at criminal prosecutions.

The South African TRC played a role in changing the South African society in subtle ways while introducing both new opportunities and obstacles. From the study, it was clear that after the TRC process, not many South Africans could claim ignorance of how the past conflict and human rights abuses disrupted and destroyed the lives of many people. Amid much controversy and dispute the TRC allowed some people who had never been heard before, to be heard, victims and perpetrators of apartheid crimes, and victims and perpetrators of crimes committed in the name of the struggle. The TRC proceedings, televised live, provided the framework for multiple expressions to be spoken and heard. The symbolism that came out was that the commission 'liberated' some of the unheard voices. That it provided a forum for the articulation of different views about the basis of the new social and moral order. Those South Africans who

followed the TRC process became aware or gained some knowledge about the atrocities that occurred in the country. This was important because it contributed to the process of morally negating the perpetration of human rights abuses and helping to create a sense of respect and tolerance between the previously conflicting groups. It is reasonable to make a hypothetical argument that South Africa has become a more sensitive society on questions of human rights abuse as a result of an accumulation of ethical and moral insights, some of which arose from the TRC process.

It is true that the South African TRC came with the vision of a new society with new values. Indeed beyond its various limitations, the TRC embodied a restorative and reconciliatory spirit. The question that arises is the degree to which this 'reconciliatory and unifying spirit' that came out of the TRC contributed to effecting radical positive change. In structural terms, South Africa today remains a complicated society. A significant proportion of its structures reflect what existed in the pre 1994 period. While political power has changed hands and issues of racism and discrimination outlawed, voters to an extent continue to vote along racial lines, the majority of the poor are still black and white owned businesses continue to take up the lions' share of the economy. The legacy of the past continues to play itself out in the average citizens' view of the use of institutional violence. South Africans of all races advocate tougher measures to deal with criminals, they support the right to carry firearms, while routinely calling for vigilante action if police do not act in timely fashion (Hamber: 2003: 224-234). The culture of the past is still apparent. Moreover, the TRC was not by any means a smooth process. There were opinions by victims which indicated that they were not happy with the amnesty provision. There were for instance those who felt that perpetrators went before the TRC and got away for free while their victims continued to languish in poverty. To this lot, the TRC significantly compromised justice. From the documented research, it is apparent that many whites, particularly among Afrikaners, continued to feel that the TRC was a castigatory tool that targeted their community. The TRC's intervention generated divided conceptualisations that reduced its effectiveness in fundamentally changing the previous conflicting groups' attitudes and behaviour and social relationships. Relations between the various races have not fundamentally changed over the past ten years beyond the handful of the formerly disadvantaged who can afford

to share in what Nalha Valji (2004) calls 'the shopping mall culture of corporatist reconciliation.' The pattern of interaction amongst South Africans is well captured by Du Toit (2003: 11) who portrays it as one of 'daytime integration and nocturnal withdrawal' This characterization reflects the South African society that is trying to promote national unity but has to struggle with the physical barriers imposed by the legacy of apartheid. In Du Toit's words while South Africa has moved away from 'overt hostility and oppression, it is a far cry short of social cohesion or a shared identity' (Ibid). So while the South African democritisation process, set in place the TRC as an institution to deal with the country's past, there remains much work to be done to effect social, psychological and economic transformation. There is need to address a number of concrete issues to ensure that the path of transformation remains smooth. In particular, social inequalities, criminal violence and racial misperceptions continue to pose threats to the peace and stability of the country.

The TRC attempted to satisfy a wide range of competing interests and by so doing, rendered itself vulnerable to accusations of lacking a clearly defined or coherent approach to key questions of national unity and reconciliation. The competing interpretations of the TRC's underlying concepts and assumptions have continued to draw mixed accounts from the different stakeholders (victims, ex-combatants, alleged perpetrators, the government and the South African society at large). The TRC for instance simply divided the past conflict into a victim-perpetrator dichotomy, which in essence lacked a deeper understanding of the nature of the conflict and its effect on society. The apartheid conflict required a broader understanding of responsibility for abuses, which went beyond the simply binary division of victim-perpetrator. The TRC created expectations and made promises that it could not fulfil. Victims did not have a clear picture about what the TRC would ultimately give them in terms of the truth, reparations, justice and reconciliation. From the study, it was clear that most victims expected a level of reparations that would change their lives away from poverty. This was however not realised and it ended up being a false expectation. The time frame of this research study captures the period immediately after events marking 10 years since the establishment of the TRC. It is a period marked by a gradual process of fading hopes especially by the victims and ex-combatants. Most of those interviewed had started

realising that their expectations for further investigations and reparations were not going to be fulfilled the way they had hoped. While this period can be seen as pessimistic especially for victims and ex combatants, it does capture the contrast between the immediate expectations and the eventual reality of the TRC's process. It appears the non-fulfilment of reparations has caused especially the victims/survivors and the ex combatants to question the logic, purpose and sincerity of the whole process..

The study also established that the assumed linkage between the TRC and conflict transformation runs into a number of other practical problems. The competing interests between the various actors in the TRC process (victims/survivors, ex-combatants and alleged perpetrators and TRC officials among others) meant that there were different agendas being pursued, some of which undermined the transformation process. From the data collected, the dialectic between principle and pragmatism inherent in the TRC is apparent. The TRC promised national unity and reconciliation, but its actual practice generated diverse views on questions of justice, reconciliation and national unity among others. Eventually, it can be argued that some of what was commonly spoken of as reconciliation and national unity was built around highly symbolic events in the course of the TRC process. Indeed, to a good number of victims, the reconciliation agenda by the TRC revolved around symbolism rather than the actual reconstruction of their lives which they perceived in economic terms.

South Africa’s past conflict was embedded in people’s relationships and social structures. Transformation therefore had to be centred and rooted not only in personal relationships but also in the social, political and economic dimensions. The structural dimension of transformation highlights the need to deal with underlying causes of conflict by building and organising socio-economic and political institution to meet basic human needs, provide access to resources and decision-making processes. At a prescriptive level, the TRC’s mandate, other than providing recommendations, did not have the provision to change especially the socio-economic and political structures in order to meet basic human needs or to maximize people's participation in decisions. This fell under the purview of the government. The conflict transformation approach assumes that it is through such structural changes that the sources of a conflict can be altered permanently so that it does not recur.

In a context like South Africa, where different levels of society experienced different manifestations of conflict and where substantial damage was done to the existing relationships among members of society during the conflict, an intervention process that takes full cognizance of the various competing needs was crucial to the promotion of positive change. A short-term intervention such as that of the TRC could not engage with this level of structural changes. Although it would be mistaken not to acknowledge that some change was effected in the psyche of a significant proportion of South Africans through the public 'truth telling' process, the TRC in itself failed to effect broad structural transformations in the socio-economic facets of the society. In terms of viewing the TRC as a conflict transformation process, it may thus be most constructive to regard it as a starting point, a vehicle that has managed to bring out the various viewpoints, values, needs and interests and put them on the table. These are however only a subset of the long term transformation process in South Africa. Nonetheless, the TRC appears to have given the basic principles of story-telling and restorative justice greater legitimacy and public recognition around the world.

