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Are Truth Commissions Just a Fad?

Indicators and Implications from the South African TRC

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Human beings suffer,
They torture one another,
They get hurt and get hard.
No poem or play or song
Can fully right a wrong
Inflicted and endured.

The innocent in gaols
Beat on their bars together.
A hunger-striker's father
Stands in the graveyard dumb.
The police widow in veils
Faints at the funeral home.

History says, *Don't hope*
On this side of the grave.
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up.
And hope and history rhyme.

So hope for a great sea-change
On the far side of revenge.
Believe that a further shore
Is reachable from here.
Believe in miracles
And cures and healing wells.

Call miracle self-healing;
The utter, self-revealing
Double-take of feeling.
If there's fire on the mountain
Or lightning and storm
And a god speaks from the sky

That means someone is hearing
The outcry and the birth-cry
Of new life at its term.

--Seamus Heaney
from *The Cure at Troy*

CONTENTS

I. Introduction

II. The Benefits of Learning from Others' Mistakes
Problems with Blanket Amnesty
Need for Robust Investigatory Powers
Need for Contextualization

III. The Politics of the TRC
Selection of Commissioners
The Politics of Amnesty
The Politics of Reparations (or Not)
The Politics of the End Game
The Politics of Prosecutions (or Not)

IV. Report Card
Philosophical/Conceptual Benchmarks
Public Ownership of the TRC
The Mandate of the TRC
Impartiality and Independence of the TRC
The Legacy of the TRC
Practical/Logistical Benchmarks
Administration of the TRC
Safeguards of the TRC

V. Extrapolating from the TRC
Ripeness
Translating Concepts in Practice
--Justice vs. Reconciliation
--The Doctrine of Even-Handedness
--Victim-Friendly Orientation

VI. Conclusion

I. Introduction

"I accept the report as it is, with all its imperfections, as an aid that the TRC has given to us to help reconcile and build our nation." So said South African President Nelson Mandela at the October 29, 1998 ceremony at which Archbishop Desmond Tutu, Chairperson of the South African Truth and Reconciliation Commission (TRC), handed over the Commission's Final Report.[1] Mandela went on to observe that:

> "the wounds of the period of repression and resistance are too deep to have been healed by the TRC alone, however well it has encouraged us along that path. Consequently, the Report that today becomes the property of our nation should be a call to all of us to celebrate and to strengthen what we have done as a nation as we leave our terrible past behind us forever."

With characteristic grace and style, Mandela set the tone for a ceremony that was mired in controversy and could have been a disaster – for the TRC as well as for his party, the African National Congress (ANC). While Mandela took the moral high road in accepting and publicly releasing a report that the ANC had launched an eleventh-hour court interdict to block, his heir-apparent, Deputy President Thabo Mbeki, along with the several other senior ANC officeholders, did not bother to make an appearance at the ceremony.[2] The ANC was not alone in its indignation, nor were its leaders alone in boycotting the ceremony. Naysayers from the right – from the National Party (NP) to the Inkatha Freedom Party (IFP) to the Freedom Front (FF) – all found fodder in the Final Report for public denunciation.[3] For its part, the Democratic Party (DP) was content to focus its admonitions on the reactions of its political opponents, rather than on the TRC itself.[4] Meanwhile, Tutu, ever the proselytizer of truth and reconciliation, intoned: "Let the waters of healing flow from Pretoria today as they flowed from the altar in Ezekiel's vision, to cleanse our land, its people, and to bring unity and reconciliation." And so the spectacle of the hand-over of the TRC's Final Report epitomized in many ways the politics that characterized the TRC process as a whole.

Much has already been written about truth commissions in comparative perspective, and about the South African Truth and Reconciliation Commission (TRC) in particular.[5] This paper assumes some familiarity on both counts. Truth commissions, it seems, are in vogue. Priscilla Hayner, an independent researcher and noted scholar of truth commissions, has identified 20-odd variations of this kind of mechanism in the past 24 years.[6] Of those, some are more noteworthy than others. The South African model is one of the most thought-through, well-funded, best-staffed mechanisms of its kind, and the share of media attention it has received is unrivaled. It is also the most ambitious truth commission to date, with a mandate that includes taking measures to restore dignity to victims and granting amnesty to eligible perpetrators of gross human rights violations, in addition to establishing as complete a picture as possible about the nature, causes, and extent of gross human rights violations that took place within and outside of South Africa's borders between 1960-94.[7] The TRC's relative success or failure, therefore, offers significant indicators vis-a-vis the extent to which truth commissions will have

staying power as a tool for future transitioning societies trying to come to grips with past abuses.

The rationale for this position is based on the assumption that, if truth commissions collectively are perceived to be little more than warm and fuzzy exercises signifying nothing, and they fail to produce concrete positive results, those assuming power in transitioning societies will be less willing to countenance such mechanisms, regardless of how strenuously those who were responsible for atrocities under the former dispensation might lobby for them.[8] By the same token, Western donors will consider the track record of previous truth commissions, and in the event of disappointing results, they would be less inclined to fund similar endeavors in the future. Even the prospect of lukewarm results might not be adequate to stave off intervention from the new International Criminal Court (ICC), which will doubtless weigh in on questions regarding impunity.

There is no clear roadmap as to how these judgments ultimately will be made. Hayner has noted the need for international standards for credible, effective truth commissions.[9] Such standards, if and when they are agreed, could also serve as benchmarks for postmortem quality assessments. Drawing from and expanding on such benchmarks, this paper assesses the South African TRC process, which passes, though not with flying colors. While it is still several generations too early to judge the TRC's ultimate success or failure, it would be irresponsible not to step back and look at its broader implications. In so doing, it should be emphasized that the conclusions drawn are, of necessity, of a preliminary nature.

In that vein then, this paper attempts to add value to the existing scholarship by examining the innovations in the South African model, whose architects benefited from lessons learned from the prior experiences of other countries with such mechanisms. It also considers a variety of ways in which the South African political backdrop informed the TRC process, and vice-versa. The Commission was established as an independent body that would operate free from external political interference – whether from the government, political parties, or other influential actors. But it was born of political compromise and, by the very nature of its mandate, it remained to the end, like any truth commission worth its salt, an inherently political body. The high-stakes politics of the TRC's endgame are particularly illustrative of this reality.