Broadly conflict transformation is a multi-level phenomenon that is dependent on different levels of structural change, individual subjectivity, identity and emotional considerations. In this sense understanding whether or not a conflict has been transformed can be a psychological process that rests on how citizens understand their relationships to others, themselves and institutions in that society. In the case of South Africa, this understanding especially to most victims/survivors and ex combatants has been placed in within the socio-economic context, but at the same time, it needs to be understood that this understanding is influenced by the social memory of the past and perceived social inequalities in the current society. Conflict transformation is a long term process and not a single event. The expressions of apology and reconciliation symbolically made before the TRC may have been significant, but did not constitute adequate transformation. Ultimately, the transformation process in South Africa has to envision an integrated process covering all the distinct but interrelated socio-economic and political dimensions of the society.

7.40 The South African TRC: Prospects for Other Countries

In many of the contemporary political transitions the perpetrators of past injustices often continue to wield considerable power. New governments are therefore faced with the challenge of repairing the damage caused by their predecessors as well as preventing the recurrence of past injustices in a way that must avoid provoking a backlash. Societies in transition are complicated by many factors including the fact that many individuals are both victims and perpetrator. There are also many competing and legitimate interests such as addressing the harm done to victims while at the same time ensuring the democratic stability of the country. Broadly, transitional justice as evident in the South African case is clearly not easy to secure. Other relevant contexts can treat the South African TRC as one example from which to draw lessons about what seemed or did not seem to work and relevantly moor them to their own contexts. There is no doubt that the South Africa TRC can yield some important lessons for other relevant contexts. Among the significant areas for learning lessons include the need to establish transitional justice measures that are relevant to a particular country, the need for political will to support such measures while giving them operational independence, and the requisite for follow-up and implementation of recommendations.

A serious concern however is the tendency for other countries to treat the South African TRC as the standard practice and paradigm to be directly borrowed with little regard to how it achieved or did not achieve its stated goals. Often in these countries, the South Africa TRC is associated with the process of South Africa's transformation, although there is little research done to establish its actual contribution to the transformation process. The South African TRC may have been unique and anomalous with its provision for conditional amnesty and public hearings, but it sometimes inappropriately skews the views of many in other distinctively different contexts, in a way that needs to be reconsidered.

Nonetheless, it is apparent that no single transitional justice policy will satisfy all the needs of a given society at the same time. Accounting for the past, reconstructing the society and promoting sustainable peace are long-term processes. They are daunting tasks because any society in transition faces a myriad of deficits among them: a lack of political will to reform, a lack of material and financial resources, a lack of institutional

infrastructure and technical capacity and generally a susceptibility to internal instability. Such societies require complex and multifaceted strategies that call for interventions beyond a truth commission. Without doubt the South African TRC is bound to continue drawing interest. Ultimately, even if it were to play a useful role in informing the social reconstruction process in other relevant contexts, it is important to understand that a truth commission on its own remains an insufficient mechanism in transforming a society away from its past conflict. It calls for other complementary measures and interventions to address the challenges of structural sources of conflict.

Future research possibilities may include examining the impact of transitional justice measures on key societal institutions, such as the judiciary, military, the police, and the media. For instance how does the judiciary deal with cases in society? Is it different before and after the adoption of various transitional justice mechanisms? What is the impact on non-state actors? This thesis has provided some ideas for how research can aid in determining appropriate transitional justice policy for a given context. There are limits as to what can be learned through empirical research with respect to transitional justice choices. Ultimately, understanding precisely how and why humankind commits grotesque atrocities against itself, and how societies move away from mass abuses towards truth and justice, establishing democracy, the rule of law and durable peace, is not an exact science and probably will not ever be. But original well-chosen and co-ordinated research can contribute toward making better and more informed decisions in the future.

7.50 Conclusion

The investigation of this study's research questions leads to some important conclusions. Significantly that the South African TRC is grounded in a series of assumptions and hypotheses that are in need of more analytical research. Often claims of utility of the South African TRC as a central mechanism in transforming the South Africa society away from its past conflict have been based on anecdotal evidence rather than on serious analytical research. While the South African TRC is increasingly being seen as the standard practice and paradigm to be followed by other societies undergoing political transition, there is inadequate information about the viability of utilising a truth

commission in other transitional contexts as a component of conflict transformation. This is a theoretical and empirical question that requires further research. Indeed, the place, role, problems and potential for incorporating truth commissions within the broader approaches to peace-building is a viable area for further research and conceptualisation. This study makes a modest contribution toward analysing the relationship between the South African TRC and the process of conflict transformation and also serves as a stimulus for further inquiry on some of the issues raised above.

The broad conclusion that follows from this study is that the South African TRC's agenda of promoting national unity and reconciliation was motivated by the conflict transformation approach. But the nature and role of the TRC in South Africa's transformation process has received little critical analysis. Several years after the end of the TRC process, an examination of the context in which the TRC operated, reveals that the biggest role it played was in engaging the society in discourse with its past. It symbolically underscored the need to build right relationships and social structures that respect the human rights. But the exercise of engaging in constructive change in South Africa needed to transcend symbolism toward dealing with the underlying structures and human relationships at various levels, politically, socially and economically. The TRC acted as a symbolic process of healing, but other than that and the making of recommendations, the long term relational and structural transformation was well beyond the TRC's mandate. Discussions on conflict transformation in post-apartheid South Africa therefore, call for an understanding of the broader and complex issues of transformation in a divided society.

8.0 Appendix 1: Approach to Gathering and Interpreting Primary Data

The study pursued primary data along the following lines:

- The experiences and perceptions of those who participated in the South African TRC in various capacities (victims/survivors, ex-combatants, alleged perpetrators and officials of the TRC) and those knowledgeable on the subject.
- For victims/survivors, ex-combatants, alleged perpetrators and TRC officials, what their expectations were from the TRC process.
- What they valued from the TRC.
- What affects their satisfaction or dissatisfaction with the TRC process?
- What affects their satisfaction or dissatisfaction with the outcome of TRC?
- For those who participated in the TRC as victims and alleged perpetrators, what impact the TRC process had on their lives and relationship with their former adversaries?
- For those knowledgeable on the subject, what was their perception of the South African TRC and what shaped that perception?
- What contribution did the TRC process have in South Africa's transformation process?
- Given the increasing international interest in the South African TRC, what lessons can it offer to other transitional contexts and can it be replicated in other distinctively different contexts?

The main sources of empirical data were interviews, observation and original documentation including the TRC Report and audiovisual material. Interviews were done with the categories of victims/survivors, ex-combatants, alleged perpetrators, TRC officials and individuals knowledgeable on the subject. It worth noting that this categorisation is for working purposes only and does not necessarily reflect the real life situation. In actual reality the distinction between the various groups was not that clear cut. Some would easily be classified in two or more categories. A case in point was Letlapa Mphahlele, a former Azanian People's Liberation Army (Apla) commander who authorised the killing of innocent white people in a church in Cape Town. He could be considered a victim, an ex-combatant and an alleged perpetrator, although he himself denies being a perpetrator.[94] Many of the victims/survivors did possibly participate in

some way in the conflict as combatants and possibly responsible for human rights violations. In locating the interviewees, the study was therefore largely influenced by the TRC's definition of victims and perpetrators. The TRC defined both categories essentially in legal terms where victims were seen as those who suffered gross human rights violations where a political motive was involved, while perpetrators were those who caused the human rights violations.

Questions during the interviews were more open-ended, the aim was to gain deeper insights into the respondents' perceptions of the TRC's role, their understanding of the conflicts of the past, the need for processes that address continued divisions and the nature and goals of such measures. The interviews in most cases lasted between ½ hour and 2½ hours. Majority of the interviews were done in Johannesburg and Cape Town largely because I was based in Johannesburg for the greater part of my studies although I spent nearly five months in Cape Town on a Transitional Justice Fellowship Programme. Given that the fellowship Programme concentrated on issues of transitional justice, and on the specific aspect of the South African TRC, both which were central to my study, it exposed me to many of my sample categories who were leading participants in the South African TRC including individuals such as the Chair Arch Bishop Tutu, his Deputy Dr Alex Boraine, TRC Commissioners Mary Buton, Advocate Dumisa Ntsebeza, the TRC Director of Research Dr Charles Villa Vicencio and a number of individuals knowledgeable on the subject including Prof. André du Toit, Prof. Dan Forster and Dr Fan du Toit. The sampling of TRC officials and individuals knowledgeable on the subject was the easiest to control because I was working with a good number of them on the Transitional Justice Fellowship Programme. The interviews with TRC officials and knowledgeable persons were arranged through personal contact. Victims/Survivors and ex-combatants were selected mainly via individuals from these groups who were working with the Transitional Justice Fellowship Programme as resource persons and through a snowball approach. While an effort was made to include significant numbers of both men and women, eventually a larger proportion of men came through as ex combatants, while women came through as victims/survivors. The reason for this was because my entry point to the two categories was mainly through groups involved in self-help initiatives and who considered themselves victims/survivors or were involved in rehabilitation

programmes of ex-combatants. Most of these initiatives operated on the male-women gender divisions. The interviews with most samples were conducted in a fairly informal manner and individuals from the various categories were approached with questions that related to their experiences in their various capacities. In the category of victims/survivors and ex combatants, only seven individuals were interviewed on one-on-one. The rest were interviewed in group interviews conducted in focus group style, with various people responding to any one question. Interviews were carried out between September 2004 and November 2005 although majority of them occurred between July and November 2005.

In terms of figures, interviews were carried out with five TRC officials, over 50 members of survivors/victims and ex combatants (often interviewed in groups ranging from four to eight), five university lecturers teaching on the subject and about 20 individuals from Non Governmental Organisations (NGO). A synthesised summary of primary data results is attached as an appendix, while an analysis of these results is incorporated into the body of the thesis and also discussed in more detail in the concluding section of the study. Not all interviews are cited in the body of thesis except where deemed relevant. The essence was to obtain supplementary evidence to augment the utilisation of findings that emerged from existing data (which was the principle source of information). These interviews however, considerably aided my understanding of socio-psychological dimensions of the TRC. They offered me a different way of understanding attitudes and perceptions about why the South African TRC is widely praised outside rather than inside South Africa. This appreciation directly and indirectly informs my analysis and discursive reflection in the study.

By integrating information from primary data into the conceptual/analytical and discursive reflection, the process allowed a critical analysis of the South African TRC's various thematic areas such as truth, justice and reconciliation to emerge. It also allowed an in-depth assessment of the underlying assumptions linking the TRC to conflict transformation and the integration of theoretical perspectives into the various interpretations in order to establish the relationship between the TRC and conflict transformation. The approach was fruitful in sorting out key ideas on the South African TRC and sometimes in piercing together viewpoints beyond those in secondary literature.

In particular, it proved illuminating to see how ideas on the South African TRC sometimes carried different but important meanings to different people. The South African TRC involved groups with different interests and sometimes these groups had legitimate but different interpretations of issues. These interpretations were helpful in clarifying role of the TRC in conflict transformation.

The study adopted a phenomenological approach, which focussed on understanding the meaning and role of the South African TRC to persons being studied. The approach was therefore qualitative research within the constructivist inquiry paradigm, as it aimed to understand perceptions constructed by respondents. It set out to capture what those interviewed said or did and how they interpreted the issues being asked. The research aimed to capture this process of interpretation through an understanding of the feelings, motives and thoughts behind what was being said or done. Through interviews, the study probed into the various influences on personal feeling and perceptions about the TRC and helped to understand the various patterns of thinking Around the TRC process.

The study's primary data research technique did not strive for representation given the national scope of the TRC and the inherent difficulties in carrying out a nationwide survey. Given the fact that the number of relevant variables in South Africa was far greater than could be controlled, and that all the categories of my samples were geographically dispersed in the whole of South Africa, it was difficult and expensive to pursue cluster sampling. In the same vein, the experimental research technique was deemed inappropriate for the study. The idea therefore, was to compensate for the lack of quantitative sampling with a focus on thematic purpose and greater qualitative depth.

Opinions of victims, ex-combatants and alleged perpetrators were sought to establish their perceptions and experiences toward the TRC and in testing whether it influenced their attitude and behaviour toward their former adversaries, or not. The study emphasised on personal experiences because it sought to understand the intersection of socio-psychological constructions and the deeper meanings that they attached to the various aspects of TRC. From TRC officials and those knowledgeable on the subject, the study sought to understand their experiences and interpretations of the TRC process and assumptions about it being central to South Africa's transformation process. Their views

were important because they were able to elaborate on questions of meaning and causality of events during the TRC process and also clarify the prospects and limits of the TRC in South Africa's transformation. Their views were useful in uncovering hypotheses and making sense of the TRC's underlying premises and significance in responding to South Africa's past. The question of who was being surveyed among those knowledgeable on the subject was significant to this study and was determined by the questions being investigated and the initial assumption made in the study. In this case the assumption was that the South African TRC is seen by some people as a mechanism that moved the country away from its past conflict. To examine this assumption, it was important to survey the views of knowledgeable individuals who could offer a critical analysis on the subject matter.

The study also benefited from inputs at a number international conferences and seminars where I made presentations relating to chapters of my study. These included conferences on the Post Colony at St Peters College, Oxford, April 17th-19th 2005, Transforming Conflicts: Options for Reconciliation and Reconstruction, Cape Town, October 10th –14th 2005, the Annual Conference of The Norwegian Association for Development Research, Oslo, Norway, September 13-15, 2006, the Teaching Transitional Justice Seminar held in Kampala Uganda, January 17th –20th 2007, seminar on Human Security in Southern Africa at the Institute for Security Studies, Pretoria, June 14th 2007 and my presentation at the Workshop of Young Scholars from the Global South at the Geneva Graduate Institute for International Studies, November 3rd -10th 2007.