On the assumption that truth commissions will outlast the fad stage, the paper extrapolates on some of the lessons learned from the South African experiment with truth-telling and accountability. It is worth conceding up front, however, that, in South Africa at least, the TRC's ultimate success or failure will depend greatly on two key aspects beyond its control. The first concerns the extent to which the TRC's recommendations are acted upon, by the government and the institutions that fostered a climate conducive to the systematic and gross abuse of human rights under apartheid. The outcome will boil down largely to a function of political will on the part of the government, which will play an enforcing role vis-a-vis the TRC's recommendations. Doing so will also entail a difficult resource allocation balancing act between urgent

claims for basic quality of life improvements for South Africa's previously-disadvantaged majority (e.g., water, low-cost housing, job creation) against many of the longer-term objectives embodied in the Report's recommendations (e.g., human rights training). How individual reparations for victims of gross human rights violations will fit into this equation remains to be seen. On an even more nebulous level, the long-term prospects of success ultimately will rely on individual South Africans – because it is on the individual level that reconciliation takes place and the seeds for societal transformation are planted. Here, political leadership, as Mandela has so aptly demonstrated, can play an immensely powerful role.

II. The Benefits of Learning from Others' Mistakes.

Timothy Garton Ash has identified three main paths by which countries have come to terms with human rights abuses by their former governments: trials, purges, or history lessons, and "the choice of path, and the extent to which each can be followed," he said, "depends on the character of the preceding dictatorship, the manner of the transition, and the particular situation of the succeeding democracy."[10] Among many other advantages, those in South Africa who planned, negotiated, and worked on the TRC had the benefit of being in a position to learn from the experiences of several other countries which had enacted amnesties, truth commissions, and other mechanisms to deal with their past. As negotiations in South Africa progressed – from secret talks between Mandela and former President P.W. Botha, to the unbanning of the ANC, the return and indemnification of exiles, and the release of political prisoners, to "talks about talks" and the multiparty talks leading to the Interim Constitution – the relevance of these issues became increasingly apparent.[11]

Ash cites Tina Rosenberg's distinction that, "in Latin America, repression was deep, in Central Europe it was broad," as helpful in explaining the different paths chosen in those respective regions.[12] South Africans contemplating their own path might reasonably have questioned how South Africa fit into this paradigm, as repression in apartheid South Africa was both deep ("there was a group of people who were clearly victims – tortured, murdered, or... 'disappeared'") *and* broad (whereas atrocities elsewhere were usually committed against a minority, in South Africa it was the majority black population which suffered the most and "was kept down by millions of tiny Lilliputian threads of everyday mendacity, conformity and compromise").[13]

Although a number of countries had successfully made a transition from authoritarian rule to democracy, no country had experienced a system akin to apartheid, which the international community had singled out in its opprobrium, labeling it a crime against humanity. So negotiators would return, time and again, to the particularities of the South African context. Minister for Water Affairs Kader Asmal, who played an influential role in the early thinking about the TRC, reflected at the time that:

> "there is no prototype that can be automatically used in South Africa. We will be guided, to a greater or lesser extent, by experiences elsewhere, notably in those countries that managed to handle this highly sensitive – even dangerous – process with success. But at the end of the day, what is most important is the nature of our particular political settlement and how best we can consolidate the transition in South Africa."[14]

In the view of Graeme Simpson, Executive Director of the Centre for the Study of Violence and Reconciliation (CSVR), Latin American examples were primarily instructive as "examples of failure rather than success," and it was with a view "to redressing the errors made in these countries, as well as to acknowledging the differences

in the unique South African context," that NGOs such as the CSVR submitted recommendations on the TRC legislation.[15]

Long before these issues were on the radar screen of mainstream South Africa, non-governmental organizations, like the Institute for Democracy in South Africa (IDASA), Justice in Transition, and the CSVR were establishing contacts with practitioners and intellectuals from other countries with experience in or expertise about truth commissions or similar mechanisms.[16] Under the leadership of Alex Boraine, who would later be appointed as Deputy Chairperson of the TRC, Justice in Transition sought out insights and lessons learned from prior truth commissions, and facilitated brainstorming, networking and lobbying efforts for some 30 South African NGOs.[17] According to Boraine, a healthy consultative dynamic developed, largely because "those in the human rights community welcomed the opportunity to do something *for* rather than something *against*. For the future."[18] Based on this extensive "homework," South African civil society was instrumental, not only in shaping the public debate about the need for some king of accountability mechanism, but ultimately in the crafting of the TRC legislation, as well. Boraine and company were responsible for the first working draft of the legislation.[19]

The ANC also had the benefit of its own experience, having appointed the Skweyiya and Motsuenyane Commissions in 1991 and 1993, respectively, to investigate allegations of torture, killings, and other abuses at ANC detention camps. Indeed, following up the concept first mooted in Kader Asmal's inaugural lecture as Professor of Human Rights Law at the University of the Western Cape, and in response to the Motsuenyane Commission's recommendation that it do so, the ANC publicly apologized to its victims, but also went a step further in calling publicly for "a truth commission to investigate all human rights violations, including those committed by apartheid agents."[20]

The NP, meanwhile, had counted on being able to indemnify the apartheid security forces from prosecution in the new dispensation, and indeed fought for a blanket amnesty until the last moment. The issue was a deal-breaker for the NP. The ANC was sensitive to the danger in "pushing the other side into a corner where the only option out is to fight" and felt the need to "preempt what was a very real possibility of a right-wing insurrection."[21] Jose Zalaquett had used the Argentine case study to reinforce this "sustainability" lesson: "It is worse for a political leader who enjoys legitimacy to have to go back on what he proposed than to achieve less than would have been ideal. In Argentina the president aimed too high. As a result he faced a backlash and had to put the stamp of a democratic president on ugly impunity measures."[22] And so the ANC agreed to the NP's demand that there be some kind of amnesty. Objecting in principle to self-amnesty, however, the ANC was savvy enough to save for a later day the battle to balance its amnesty concession with provisions that would help meet the needs of those who had suffered under apartheid.[23] At the eleventh hour, then, those who were negotiating South Africa's Interim Constitution agreed to tag onto it a postamble, whose formulation left it to a democratically-elected parliament to work out the precise mechanism under which an amnesty regime would be implemented.[24]

Without going into too much detail on a subject that will doubtless be examined in forthcoming books on this subject, it is worthwhile to reflect on some additional examples of how lessons learned in other parts of the world were applied to the TRC.[25] In doing so, it is useful to keep in mind the constraints and advantages South Africa faced in putting them into practice, as well as the extent to which the intended outcomes had practical effect.