The study also collected data from audiovisual materials, tapes and compact discs relating to the South African TRC, informal discussions and also utilised the observation technique to collect data on social phenomena in real life situations; for instance in observing interactions in various social settings across various social categories in order to assess the essence of reconciliation in South Africa. The objective was to achieve sufficient amount of information from which to support my analytical/discursive arguments on the subject matter. By entering into the actual South African case study and talking to those directly involved or affected by the TRC to collaboratively define their experiences and perceptions, the study was able to clarify the existing assumptions about

the contribution of the TRC to South Africa's transformation process and progress into other emerging directions like its relevance to other transitional contexts.

For data analysis, the study adopts an examination of the specific thematic aspects of the South African TRC, where various sub themes and issues are formulated and discussed. It identifies or makes connections through analysis and discursive reflection based on secondary and primary data. It treats concepts and also appraises the actual attitudes, perspectives and experiences from primary data. A significant running premise in the treatment of the various sources of data is the appreciation of diversity in beliefs and perspectives. This is consistent with the idea that there are often diverse views and perceptions about reality. The analysis is covered through a qualitative synthesis of the various principles relevant to answering the study's questions. These principles were identified and collated from the data collected into coherent frameworks of meaning. In other words by distilling and substantiating insights and assertions from the diverse sources of data, the study was able to make analytical judgments on the relationship between the South African TRC and conflict transformation.

One significant limitation was the lack of interviewees from the white community particularly in the two categories of victims and perpetrators. In one case, a tour operator in Cape Town, simply observed that, 'that was for other people to talk about.' A maximum of six other contact attempts were made at different times but the potential respondents turned down interviews. One NGO official told me that many alleged perpetrators from the white community, particularly among Afrikaners, felt that the TRC was a witch-hunt targeting them as a community and some of them would not want to talk about their versions of the story and other things that would make the public uncomfortable.[95]

A number of other challenges were encountered during the study. These included a degree of emotional involvement especially by some victims/ex-combatants who relived past stories with personal sentiments. Although lacking in impartiality, this group provided valuable information on the research questions posed to them. Some conditions in the country also affected this methodology. For example, language and racial sensitivities had to be considered when phrasing some of the questions. The other challenge related to studying the question of 'effect', given the lack of baseline data

capturing respondents' perceptions before the establishment of the TRC. Nonetheless by contextualising South Africa's past and the transition process, and subsequently drawing from diverse sources of data in analyzing the relationship between the TRC and conflict transformation, it is hoped the study acquires substantial new information and insights that serve to bridge the above limitations.

A constant challenge in carrying out research is the need to consider ethical dimensions of the research. Primary data collection for this study entailed interacting with, among others, victims/survivors of human rights abuse and ex combatants. Working with these individuals who have survived systematic violence required a careful consideration of their sensitivities. The essence was to conduct research in a way that does not traumatise the individuals from these groups. The process, therefore, emphasized voluntary participation and promised confidentiality to those who did not want their identity revealed. At the end of the interviews, individuals especially from these groups were asked whether the research questions had caused them anxiety or distress, to which nearly all of them said it did not.

Responses to interview questions varied but the running themes included:

For Survivors/victims and ex combatants

- Various understandings of reconciliation, some seeing it as forgiveness, others as measures to better their lives (There were several cases of victims/survivors and ex combatants arguing that they could not reconcile with 'perpetrators' (in this case seen in simplistic terms of 'whites') given the social inequalities which the victims/survivors and ex combatants continued to view as social injustices.
- Perpetrators should come forward to tell how and why they committed certain acts, most victims felt they could not forgive people who did not come forward.
- There were strong feelings expressed that perpetrators must be made to contribute materially and financially toward the reparation and rehabilitation of victims.
- Justice and punishment was favoured by some as a way of dealing with the perpetrators over amnesty.(For instance one victim Vusi serious regretted

Mandela's and the TRC's reconciliation approach given he had never seen his father as a result of the apartheid conflict)

- A sentiment expressed by most victims/survivors was that reconciliation and reparation were integrally linked.
- The victims/Ex-combatants expressed a number of concerns and frustrations with the TRC and its work.
- They felt that the TRC process had not overcome the divisions of the past.
- Similarly, social inequalities were seen as a serious concern that undermined reconciliation.
- There was a perception that perpetrators have been rewarded by the system and are still benefiting from the rewards (e.g. pensions, amnesty, etc.) and that victims are still suffering from the effects of apartheid.
- A number of victims felt that the TRC has only raised the hopes and aspirations of the people but that tangible results have not emerged.
- There was a feeling that ordinary victims were discriminated against in favour of high profile victims.
- Many survivors and victims are still concerned that no processes have been set-up to deal with the ongoing effects of the past and also the processes that have been set in motion by the TRC.

Letlapa Mphahlele Former Azanian People's Liberation Army (Apla) Commander (26th August 2005) Cape Town.

- Authorized attacks on white civilian targets including a church service in Cape Town.
- Justified acts of violence on the basis 'his people' were victims of injustice and he wanted to take similar experiences of injustice to the doorsteps of the white community
- He accused the TRC of deliberately criminalising the actions of Apla cadres by equating them to Apartheid crimes.
- To him Apla's actions were equivalent to 'a lady defending herself against rape'

- He does not regret neither would he apologise for Apla's such operations, although he is willing to reconcile with those whose relatives he harmed.
- Observed that some of the people that Apla fought and harmed and caused grief to were never their direct enemies. But they suffered, his job is therefore to reach out to those who survived.
- Argued that he believes in reconciliation 'Meeting soul to soul, person to person.'
- Observed that happened was the result of history and as human beings 'we have to face each other and mend relationships.'

TRC Officials

- **Arch Bishop Desmond Tutu** (Presentations at the Institute of Justice and Reconciliation Award, 24th August 2005 and at the Conference on Transforming Conflicts: Options for Reconciliation and Reconstruction 11-14th, Monkey Valley Cape Town) I attended these presentations courtesy of the Transitional Justice Fellowship Programme.
- Tutu explains that the South African TRC played a powerful role in healing the post-apartheid South Africa
- He observes that in many ways the TRC was unbelievable. 'It has been almost breathtaking – this willingness to forgive, this magnanimity, this nobility of spirit.'
- That those who came to confess contributed hugely to the process of healing and reconciliation because they accepted moral and political responsibility
- Tutu observed that the South African TRC is seen in many countries as some sort of magic wand for solving problems of transitional justice.
- He is often invited in many countries to export that 'magic wand' but he always advises every context to formulate transitional justice measures that are relevant to that context
- The TRC placed on record the need for reparations for victims and survivors

- Tutu regrets the failure to fully implement the recommendations on reparations and argues that with hindsight, the reparation process should have been part of the TRC mandate

Dr Alex Boraine, Vice President of the South African TRC (Interview 15th August 2005) and also had various formal discussion sessions during the Transitional Justice Fellowship Programme)

- Observed that the South African TRC widened the conception of justice away from the narrow legalistic lenses of retribution toward restorative justice
- Observed that punishment is one instrument but not the sole or even most important one for forming the collective moral conscience
- The TRC was seen in South Africa as a necessary evil because prosecutions and general amnesty were politically problematic
- To promote sustainable reconciliation in South Africa, there is need to address the prevalence structural inequalities
- It is neither possible not desirable to impose the South African model on other societies
- But the South African TRC can inform and influence other contexts undergoing transitions from dictatorship or authoritarian rule to some of democracy.
- Some of these countries share with South Africa similarities such legacies of oppression and human rights abuse, and a determination to deal with past atrocities.
- Nonetheless South Africa is also likely to be different from these other countries in terms of the nature and extent of past atrocities and the transition trajectory
- This means that considering the need for a truth commission has to be on the basis of that society's experience, history, needs and resources

Dr Charles Villa-Vicencio (Former Director of Research at the South African TRC) 27th September 2005.