Problems with Blanket Amnesty

Consider, for example, the lesson on blanket amnesty that Jose Zalaquett, who served on the Chilean National Commission for Truth and Reconciliation, shared with his South African interlocutors at one of the pre-TRC consultative conferences referred to above:

> "One should begin by reconciling oneself to the idea that amnesties are possible. However, several things should first take place:
> - amnesty should possibly serve the ultimate purposes of reparation and prevention;
> - it should be based on the truth, or one cannot really know what the pardon or amnesty is for;
> - there should ideally be an acknowledgement of that truth; and
> - the amnesty must be approved democratically in the sense that it must be the will of the nation to forgive."[26]

Zalaquett's advice struck a chord with those in the audience who would become the architects of the TRC. The compelling need to establish the truth – and an acknowledgment of that truth – was seen as particularly important for victims. Out of such concerns was born the most significant innovation associated with the TRC: rather than offering a blanket amnesty to all perpetrators of gross human rights violations under the *ancien regime*, individuals would have to apply for amnesty for their politically-motivated acts, omissions, or offenses, and that amnesty would be conditional, among other things, on full disclosure. The Final Report explains this key innovation thus:

> "No other state had combined this quasi-judicial power with the investigative tasks of a truth-seeking body. More typically, where amnesty was introduced to protect perpetrators from being prosecuted for the crimes of the past, the provision was broad and unconditional, with no requirement for individual application or confession of particular crimes. The South African format had the advantage that it elicited detailed accounts from perpetrators and institutions, unlike commissions elsewhere which have received very little cooperation from those responsible for past abuses."[27]

Harvard Law professor Martha Minnow has succinctly captured the logic of this innovation: the legislation "turns the promise of amnesty, wrested from political

necessity, into a mechanism for advancing the truth-finding process."[28] Furthermore, for those not already in the dock, the carrot of amnesty is coupled with the stick of possible prosecution for those who either do not come forward to apply for amnesty; or are unsuccessful in doing so, according to one or more of the conditions set forth in the Act.[29] ANC Member of Parliament Willie Hofmeyr, who was one of the key negotiators of the Act, has explained that the requirement for individual rather than group amnesty applications was intended in part to "undermine the solidarity of the security forces," who would otherwise conspire to conceal the truth.[30] A certain degree of uncertainty amongst perpetrators about who had come forward and what they said could help provide a stronger incentive for perpetrators to apply for amnesty. That the deadline for amnesty applications came well before amnesty hearings had been concluded, it was hoped, would heighten this uncertainty.

In reality, the threat of prosecution as incentive to come forward had mixed results. For starters, the threat of civil suits was never particularly credible. There is a two- to three-year statute of limitations for most civil claims in South Africa. Furthermore, most South African victims cannot afford costly legal expenses associated with bringing a civil suit, and in many cases, the facts of the case, including the perpetrators' identities, were not known. As long as the perpetrators kept their code of silence, it would stay that way.

Where there was credible threat of prosecution, results were more favorable: The state pulled out all the stops in the criminal trial of notorious South African Police (SAP) Vlakplaas hit-squad commander Eugene de Kock. In August 1995, de Kock was convicted of 89 charges, ranging from murder to fraud, and was sentenced to two life terms plus 212 years. (De Kock applied for amnesty for these crimes in March 1996.) In the process, De Kock implicated several ranking SAP officers and former cabinet officials. Many of those implicated subsequently applied for amnesty. A similar dynamic, it was hoped, would develop in the amnesty process. As Lyn Graybill points out, while the Act "disallows court use of confessions given before the Amnesty Committee as evidence, confessions may nevertheless alert attorneys general to the culprits in unsolved cases, and they may then prosecute them on the strength of their own investigations."[31] In this way, several mid-level police officers who applied for amnesty for firing indiscriminately into a crowd of protesters in 1992 "incentivized" General Johan van der Merwe to apply for amnesty, as the one who gave the order. Van der Merwe, in turn, implicated two cabinet level officials, and later also implicated former President P.W. Botha in the 1988 bombing of the headquarters of the South African Council of Churches.

Meanwhile, however, in 1995, then-KwaZulu-Natal Attorney General Tim McNally botched the prosecution of former Defense Minister Magnus Malan and 16 other top officers of the South African Defense Force (SADF), who had been charged with organizing hit squad activity that resulted in the 1987 murder of thirteen people in KwaMukutha. As Ash points out, in the aftermath of the Malan trial, the threat of prosecution lost credibility, and "without that stick, the carrot of amnesty is useless."[32] It comes as no surprise, then that the amnesty-for-truth exercise yielded more fruit from

among the ranks of the former SAP, where the code of silence had effectively been broken – and threat of prosecution was more credible – than it did with the former SADF.

The logical conclusion of a conditional amnesty is that if the conditions for amnesty are not met, prosecution is possible, if not probable. It therefore came as something of a surprise when, in the aftermath of the handover of the Final Report, the issue of a general amnesty once again raised its head. Journalist Max Du Preez pointed out the irony in hearing, "the very same arguments that I heard three years ago against the establishment of a truth commission," used by ANC members in support of a blanket amnesty: "Let's forget the past... this will only divide our nation; it will be bad for reconciliation; it will lead to violence."[33] The political motivations and implications of this development are discussed in greater detail later in the paper. In the meantime, it is worth pondering the extent to which South Africa really did benefit from the Latin American "lesson" on amnesty, given the notion's resurrection. What are the implications for future truth commissions? The short answer is that all amnesties are imperfect, even conditional amnesties, and the politically-expedient pull of blanket amnesties should never be underestimated.

Need for Robust Investigatory Powers

South Africa was not the first country to encounter difficulty in breaking the code of silence of the security forces. Commenting about the obstacles faced by the Chilean Truth Commission, Zalaquett noted that, "while witnesses and possible perpetrators were invited to testify," they could not be forced to do so; "subpoena powers would have been an effective tool."[34] Simpson echoed this concern, noting that, the considerable limitations on that Chilean Commission's investigative powers meant, in practical effect, that it was therefore unable "to effectively elicit the necessary information about the 'disappeared'... (or) attribute individual responsibility for past human rights abuses."[35] Given that South Africa's political leadership and top military brass had long operated according to the principle of "plausible deniability," and, as former TRC Executive Secretary Paul Van Zyl has pointed out, many of the political crimes to be investigated were "committed by highly skilled operatives trained in the art of concealing their crimes and destroying evidence," it became clear that the TRC, if it was going to have any success in fulfilling its mandate, was going to need ample investigative muscle.[36] And so the drafters introduced the innovation of a permanent Investigative Unit and provided for a number of specific investigative powers, including the powers of subpoena, search, and seizure.

Under Section 29 of the Act, for example, the TRC could subpoena a person to appear before it and answer questions relevant to a particular investigation. Thematic hearings of this nature included inquiries into the Vlakplaas (hit squad) operations; violence perpetrated by the Civil Cooperation Bureau (CCB); the role of security police in KwaZulu and Natal; the Mandela United Football Club; and the apartheid state's chemical and biological warfare program. As further remedy, Section 32 of the Act lays out robust search and seizure powers. Anticipating problems associated with the widely

reported destruction of sensitive documents by the previous government, the TRC's mandate also includes the requirement to "determine what articles have been destroyed by any person in order to conceal violations of human rights or acts associated with political objectives."[37]

In practice, the TRC had difficulty exercising its enhanced investigatory muscle. The Investigation Unit was hampered both by a lack of policy direction in the early phase, in addition to delayed receipt of funding. "The fact that public hearings were launched in mid-April 1996, before the Investigation Unit was fully established and prior to the formulation of any policy regarding the selection of matters for public hearings," is testament to this reality.[38] That there would be a political imperative to move expeditiously in holding human rights violations hearings is understandable. But this impulse, however well-intentioned, was short-sighted. Piers Pigou, a former investigator with the Unit, has said that "not nearly enough has been done to uncover the past," in part because the Investigation Unit was "plagued by organizational, managerial, and bureaucratic problems."[39]

Subsequent reorganizations allowed the Investigation Unit to assume a more proactive role, though difficulties remained, and it encountered a great deal of resistance, in particular, in attempting to access information from the government. The Unit had agreed, somewhat naively, to the use of "nodal" (liaison) points through which all requests for information and responses were channeled between it and the South African Police Service (SAPS) and the South African National Defense Force (SANDF). But instead of serving to facilitate access to relevant information, appointed officials in those agencies often played more of censoring role.

TRC Commissioner Dumisa Ntsebeza, the head of the Investigation Unit, has said that, in retrospect, he regrets that the TRC did not used its search and seizure powers more effectively: "Consciously or unconsciously, we imposed our own constraints. We did not want to upset the apple cart, and we wanted to give those within the regime a chance."[40] Among other things, the early flexing of the TRC's enhanced investigative muscle would have sent a strong signal and could have brought significant pressure to bear on perpetrators who were sitting on the fence. Lamenting this missed opportunity, Simpson said: "It's about showing your teeth early in the process."[41] The failure to adopt a more robust approach – early on – in exercising its powers of search, seizure and subpoena, is linked to the perception on the part of many perpetrators that the threat of prosecution lacked credibility in that both factors emboldened the alleged perpetrators to adopt an arrogant and defiant posture towards the TRC and the amnesty process. This approach was not confined to the security forces. In 1996, Mangosuthu Buthelezi publicly announced that the IFP would not cooperate with the TRC, and IFP members were discouraged from applying for amnesty. Only two former NP cabinet officials applied for amnesty; P.W. Botha and F.W. de Klerk conspicuously refrained. This flouting has left the TRC with significant gaps in its truth recovery effort and left South Africa with a large pool of unrepentant perpetrators facing possible prosecution, a political hot potato if ever there was one.

Need for Contextualization

Zalaquett had also counseled that South Africa's truth commission would need to "balance between case by case... and contextual references."[42] The Act incorporated this advice by mandating that the TRC make findings on "the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives, and perspectives which led to such violation."[43] The TRC's interpretation of that part of the mandate led to another important innovation in the continuum of truth commissions: the holding of thematic and institutional hearings. Van Zyl discussed the logic in this: "We felt that it was impossible to paint as complete a picture as possible unless we looked at the institutional and systemic dimensions," and in order to be responsive to the Act's requirement to recommend administrative, institutional, and legislative measures designed to prevent future human rights abuses, "we felt that we would not be able to make sufficiently nuanced recommendations unless we understood the institutional causes of them."[44]

In addition to human rights violations hearings, at which victims of gross human rights violations were invited to testify in public, the TRC held event hearings or "window cases," at which both victims, alleged perpetrators, and experts participated, so as to thoroughly explore the context of a specific event, deliberately selected because it was considered representative of broader patterns of abuse. Special Hearings on children and youth and on women complemented this effort by looking at patterns of abuse experienced by those specific groups. Finally, the TRC also held institutional hearings, "exploring how various social institutions contributed to the conflicts of the past."[45] These hearings played a positive role in shedding light on and provoking public debate about the role the health sector, the judiciary, the media, the business sector, faith communities and the prison system had had in apartheid South Africa.

Some of the institutional hearings were more successful than others, however. Circumstances permitting, these hearings offered the added potential benefit of serving as catalysts to trigger institutional change from within. Van Zyl points out, for example, that the TRC's hearings on the health sector prompted an internal process within the organized medical profession to review its code of ethics.[46] But circumstances were not always permitting. Participation in some of the institutional hearings, for example, left something to be desired. Most judges and magistrates, citing concerns that participation would somehow compromise their independence, declined to attend the institutional hearing on the judiciary; only a few sent in written responses. The Final Report addresses their non-participation with disdain:

> "The failure of the judiciary to appear is all the more to be lamented when the historic significance of the Commission is considered, as well as its envisaged role in the transformation of South African society into a caring, humane and just one. The Commission was thus denied the opportunity to engage in debate with judges as to how the administration of justice could adapt to fulfil the tasks demanded of it in the new legal system; not so as

> to dictate or bind them in the future, but so as to underline the need urgently to re-evaluate the nature of the judiciary... The Commission deplores and regrets the almost complete failure of the magistracy to respond to the commission's invitation, the more so considering the previous lack of formal independence of magistrates and their dismal record as servants of the apartheid state in the past. They and the country lost an opportunity to examine their role in the transition from oppression to democracy." [47]

Beyond the obvious missed opportunities referred to above, the judges' and magistrates' non-participation suggests that follow-through in taking concrete steps to transform the judiciary will be grudging, at best. The same holds for those business representatives who half-heartedly participated in the institutional hearing on business and labor, taking the position that, because they did not actively or deliberately plan or participate in human rights violations, they were effectively exempt from making submissions. Their stated purpose in participating in the Commission was, rather, "to promote understanding of the role of business under apartheid and to explore areas where business failed to press for change..."[48] This is a far cry from the ANC's position that, "historically privileged business as a whole must... accept a degree of co-responsibility for its role in sustaining the apartheid system of discrimination and oppression over many years."[49] The passive-voice recommendations that came out of this hearing (e.g., "that consideration be given to the most appropriate ways in which to provide restitution for those who have suffered from the effects of apartheid discrimination..." or that, "the feasibility of the following as means of empowering the poor should be considered: a wealth tax; a once-off levy on corporate and private income; each company listed on the Johannesburg stock exchange to make a once-off donation of one percent of its market capitalization...") reflect the difficulty the TRC encountered in reconciling these contrasting perspectives on institutional responsibility, as well as the difficult road that lies ahead.[50]

Nonetheless, these thematic and institutional hearings collectively helped the TRC avoid the possible pitfall of looking at specific cases of human rights abuse in isolation. They also allowed the TRC to highlight the institutional and societal legacies of apartheid, such as the vast and egregious disparity that still exists between rich and poor. Finally, the thematic approach permitted the TRC to get away from a strictly victim/perpetrator approach to address the role of beneficiaries of apartheid, as well.[51] That there was some degree of reluctance on the part of both individuals and institutions who benefited from apartheid to acknowledge as much, let alone "take the rap" for doing so, comes as no surprise, and can be ascribed, in part, to the common mentality among whites that, "I won't pay because I'm not guilty, I was not one of the perpetrators."[52] The prevalence of this mentality, which is reflected in a March 1996 public opinion poll of white South Africans, does not bode well for voluntary compliance with suggested reparative measures like a wealth tax.[53] Again, political leadership will be key to achieving greater "buy-in," on the part of apartheid's beneficiaries to the notion that they have some degree of responsibility in this regard.