- The TRC defined itself as contributing toward the laying of the foundation on which national unity and reconciliation could be build
- The TRC provided a context within which victims and survivors could begin to deal with the past
- It exposed a great deal of truth about the past
- It underscored the importance and complexity of seeking to overcome denial and silence
- It provided a catharsis for some of the victims
- The TRC reminded South Africa about the capacity of decent people to sink to such a level where they can commit the most atrocious evil
- Many of the worst perpetrators of human rights abuse were themselves victims of a political system and cultural milieu that promoted violence.
- If reconciliation and national unity are to be achieved in South Africa, a clear understanding of the past is indispensable.
- The is no certain answer about transferring the South Africa TRC to other contexts, the task becomes one of learning from one another, using different experiences and insights to design measures that promote reconciliation in the light of past conflicts and human rights abuse

Prof. Dan Forster, Lecturer on Social Psychology and Facilitator Transitional Justice Fellowship Programme 18th September 2005

- Largely provided a social psychological account of victims and perpetrators in South Africa
- Argued that being preoccupied with who did what to whom often fails to realize how few political protagonists were pre-disposed in some obvious ways to violence
- That the potential for perpetration of violence is more widespread than we would like to believe
- The employment of the terms victims and perpetrator are themselves problematic because in most cases of violence individuals are potentially both

- Observed that if reconciliation was to be the final achievement of the TRC, then it was likely to beyond its grasp, but the TRC was indicative of the positive signs that South Africa was on that road even if there is considerable route a head

Prof. Kader Asmal (One of the Architects of TRC and former Minister in the first democratic government) October 10th 2005

- Observed that to understand the South African TRC, its dynamics, challenges etcetera, one should not only look at the actual TRC process but the entire course from the political negotiation to its actual implementation
- The TRC arose out of a negotiated compromise
- The TRC process was initially intended to address the whole gamut of past atrocities
- It however confined its focus to the physical and repressive dimensions of apartheid rule and did not address the more structural violence of apartheid.
- this narrow focus on violations of the body ignored the implicit wider mandate of the TRC Act which according to him, included the wider structural violations of apartheid based upon racial discrimination

Prof André du Toit, Lecturer Department of Political Science, University of Cape Town. He also participated in the South Africa's negotiation process and provided technical support to the TRC. He was among the facilitators of the Transitional Justice Fellowship Programme and I have informally interacted with him in numerous other fora. The following outline comes from the various interactive seminar sessions during the Transitional Justice Fellowship Programme.

- The South African TRC contributed to bringing out new information about past atrocities which was previously unknown
- To have a process where people with a living memory of officially denied a atrocities, are acknowledged can serve a significant social and political function
- It can pre-empt sectional mobilization
- Different people in the TRC process had different conceptions of reconciliation

- The TRC may not have brought out reconciliation as understood by various people, but neither did it bring about trouble as anticipated by some.
- Amnesty in South Africa did not include the condition to show remorse, and this may have made some of the victims to believe that alleged perpetrators were not interested in reconciliation
- While the South African TRC is taken as a model elsewhere, ordinary South Africans remain skeptical and even sometimes cynical
- They don't take it serious because it is no longer central to South African politics

Zubeida Jaffer, Former Journalist and ant apartheid activist 16th August 2005

- Told of incidents where she was beaten, threatened with rape and death.
- Wishes the TRC had helped establish a fund to assist past victims of torture and abuse
- Felt that perpetrators of past human rights abuse should not be allowed to get away with it. That they should be made to realise what they had did was wrong
- **Garth Angus 4th August 2005, Cape Town**
- Was not willing to talk about the TRC.
- Simply observed that that was for other people to talk about

Among the primary Audio Visual Material I consulted include,

Audio tapes

- Hoffman, D and Reid, F., Video *Long Night's into Day: South Africa's Search for Truth and Reconciliation*, (South Burlington, VT. California:Newsreel,2000),94minutes
- Director/Producer:FrancesReid, Director:DeborahHoffmann,*Long Night's Journey into Day*, 2000, focuses on four cases, revealing that the system that imposed racial separation was anything but clear-cut. In 1993, four black men murdered a white student named Amy Biehl, who had become immersed in the fight against apartheid. In an interview, a cousin of one of the perpetrators

described the climate at that time as very political, a time when ‘everyone can do anything to everyone.’ Out of respect for the work of their daughter, Biehl's parents support the four men's quest for amnesty.

- The Gugulethu Seven, *Guguletu Seven* (2002, 107 minutes)
  Director/Producer: Lindy Wilson
  This video investigates the tragic deaths of a group of young black South Africans in 1986. Originally reported as a terrorist ambush thwarted by the police, the story behind the incident is uncovered by investigators for the Truth and Reconciliation Commission.

- The study research also widely referred to the TRC’s final report (Available at William Cullen Library, University of the Witwatersrand, Johannesburg)

9.0 Endnotes

[1]For an in-depth discussion on the development of transitional justice, see R. G. Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal*, Vol. 16, Spring 2003.

[2]Other countries where there has been agitation or formation of truth commissions borrowing from that of South Africa include Afghanistan, Bosnia-Herzegovina, Burundi, Cambodia, Indonesia, Jamaica, Kenya, Morocco, Philippines, Uganda, Ghana, Sierra Leone, Somalia, Sudan, Liberia and the Democratic Republic of Congo, Nigeria.

[3]See the analytical framework and chapter five for a detailed discussion of the concept which is used in this study interchangeably in this study with Conflict Transformation Models.

[4]Restorative Justice encompasses innovations which rather than privileging the law, involve engaging those harmed, wrongdoers and their affected communities in search of solutions that promote repair, reconciliation and the rebuilding of relationships. Restorative justice seeks to build partnerships to reestablish mutual responsibility for constructive responses to wrongdoing within communities. They seek a balanced approach to the needs of the victim, wrongdoer and community through processes that preserve the safety and dignity of all. Retributive justice on the other hand is a theory of criminal justice that emphasises proportionate punishment as a response to crime. It is an adversarial legal process underlined by the principle that the severity of penalty for a misdeed or wrongdoing should be reasonable and proportional to the severity of the infraction

[5]As mentioned in the Relevance of the Study, a number of countries have drawn from the South African TRC approach in an attempt to deal with the pasts. These include Burundi, Indonesia, Kenya, Morocco, Philippines, Ghana, Sierra Leone, Liberia and the Democratic Republic of Congo.