The Selection of Commissioners

The selection of commissioners proved to be a highly visible political exercise, the effects of which would influence virtually every aspect of the TRC's work. Aside from serving the largely symbolic function of leading the Commission and setting the tone for the overall process, those who would be selected as commissioners would be tasked with directing the more nuts and bolts work of TRC's three committees (on Human Rights Violations, Reparations and Rehabilitation, and Amnesty) as well as the Investigation Unit. Furthermore, though much of the drafting of the Final Report – most notably, the Findings, and Recommendations – would be left to TRC staff, the Commissioners would have the final say over the report's substance. The stakes were thus quite high.

The Act stipulates that "the Commission shall consist of not fewer than 11 and not more than 17 commissioners," and that "The President shall appoint the commissioners in consultation with the Cabinet."[55] The Act also specifies, somewhat preposterously in retrospect, that the commissioners must "not have a high political profile."[56] It is interesting to note that the Act left open the possibility of the appointment of up to two non-South African commissioners, though it is not surprising that this route was not taken, as it would have played to political sensitivities about outside influence.

Mandela chose to open up the selection process for even wider public participation than was called for in the Act by inviting nominations from the public. A selection panel comprised of members of civil society and government considered these nominations and narrowed down a list of some 300 to a short list of 25, from which Mandela, in consultation with his Cabinet and, significantly, the heads of the political parties, selected 15. Two additional appointments not from the short list – Rev. Khoza Mgojo and Adv. Denzil Potgieter – were added to make a total of 17 commissioners, apparently to render the commission more representative.[57] Mandela later revealed that he had not personally approved of all of his appointees, but that he had appointed them, in spite of his reservations, in the interest of national unity.[58]

Though the commissioners' makeup was not strictly proportional to census figures, the selection process clearly reflected a deliberate political attempt to achieve a high degree of representivity. The result was a commission composed of seven women and ten men; the racial breakdown was seven blacks, six whites, and two each of "coloured" and Indian extraction. The Commissioners also spanned the political spectrum in their political affiliations. Despite the good intentions which brought it about, this very representivity, which yielded starkly contradictory views about human rights violations in South Africa's past, let alone the political and moral accountability for such, was a recipe for inertia when it came to interpreting the mandate and making tough political decisions. To be fair, though, part of the problem can probably also be attributed to the large number of Commissioners at the helm. Van Zyl has commented that the diverse composition of the TRC's policy-making organ left Tutu and Boraine with the never-ending task of trying to minimize the contradictions; eliminating them was out of the question.[59] Boraine noted the practical effect: "Commissioners had a great deal of difficulty finding

III. The Politics of the TRC

Many of us would have liked the TRC to be above politics. But it would be foolhardy to expect an institution that was born of political compromise, that has operated in a politically-charged environment, and whose mandate includes such politically-loaded concepts as truth, reconciliation, and amnesty, to be anything but political. Michael Sharf has observed that truth commissions are:

> "inherently vulnerable to politically-imposed limitations and manipulation; their structure, mandate, resources, access to information, willingness or ability to take on sensitive cases – even the wording of the final report – are all largely determined by political forces at play when they are created."[54]

Though Sharf may overstate the argument, one can certainly make this case with respect to the TRC, and it provides a useful point of departure for this discussion about the politics of the TRC. In fact, it may also be useful to take Sharf's analysis a step further: One can also anticipate that the political forces to which he referred will evolve over time, that they will continue to influence public debate about the commission, if not the commission itself, and that the proceedings of the commission, depending on its scope and visibility, may also play a role in altering the political landscape. This is not to suggest that the integrity of the TRC was compromised, that it did the political bidding of any party or leader, or that it will single-handedly be responsible for making or breaking any political careers. But there should be no illusion: the TRC process was a profoundly political undertaking.

Much about the TRC process is unique to South Africa, because of the particularities entailed in addressing its uniquely apartheid past. But all truth commissions take place in a political context. It is therefore worthwhile to consider a number of illustrative examples of how politics influenced the TRC process – and vice versa. This brief examination of the politics of the TRC is not confined to the question of who applied political pressure and why – although that is certainly important; it looks as well at questions of appearances, "spin," and political consequences. For example, TRC commissioners and staff were well aware of the political ramifications of their actions and decisions, and they contemplated and debated such matters. In fact, they were often on guard against political pressure with respect to such matters and indeed went out of their way to avoid even the perception that the TRC was subject to outside influence. Such evasive actions do not make it any less a political body; rather, they are evidence of the kinds of political forces at play. The point is not to criticize the TRC, or for that matter, those parties who may have attempted to influence it or use it as a political tool, but rather to better understand the dynamics of such politicization. From a prescriptive point of view, one might turn the logic of Sharf's observation around to consider how the political reality that provides the backdrop to a truth commission can be a strength, rather than a weakness in the pursuit of truth and reconciliation.

each other and working with each other, which meant we spent a lot of energy on maintenance, rather than on getting the job done."[60] Racial undertones – and outright racism – further complicated the dynamics. As Boraine said, "there was a great deal of racism within the Commission itself. People were very quick to judge and to undermine."[61] The Final Report refers to these challenges only elliptically, but clearly they were at the core of many of the Commission's problems.[62]

The Politics of the Amnesty Process

The issue of how the amnesty process would be administered was contested from the start and the Amnesty Committee's decisions have frequently been second-guessed. Part of the controversy stemmed from one of the compromises the NP had successfully lobbied for in Cabinet: that amnesty hearings would be held behind closed doors. The provision did not sit well either with human rights groups, especially coming on the heels of the revelations that, on the eve of 1994 elections, then-President de Klerk had allowed some 3,000 people, including high-ranking police, military officers, and cabinet officials to be secretly indemnified, without consulting the ANC.[63] Human rights NGOs and media organizations mounted a successful campaign to amend the legislation, with the result that amnesty hearings involving gross violations of human rights would take place in public, except where doing so would defeat the ends of justice.[64]

In addition, the original draft of the legislation put forward by Justice in Transition would have had one of the Commissioners serve as Secretary of the Amnesty Committee. The Amnesty Committee would have made recommendations on granting or denying amnesty; the Commissioners would have taken final decisions. Another option contemplated would have had recommendations on amnesty vetted by the President. The NP objected to these proposals, arguing instead that the Amnesty Committee, comprised of judges, should be independent from the Commission itself. Their aim was to insulate the quasi-judicial decisionmaking on amnesty from political influence and potential bias. Ultimately the NP was successful in its bid to have an Amnesty Committee as part of the Commission itself, but with independent decision-making authority. Indeed, there are sound reasons for an independent Amnesty Committee – any suggestion of bias could sully the whole process – but provision also had unforeseen consequences. As Boraine lamented in retrospect, "something of the spirit of the Commission was not transferred to the Amnesty Committee."[65]

An anecdote about the Committee's early amnesty decisions illustrates the practical impact of Boraine's observation. In the early batches of decisions handed down by the Amnesty Committee, a pattern was seeming to establish itself, whereby white applicants were refused amnesty, while black applicants were successful. To put the potential impact of this trend in context, one need only consider the wariness with which perpetrators were approaching the amnesty process. Of this, Lyn Graybill wrote that, "initially, perpetrators were slow to come forward as many were waiting to see how judges interpreted such ambiguous clauses of the amnesty legislation as 'politically-motivated acts' and 'proportionality to objectives.'"[66] When a Commissioner learned that the

Amnesty Committee was on the verge of publicly releasing another batch of amnesty decisions that would have fit this troubling pattern, the Commissioner intervened. An exchange between Commissioner and Amnesty Committee representative was said to have gone something like this: "Are there not *any* successful white applicants?" "Oh yes, but they're not quite finalized." "Well finalize them *now*! Don't you realize that these decisions have consequences!"[67] That the Amnesty Committee was apparently oblivious to the political signals it was sending when it announced those early decisions – whether or not as a result of its strictly quasi-judicial function – points to one of the possible downsides of its complete independence.

And then there is the Amnesty Committee's decision to grant amnesty to the 37 ANC members who had applied collectively for amnesty, not for any specific act, but based on the notion of their collective responsibility for any human rights violations perpetrated by their members in the course of the struggle against apartheid. Misunderstandings abound with respect to these applications, the Amnesty Committee's initial decision to grant amnesty, the subsequent court challenges, and later reversal. Political parties (and their leaders) seized on those misunderstandings to further their respective political objectives.

That there were no specific details about actual violations of human rights in the amnesty applications of the ANC leaders is not as inauspicious as some of the opposition parties have suggested. Those ANC leaders who applied for amnesty had not personally been involved in executing or ordering any actions that would constitute gross human rights violations; the applications were a symbolic gesture. The ANC's intentions in putting forward this group of amnesty applications were two-fold. First, the ANC was sending a political signal to its rank and file to the effect that: we leaders accept ultimate responsibility for the excesses committed by comrades in furtherance of what was a just cause – the struggle against apartheid; you too should cooperate with and participate in the TRC process. In addition, the ANC was trying to set an example for the other political parties' leaders, primarily those in the NP. The intended message to them was more of a challenge: We accept political responsibility for excesses committed by our comrades, will you do the same on behalf of your security forces? Amnesty Committee Chairperson Justice Mall presided over the panel which initially granted amnesty to the group. Van Zyl downplayed the role political pressure played in this case but suggested that the fact that the ANC was the ruling party may have "subliminally influenced their decision."[68]

However commendable the ANC's gesture was, the Amnesty Committee's decision to grant amnesty was not in keeping with the Act's requirement of full disclosure. Furthermore, the fact that the decision came without any public hearings stoked public perceptions that the ANC had cut itself a deal with the TRC. The Commissioners, meanwhile, were baffled by the Amnesty Committee's lack of political – let alone judicial – judgment. The atmosphere within the TRC in the aftermath of the announcement was one of panic; the Commission's credibility was on the line. Boraine was said to be furious; Tutu appalled.[69] The TRC barely beat the NP to the punch in taking its own Amnesty Committee to court, but the decision to do so was not

uncontested. Ntsebeza, for example, has maintained that those ANC leaders who applied for amnesty did so only because of their "association with the liberation movement under whose name human rights violations occurred... It was a legitimate application."[70]

By taking its own Amnesty Committee to Court, the TRC was indirectly taking on the ANC. Van Zyl opined that, "if an illustration were needed of impartiality, this would be it."[71] Unfortunately, however, the damage had already been done to the Amnesty Committee's credibility, and it is not clear that the public understood the distinction between the TRC's Amnesty Committee and the TRC proper. And so the positive aspects of both the symbolic gesture on the part of the ANC and the resoluteness on the part of the TRC were overtaken by the high-decibel partisan reactions and accompanying media frenzy that greeted the Amnesty Committee's initial decision.

The NP brought its own court application to have the amnesties declared illegal, which served the purpose of discrediting both the ANC and the TRC. Meanwhile, the ANC was left in the unenviable situation of trying to defend the *bona fides* of its gesture when the terms and the tone of debate had already been set – much to their disadvantage.[72] The media was complicit in focusing its attention more on the hyperbole of the debate than on the complexities of the case.

In March 1999, the Amnesty Committee handed down a decision reversing itself and rejecting amnesty: "In so far as the applicants seek to apply for amnesty for acts committed by their members on the basis of collective political and moral responsibility, their applications fall outside the ambit of the ... Act and accordingly they do not require to apply for amnesty."[73] Predictably, opposition parties took the opportunity to score political points. The New National Party (NNP), for example, suggested that the ANC leaders would now be liable to criminal and civil prosecution, and that "all this is of their own doing because the ANC leaders were less than truthful... and played games with the TRC when they lodged their amnesty applications."[74] For its part, the IFP directed its criticism at the TRC itself: "The legal challenge to the TRC concerning 'the ANC 37' has revealed a staggering example of confusion, incompetence or something even more sinister."[75] Sinister forces, it seem make good political fodder. On a campaign swing through Gugulethu, Winnie Madikizela-Mandela suggested that sinister forces were responsible for the timing of the TRC's refusal to grant amnesty to the ANC leaders so soon before the election.[76]

To put this in context, it is worth noting that this is not the only amnesty decision subjected to close scrutiny or used for political gain. Take the recent decision to refuse amnesty for Janus Walusz and Clive Derby-Lewis, who were convicted of the April 1993 murder of South African Communist Party leader Chris Hani. When the Amnesty Committee denied amnesty on grounds that the applicants failed to make full disclosure of their acts and that they lacked political motivation as required in the Act, several predominantly white Afrikaner opposition parties promptly denounced the decision and accused the Amnesty Committee of giving in to political pressure.[77]

Those who served on the Amnesty Committee did encounter some pressure from political parties, but in the words of one, it was "an indirect pressure," and its aim was not to influence individual amnesty decisions but to prompt the Committee to finish its work as quickly as possible.[78] To this end, party leaders conveyed the message by letting the Committee know that "funds will not be available forever," and through public statements to the effect that, "We would not want to let the work of the Amnesty Committee interfere with the election."[79]