[6]A war in this case refers to a type of violent conflict in which violent force is used with certain continuity in an organized and systematic way, Heidelberg Institute for International Conflict Research (HIIK, 2005).p. 2). F. R. Pfetsch and C. Rohloff, *National and International Conflicts, 1945-1995: New Empirical and Theoretical Approaches*, (London: Routledge, 2000).p. 32

[7]COSIMO purpose is to build an up-to-date databank of internal and international as well as violent and non-violent conflicts around the world. It provides a searchable database of political conflicts including crises, wars, insurrections, negotiation, mediation and peace settlements.

[8] This debate is taken up later in chapter four.

[9]Teitel's cases are largely confined to post-authoritarian or post-communist regimes, rather than war-torn societies.

[10]Discussion with Dr Alex Boraine during the Transitional Justice Fellowship Programme organized by The International Centre for Transitional Justice and the Institute for Justice and Reconciliation, in Cape town South Africa, August 14th 2005.

[11]Ibid.

[12]For more on the various tasks assigned to transitional justice mechanisms especially truth commissions, see M. Perlevliet, 'Considering the Truth, Dealing with the

Legacy of Gross Human Rights Violations,' *Netherlands Quarterly of Human Rights*, Vol. 16, 1998. P.149. See also M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, (Boston: Beracon Books, 1998). P. 88

[13]The United Nations is the principal forum for creating international law and principles. Apart from the elaboration of treaties, the systematic work of UN human rights bodies over the last decades has crystallized into declarations, resolutions, guidelines, principles and opinions, collectively named 'soft' law. These norms are especially relevant in the promotion of human rights and in the prosecution of severe crimes. One such relevant human rights document is the Commission on Human Rights resolution 2003 of 1972, which requested the Secretary-General to order an independent study on best practices, that resulted in Prof. Orentlicher's report, titled *'Best Practices to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity'* See B. Pavon, 'Combating Impunity: Transitional Justice in the Aftermath of Mass Atrocities,' *United Nations Chronicle* Online Edition, http://www.un.org/Pubs/chronicle/2004/issue3/0304p22.asp. See also C. C. Joyner, 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the search for Accountability,' in *Denver Journal of International and Policy*, Vol.26, No.4. 1998, W. Allmand, 'Combating Impunity: The Convention Against Torture,' in *The Changing Face of International Criminal Law*, Selected Papers, June 2001. pp 161-166.

[14]For a detailed discussion on this subject see, M. C. D'Araujo, 'Democratic Governments and the Military in Latin America: Brazil in A Comparative Perspective,'http://www3.ndu.edu/chds/Journal/PDF/2004/DAraujo_essay-edited.pdf

[15]In most of the Interviews with victims of the apartheid policies in South Africa, particularly those from poor backgrounds, their main complaint was that 'perpetrators were walking freely and living well while their victims continued to languish in poverty.

[16]Argentina tried several members of the former military junta

[17] A detailed discussion on the concept of reconciliation (in the context of South Africa) will be pursued in Chapter Four.

[18]See, Algerian Charter Risks Reinforcing Impunity and Undermining Reconciliation, http://www.ictj.org/downloads/algeria.sep26.eng.pdf. International Center for Transitional Justice (ICTJ) argued that the Algerian government's proposed Charter for Peace and National Reconciliation, to be voted on in a referendum on 29th September 2005 risked entrenching impunity, denying the rights and needs of victims, and impeding the reconstruction of a society. The document was a declaration of principles for resolving the civil war that had led to the deaths and disappearances of up to 200,000 Algerians since 1991. The ICTJ argued that while the Charter aimed to promote reconciliation, it left open the possibilities that a *de facto* amnesty could be granted to perpetrators of serious crimes and that an independent and comprehensive investigation into past abuses could be blocked. The ICTJ expressed serious concern that these measures will regress rather than advance the government's stated goal of achieving reconciliation.

[19]The new government may not be in a position to prosecute all past human rights violations

[20]In a discussion with Prof. Andre Du Toit who participated in the negotiation process, he says negotiations moved from the initial secret talks between National Party and ANC representatives, to the post-February 1990 bilateral pre-negotiation talks between key parties to determine the shape of the negotiation process, to the initial multilateral negotiations between political parties to develop the 1991 *National Peace Accord* (NPA) to address the political violence, to formally constituted multi-party negotiations to agree the rules for a transitional government and key constitutional principles, and finally culminated in an elected Constitutional Assembly with an ambitious public consultation programme to draft the new Constitution

[21]The term 'Standpatter' was used in the United States history in early in the 20th century to designate conservatives in the Republican Party as against the Insurgents or progressive Republicans. The term is said to have originated in Mark Hanna's remark concerning an election—all that was necessary for Republican success was, in poker parlance, to 'stand pat.' See http://www.answers.com/topic/standpatters

[22]Interview with Dr Alex Boraine, Former Deputy Chair Person of the South African Truth and Reconciliation Commission, 14th August 2005, Cape Town, South Africa.

[23]For more on this discussion See T. Carothers, 'The End of the Transition Paradigm,' in *Journal of Democracy*, Vol. 12, No.1, 2002

[24]An abridged version of this chapter was published in the *African Security Review*, Vol. 13 No 4, 2004, www.iss.co.za/pubs/ASR/13No4/Contents.htm, pp.101-114

[25]The Prime Minister of South Africa from 1958 until his assassination in 1966. He is considered a polarizing figure who was the primary architect of apartheid (although the foundations of apartheid were laid earlier).

[26]The term intractable is used in this case to refer to conflicts that sink into self-perpetrating violent interactions in which each party develops a vested interest in the continuation of the conflict.

[27]These effects are still prominently feasible in such areas as Soweto in Johannesburg and Khayelitsha in Cape Town where black people continue live in poor conditions.

[28]The interviews in Soweto, Johannesburg, were carried out in June 2005 while those in Gugulethu and Khayletsha in Cape Town were carried out between August and November 2005 during my Transitional Justice Fellowship Programme organised by the International Center for Transitional Justice (New York and the Institute for Justice and Reconciliation (Cape Town). The ex-combatants in Soweto have initiated a self help group called SOMOHO while some of those interviewed in Cape Town had been co-opted into community peace initiative programmes and one such programme is facilitated by the Centre for the Study of Violence and Reconciliation, Cape Town Office.

[29]Discussion with Prof. Andre de Toit who participated in the South African negotiation process, Cape Town, Cape Town, August 2005.

[30]Interview with Charles Villa Vicencio, Former Research Director, South African Truth and Reconciliation Commission, September 2005.

[31]A detailed examination of these issues is pursued in Chapter Four

[32]Interview with victims/survivors and ex combatant were carried out in Langa and Gugulethu areas of Cape Town and in Soweto, Johannesburg on various dates between June and November 2005.

[33]Its primary goal was said to be that of not sanctioning and imprisoning perpetrators (retributive justice) but rather reconciling a population, letting the perpetrators confess their fault and the victims forgive (restorative justice)

[34]Archbishop Tutu observed at a Conference on 'Transforming Conflicts: Options for Reconciliation and Reconstruction', 10 - 14 October 2005, Monkey Valley Resort, Cape Town, organized by the Institute of Justice and Reconciliation that everywhere he goes outside South Africa, the South African TRC is regarded as that 'magic wand' that can be used solve problems of past conflict and human rights abuse.