One final aspect of the amnesty process that deserves attention is the decision to extend the amnesty cut-off date from December 6, 1993 (the date the negotiations for an Interim Constitution and multiparty democracy concluded) to May 10, 1994 (when President Mandela was inaugurated). The Final Report explains the decision, which required an amendment to the Interim Constitution, thus:

> "The extension of the cut-off date for amnesty applications... was a reminder of the transitional context in which this unique, accountable amnesty process needed to be understood. The extension of the date was due largely to pressure by, on the one hand, the white right-wing (the Afrikaner Weerstandsbeweging (AWB) and Afrikaner Volksfront) which opposed the elections by violent means and, on the other, black groups such as the Pan Africanist Congress (PAC) and Azanian Peoples Liberation Army (APLA), which had continued the 'armed struggle' during the negotiation process. It became clear to the Commission in the course of its work that such an extension would enhance the prospects of national unity and reconciliation, because it would allow these groupings to participate in the amnesty process."[80]

That the TRC itself lobbied Parliament on behalf of extending the cut-off date marks a significant shift in the politics of the TRC. Graeme Simpson has criticized the TRC's decision to actively lobby as, "a most fundamental political compromise (that) demonstrated a willingness to play politics on the part of the TRC. Prior to that, the TRC could claim that, whatever they were doing, they were doing no more than administering in some senses a compromising political agreement reached by the ANC and the National Party in the negotiation process."[81] Others have defended the lobbying, pointing out that TRC did so in the face of ANC's opposition to the idea of an extension. The rationale, according to Van Zyl, was that the election was a more natural cut-off date; groups like the PAC and AWB, who had at best a marginal influence in the multi-party talks – the conclusion of which marked the Act's original cut-off date – had stopped engaging in violence after the election; to insist on the original, more arbitrary date, he said, "smacked of selective justice."[82] Both arguments have merit, but on balance, it seems that the TRC should have erred on the side of caution and refrained from active lobbying and let others make the sound argument in favor of the later cut-off date. Furthermore, if, as many have conjectured, the TRC lobbied for extending the cut-off date in order to achieve a greater degree of "buy-in" on the part of the right-wing Afrikaners, one should also note that that effort was not particularly successful.

The Politics of Reparations (or Not)

The Act charges the TRC with making recommendations with respect to granting reparations to victims, including urgent interim measures, but reserves the power to implement those recommendations for the President in consultation with Parliament. Only when the President's proposals are approved by Parliament is the government empowered to make the necessary regulations.[83] This requirement marks a departure from the Act as originally drafted, which would have allowed the TRC to determine compensation on its own. That the politicians would so insert themselves in the process is understandable, given the fact that large sums of money would be involved. But the fact that the legislation left the Commission without the ability to implement its own recommended reparations policy has had profound consequences. In the words of the Final Report, "reparation is essential to counterbalance amnesty," but the Commission's mandate left it with a "glaring" contradiction between its ability to deliver amnesty, on the one hand, and its inability to deliver reparations, on the other.[84] This lack of synchronicity has been exacerbated by delays. With regard to the urgent interim measures, the Amnesty Committee's formulation of a recommended policy took longer than expected, and there were further delays in the government's promulgation of regulations to deliver them. That the first such payments (starting at a baseline of R2000) were not made until July 1998 speaks volumes to these problems. Similarly, the government's seeming reluctance to move forward on the individual reparations grants as recommended in the Final Report has contributed to the perception on the part of many victims that they have been shortchanged.[85]

The Final Report explains the rationale for its recommended individual reparations grants:

> The individual reparation grant is an acknowledgement of a person's suffering due to his/her experience of a gross human rights violation. It is based on the fact that survivors of human rights violations have a right to reparation and rehabilitation. The individual reparation grant provides resources to victims in an effort to restore their dignity. It will be accompanied by information and advice in order to allow the recipient to make the best possible use of these resources."[86]

The maximum individual reparation grant would total R23,023 per annum for a six year period and would be administered by the President's Fund. The exact amounts would vary, according to a formula that would differentiate between rural and urban-dwelling victims (based on the assumption that accessing health services is 30 percent more expensive in rural areas); and the number of dependants and/or relatives (up to maximum of nine). The projected budget is R477,400,000 per annum, adding up to a six year total of R2,864,400,000.[87] With stakes this high, it is not surprising that the country's political leaders would want to scrutinize the policy and subject it to a thorough costs/benefits

analysis. What is of concern, however, are the increasing signals that the ANC is leaning toward not granting individual reparations at all.

In part, the ANC is reacting to what, in the words of one interlocutor, it considers to be "an absolutely disastrous proposal," in which the TRC "went way outside what is a fairly clear conception of the law, that financial reparations would be a fairly token thing."[88] The gist of the ANC's concern is that the generous grant recommended by the TRC risks creating two classes of victims, those who were victims of gross human rights violations and those who were merely victims of the everyday indignities and hardships under apartheid. As a matter of policy, the ANC does not want to compensate one class of victims at the expense of the other, especially when those other victims are also still facing hardships associated with the legacy of apartheid.

It is conceivable that the ANC's sensitivity on this issue stems from memories of the provision of financial assistance to returning exiles in the early 1990's, which led to division between the ANC members who had been in exile, who stood to benefit, and those who had stayed in the country, who did not. It would follow that the ANC would not want to reawaken or exacerbate those tensions by providing generous reparations grants to victims of gross human rights violations at the expense of the other victims of apartheid, who may have suffered just as much, if not more.

In light of these concerns, it is useful to consider some recent public statements regarding reparations: In February 1999, the ANC's Secretary-General Kgalema Motlanthe suggested that the government was more inclined to make reparations to communities rather than to individuals.[89] Soon thereafter, Presidential Spokesman Parks Mankahlana confirmed that this was the substance of the government's recommendation, but that the Cabinet had yet to take a decision. Mankahlana justified the government's position thus: "How do you compensate a person who left school because of police harassment... When we reduce this into rands and cents then we are not addressing the whole notion of reconciliation."[90] Mbeki's Parliamentary statement on the TRC's Final Report sent mixed signals on this question: He indicated that "we must also attend to the matter of individual reparations, both in the form of cash and the provision of services," but he also said that government should not insult the dignity of victims by trying to compensate them with money. He hinted that the ANC's preference was for community-based reparations that would benefit all victims of apartheid, saying that all South Africans must be "ready and willing to provide reparations to entire communities, by helping to pull them out of the wretched conditions which are the product of a gross and sustained violation of their rights as human beings."