[35]In Kenya for instance, there have been several commissions of inquiry to look into issues like tribal clashes, economic scandals and political assassinations but they have not been considered in the same vein as truth commissions. In fact the clamour for the establishment of a credible and comprehensive truth commission is still very much alive in Kenya despite the formation of those various commissions. For a detailed discussion on the question of ethnic clashes in Kenya, See S. Brown, 'Quiet Diplomacy and Recurring Ethnic Clashes in Kenya,' in Rothchild, D, Sriram, C and Wermester, K., eds. *From Promise to Practice: Strengthening UN Capacities for the Prevention of Violent Conflict.* (Boulder: Lynne Rienner, 2002). pp. 69-100.

[36]In one case a former member of Umkhonto we Sizwe, told me that he appeared before the South African TRC solely because he wanted to give 'evidence' that could help the release of his friend. He acknowledged that that evidence was not necessarily the truth. Interview, with Member of Umkhonto we Sizwe, Langa Township, Cape Town, South Africa. 4th August 2005

[37]Job Kihumba for instance thinks that Kenya should just forget about its past human rights abuses and move on.(Interview with Job Kihumba, the Director, Association of Professional Societies in East Africa (APSEA), held earlier in 2002 for a different research assignments on Constitutionalism in Kenya .

[38]Interview with Alex Boraine, Cape Town, South Africa, 22nd August 2005.

[39]The TRC also conducted some 'event hearings' (Republic of South African:: TRC Final Report 2003:147–8), political party hearings (Ibid Vol. 1, 149) and some special investigations (Ibid Vol. 1, 151).

[40]Under Section 26 of the *Reconciliation Act* victims could apply directly to the Reparation and Rehabilitation Committee but these applications were all immediately forwarded to the Human Rights Violations Committee. Consequently the list of victims came from the Human Rights Violations Committee and the Amnesty Committee.

[41]The government has often argued that 'the struggle was not for money', that 'one cannot attach a monetary value to the suffering' and that symbolic reparations in favour of communities and the nation may have been more appropriate. See Centre for the Study of Violence and Reconciliation, 'Reparations: Three Years on and Victims Are Still Waiting' *National Strategy Workshop on Reparations* (Press

Release, 30 October 2001), G. Wanneberg and W. Chege, 'Apartheid Victims Will Get R30 000 Payment', *Independent Online* (Cape Town, South Africa), 15 April 2003 <http://www.iol.co.za>. Note that this amount falls well short of the TRC's recommendations.

[42]Magnus Malan was a former defence Minister who was charged on November 2, 1995 together with other former senior military officers for murdering 13 people (including seven children) in 1987. The murders were said to have been part of a conspiracy to create war between the African National Congress and the Zulu Inkatha Freedom Party (IFP), in order to maintain the white minority rule. Malan and the other accused were bailed and ordered to appear in court again on December 1, 1995. A seven-month trial then ensued and eventually all the accused were acquitted. President Mandela supported the verdict and called on South Africans to respect it.

[43]This observation was made by Prof. Andre' du Toit during a seminar at Transitional Justice Fellowship Programme in Cape Town in September 2005.

[44]This argument however assumes that provision for amnesty was critical to the handover of power by the former regime, and not the other matters that were part of the negotiated settlement

[45]The Amnesty Committee was charged with making important legal decisions from both perpetrators' and victims' perspectives and thus it was structured so that it allowed for legal representation and cross-examination of those giving evidence. Under s 17(3) of the *Reconciliation Act,* the Chairperson was required to be a judge or former judge.

[46]See also Republic of South Africa: *Constitutional Law Reports*, 1996, p.1017 where Constitutional Court judge I. Mahomed observes that much of what had transpired during the apartheid conflict was shrouded in secrecy. That the TRC Act sought to address this massive problem by encouraging a public unburdening of grief on the part of the survivors and families of victims so that they could be helped to discover what in truth had happened, and to receive the collective recognition of a new nation that they had been wronged.

[47]The debate about the meaning of reconciliation will be taken up later in this chapter.

[48]Interview with Dr Alex Boraine, 22th August 2005, Cape Town, South Africa.

[49]Interview With Noma Kulati, a community representative on the Correctional Supervision and Parole Boards at Pollsmoor Prison, Cape Town, September 2005.

[50]For a further explanation and critical analysis of these arguments, see S. Garkawe, 'Restorative Justice from the Perspective of Crime Victims' in *Queensland University of Technology Law Journal*, Issue No.15, 1999. pp.40-56.

[51]Interview with Vusi, then a first year student at the University of the Witwatersrand, 6th June 2005.

[52]Most of the Ex Combatants interviewed were not in any formal employment. When asked about what they thought was reconciliation, most of them held the view that reconciliation centred on bridging the divide between blacks and whites in South Africa. Others saw it as a process of repentance and forgiveness. The study could not conduct interviews with individuals alleged to be perpetrators from the white community because they seemed apathetic and reluctant to participate. See also, J.

L. Gibson, 'Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Process.' *Revised unpublished paper originally delivered at the American Political Science Association Annual Meeting*, San Francisco, CA, August 30-September 2, 2001.p.1

[53]In my entire research for this study, I did not come across any baseline studies focussing on any aspect of the TRC.

[54]Examples of these countries were mentioned at the beginning of the study.

[55]A good case is Kenya, where Civil Society Organisations, have continuously called for the formation of a truth commission similar to that of South Africa. Underlying their assumption has been the believe that the South African TRC realized such benefits as truth and reconciliation, yet the agitators do not base their assumptions on any actual empirical data.

[56]In an Interview with one former ex combatant from Langa in Cape Town, he said he went to the TRC to testify because he wanted his friend in Prison to receive amnesty. He acknowledged that what he said before the TRC was done so selectively to facilitate his objective.

[57]Interview with Dr Alex Boraine, 22nd August 2005 and Charles Villa-Vicencio, 15th August 2005, Cape Town, South Africa.

[58]Ibid

[59]Discussion with Prof. Andre Du Toit, 12th September 2005, Cape Town, South Africa.

[60]Unfortunately, this study could not trace the survivors of the two individuals to ascertain whether they feel 'reconciled'

[61]Interview with Letlapa Mphahlele, Cape Town, South Africa, 26th August 2005.

[62]In one case at the University of the Witwatersrand, a washroom wall was filled with graffiti and unprintable exchanges of racial abuse.

[63]One young man told me that to him, 'taking away' a white person's property without his/her consent cannot be equated to stealing because he will just 'taking back what was taken away from him.'

[64]Ramphele, one of the World Ban's four managing directors, was speaking in Cape Town at a conference reflecting on the work of the former Truth and Reconciliation Commission and its continuing worldwide impact

[65]Former South African President P.W. Botha's refused to answer the subpoena of TRC and rejected a demand that he testifies about his role in perpetrating the human rights violations that constituted apartheid. The man known as 'die Krokodil' (the Crocodile) is quoted saying 'I will not appear before the Truth Commission,' 'I don't perform in circuses.' 'I'm not a fool. I made many mistakes, but I ask God on my knees for the light to come. An Afrikaner doesn't go on his knees before people, he does it before God' Quoted in R. Jolly, 'South Africa's Truth and Reconciliation Commission', Modernity and Their Discontents, Vol.98, No.2, Spring, 1999. Botha denied the legitimacy of the TRC's subpoenas on at least three occasions and eventually received a suspended sentence and a fine

[66]Interview with an ex combatant, now a Taxi Driver in Johannesburg, July 29th 2005.

[67]Interview with Dr Alex Boraine, 22nd August 2005,Cape Town, South Africa. Similar sentiments were expressed by TRC Officials including the Chairperson Arch Bishop Desmond Tutu, Director of TRC Research Department, Dr Charles Villa-

Vicencio, Commissioners Mary Burton, Various Ex Combatants including APLA's Director of Operations Letlapa Mphahlele and nearly all the interviewees who, mostly came from the Black Communities. As observed earlier, it was quite difficult to get interviews with alleged perpetrators from the White community because efforts to find any who was willing to identify with past human rights abuses bared no fruit.

[68]Tutu said this at a Conference on Transforming Conflicts: Options for Reconciliation and Reconstruction, 10 - 14 October 2005, Monkey Valley Resort, Cape Town, also Cited in 'Tutu voices fears over apartheid prosecutions,' *Mail and Guardian*, 21 April 2006 08:32

[69]Interview with Dr Charles Villa-Vicencio, Cape Town, South Africa, 15th August 2005.

[70]An abridged version of this chapter was published by the Institute for Security Studies (ISS), Pretoria, as ISS Paper no. 156, November 2007.

[71]The concept of peace-building is explained later in this chapter.

[72]Although most of these symbolic representations were not directly erected or linked to the TRC.

[73]Speech by Arch Bishop Desmond Tutu, at the TRC Conference, *Ten Years On*, 20 - 21 April 2006, IZIKO SA Museum, Cape Town

[74]For a detailed discussion on this debate, see J. Rauch, 2004, 'Police Transformation and the South African TRC,' http://www.csvr.org.za/papers/paprctp4.htm as retrieved on 13 Aug 2006 12:41:26 GMT.

[75]Cybernetics refers to the study of communication and control, typically involving regulatory feedback in living organisms, machines and organisations, as well as their combinations.

[76]In 2002, the then ruling party, the Kenya African National Union (KANU) that had been in power since independence in 1963 was removed from power in a peaceful election by the National Rainbow Coalition (NARC), which had campaigned on a platform of reform and the establishment of a truth commission to deal with cases of past impunity.

[77]Mau Mau was an insurgency against the British colonial administration in Kenya that lasted from 1952 to 1960. Their core of the resistance was formed by members of the Kikuyu tribe, along with smaller numbers of Embu and Meru and their primary source of contention was their land which was appropriated by the European settlers in the central highlands of Kenya.

[78]For details of these atrocities see C. Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (New York: Henry Holt, 2005).

[79]As will be observed later, Kenya established a Task Force that examined the possibility of establishing a truth and reconciliation commission in 2003. This Task Force headed by Prof. Makau Mutua recommended the establishment of a Truth, Justice and Reconciliation Commission. However these recommendations have never been implemented by the Kibaki Government.

[80] President of Kenya from 1978 until 2002.

[81] KANU, ruled Kenya for nearly 40 years after its independence from British colonial rule in 1963, until its electoral loss at the end of 2002. It was known as Kenya African Union before it was renamed in 1960.

[82]This view is shared by S. Ndegwa, 'Kenya: Third Time Lucky?' *Journal of Democracy*, Vol.14, No. 3, (2003). p.153.

[83]The Human Rights Watch reported after the 2002 General elections in Kenya that while the country had gained many important freedoms since the early 1990s, and was considered a relatively free and open society– especially in comparison with many other African countries, it still experienced a closed system of patronage and graft which continued to undermine human rights. See Human Rights Watch Report, 'Kenya's Unfinished Democracy,' A Human Rights Agenda for the New Government, December 2002, Vol.14, No 10 (A), http://www.hrw.org/reports/2002/kenya2/

[84]New interest in forming a truth commission arose in early 2008 amidst debate on how to deal with those implicated in the violence that broke out after the disputed elections of December 2007. More than 1,500 people were killed and some 300,000 more fled their homes in the unrest. The then President Mwai Kibaki and Orange Democratic Movement leader Raila Odinga, who became prime minister, signed a power-sharing deal in February 2008 to bring an end to the crisis and formed a coalition government. The National Dialogue and Reconciliation Committee which mediated the power sharing agrement recommended the setting up of a Truth, Justice & Reconciliation Commission (TJRC) which was approved by Kenya's Parliament on 24 October. At the time of completing this thesis, the TJRC has not been implemented.

[85]This debate is pursued later in this Chapter, under the option of prosecutions in Kenya.

[86]Interview with Dr Alex Boraine, Cape Town, South Africa, 15th August 2005.

[87]See The Universal Declaration of Human Rights, available at www.un.org/Overview/rights.html, The International Covenant on Civil and Political Rights, available at ww.ohchr.org/english/law/ccpr.htm and The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) http://www1.umn.edu/humanrts//instree/h2catoc.htm

[88]John Githongo was recruited by President Kibaki to lead the government's war on corruption as a Permanent Secretary in the Office of the President. He was however hounded out of the same office, by threats on his life from people said to be involved in corrupt deals and who were alleged to be close to the president.

[89]This debate will be taken up later in this chapter.

[90]See http://www.easttimor-reconciliation.org

[91]http://www.specialcourt.org

[92]The Kenya government employed a team of investigators, Kroll and Associates to trace, identify and recover assets acquired illegally and held in foreign bank accounts It is believed to have traced more than $1bn in Europe - much of it in London. However, former Minister for Justice and Constitutional Affairs, Kiraitu Murungi, struck a different tone on the matter of tracing looted millions, in 2005 by saying 'The contradiction in transitional anti-corruption strategies is whether...scarce resources should be invested in digging up the rotten past.' Kiraitu was later to

become one of several ministers to lose their posts (although he was later reinstated to Cabinet to a different ministry) over investigations into Anglo Leasing and Finance Limited, a fictitious firm that was nonetheless awarded contracts to supply a system for producing passports that could not be forged and for building police forensic laboratories. See D. Taylor, 'Kenya: A corruption suspect's best friend? The law,' *Inter Press Service* (Africa), http://www.ipsnews.net/africa/index.asp Today nothing much is heard about the investigation despite the government spending 20 Million Kenyan Shillings(approximately 273 973 US Dollars) to track the stolen billions

[93]In most of my interviews, the reference was on unfulfilled financial compensations.

[94]This debate is taken up later in chapter four under the section on Victim-Perpetrator Dichotomy

[95]Interview with an NGO official working on issues of transitional justice, Johannesburg, October 2004.

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