Simpson has criticized this position: "I sympathize with the dilemma, but it's a marvelous excuse for doing nothing."[91] The TRC cannot be too pleased, either. As early as April 1998, Hlengiwe Mkhize, the chairperson of the Reparation and Rehabilitation Committee, was cautioning about the need for a clear signal from the government about its commitment to individual reparations grants.[92] Naturally, the ANC's approach does not sit well with the victim community, many of whom have come to expect individual

compensation, in spite of bold-faced disclaimers like those that appear in the TRC's pamphlet on reparations: "Please remember that these are proposals to the President. The President and Parliament will make a final decision on them."[93] What is not yet clear is whether that perception will develop into a more serious political liability for the ANC.

The Politics of the End Game

Nobody anticipated the whirlwind of legal challenges and political maneuvering that would usher in the release of the Final Report. The high drama that accompanied the endgame soured the overall atmosphere and provoked bitter reactions. Lines were drawn, and prospects for reconciliation looked dim as political parties, commissioners, and commentators traded scathing sound bites. That the truth and reconciliation process would be reduced to such spectacle is unfortunate. In retrospect, however, it is useful to consider the politics that were at play, because they spotlight the high stakes of the TRC process as a whole.

What started the ball rolling were the Section 30 notifications sent out by the TRC to those against whom it intended to make derogatory "findings." The TRC so notified former President F.W. de Klerk, whom it was to declare "an accessory to gross human rights violations," because, among other things, in failing to report that he had known about unlawful acts committed by the state's security forces (e.g., the 1988 bombing of the headquarters of the South African Council of Churches), he had "contributed to creating a culture of impunity within which gross human rights violations were committed."[94] Contesting the legitimacy of the findings, de Klerk launched an urgent court interdict to prohibit the TRC from publishing them. He and the TRC reached a settlement in which the TRC agreed temporarily to expunge from the Final Report derogatory findings about him.[95] De Klerk's last-minute settlement was conspicuously evidenced in a page-worth text that was dramatically blacked-out in the Final Report. In an ironic twist, in light of the ANC's own legal challenge that would soon follow, Justice Minister Omar challenged the logic behind de Klerk's interdict and defended the TRC's prerogatives: "The Commission must be allowed to boldly, courageously and without interference speak its mind in the report..."[96]

In the Section 30 notification it sent out to the ANC, the TRC indicated that it planned to find the ANC morally and politically responsible for gross human rights violations, including the indiscriminate killing of civilians by planting landmines and during bomb attacks, in addition to torture, severe ill-treatment, and execution of alleged spies. The ANC was incensed by the perceived "criminalization" of the liberation struggle by the TRC and the "moral equivalence" and "artificial even-handedness" with which the TRC treated the abuses by the liberation movements and those of the former government and security forces. An indignant ANC leaked the offending findings and demanded a meeting with TRC commissioners. The ANC wanted to make the case that it had waged a "just war" against apartheid, which was recognized as a crime against humanity. Therefore, it would argue, abuses committed by those in the ANC should be seen as "inseparable from the consequences of legitimate struggle."[97] Critically, however, in

focusing its energies on a face-to-face meeting, the ANC failed to respond in writing to the TRC within the designated 15-day deadline.

The commissioners were deadlocked over how to respond to the ANC's request for a meeting. Tutu, who was in the United States at the time, was called on to cast the deciding vote. He voted against meeting with the ANC leadership on the grounds that such a meeting would entail bending the regulations for the ruling party, which would be both inappropriate and unfair.[98] Those who voted with him were also troubled that such a meeting would create the appearance of the TRC succumbing to political pressure from the ANC, a concern the ANC described as "utter rubbish."[99] Press leaks on both sides fueled the explosive political climate that was developing.

With the face-to-face meeting route effectively closed, the ANC turned to a different tactic. Apparently taking its cue from de Klerk, the ruling party launched a late-night court interdict the night before the handover ceremony was scheduled to take place. It aimed to prevent the TRC from publishing its Final Report unless and until it had taken into consideration the ANC's response to the derogatory findings against it. On the morning of October 29, 1998 the case was dismissed with costs, allowing the handover ceremony to go forward.

Suggesting that the ANC action smacked of abuse of power, Tutu had vowed to fight the ANC's interdict "with every fibre in my being," adding, "I have struggled against tyranny. I did not do that in order to substitute another tyranny."[100] Tutu's characterization of the ANC as a new 'tyranny' reportedly angered some of his fellow commissioners, and the following day, Tutu publicly apologized for "my self-righteousness, my arrogance."[101] If these developments stirred division within the TRC, the effect was equally inflammatory within the ranks of the ANC. In the aftermath of the failed attempt, several ANC politicians voiced their embarrassment and displeasure, though most did so anonymously, saying, for example, that the court application was "absolute nonsense... God only knows where that decision was taken and how it was taken;" and that the move was "unbelievably stupid."[102] Several ANC cabinet ministers, members of the National Executive Committee and premiers also reportedly expressed their personal regrets to Tutu and other commissioners.[103]

It became clear in the subsequent days and weeks that Mbeki, as ANC President, was behind the decision to launch the court interdict; Mandela, it was said, had been consulted, but he did not have a say in the decision. The strong insinuation was that, although he objected to the offending findings, Mandela disagreed with the strategy of pursuing a legal challenge, and his posture at the handover ceremony would seem to confirm that. To the extent that there was a split within the ANC on the question, it seemed to have been along the following fault-line: those who had fought so hard to keep the armed struggle within the parameters of international norms and standards – and this was primarily the ANC leadership in exile – were said to be the ones who were most bitter about the findings, which offered little in the way of acknowledgement of their

efforts.[104] The media played up the significance of this apparent split in the ANC, inferring troubling indicators about Mbeki's leadership style.[105]

In light of the ensuing political fall-out, it is worth revisiting the ANC's (over-) reaction to the substance of the Final Report. First, that its leadership was so caught off guard would seem to indicate that those who were responsible for TRC matters within the ANC were asleep at the wheel, because, as many have pointed out, there were no surprises in the Final Report. Its findings on the ANC, in fact, were based primarily on information that the ANC had provided in its submissions to the TRC. As one ANC MP commented, "There was nothing new in what the Commission found...it wasn't new until we made it news."[106] Beyond that, one should consider the troubling implications of the poisoned atmosphere that characterized the endgame. The widespread disdain for the TRC within the ruling party does not bode well for early or enthusiastic implementation of the TRC's recommendations, particularly those that are politically sensitive or financially costly.

The Politics of Prosecutions (or Not)

The Final Report recommends that, "where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation..."[107] In the aftermath of the release of the Final Report, the recently-appointed NDPP was repeatedly asked whom among those implicated in the TRC process he would prosecute, and there has seen been a great deal of speculation in the South African media on the question. Ngcuka indicated obliquely that, in the interest of national reconciliation, some cases should not be prosecuted.[108] The implicit logic is as follows: Certain prosecutions would provoke political violence, which would be contrary to the goals of national reconciliation. In cases where prosecutions would provoke violence and political instability, it follows, they should not be pursued. Renascent violence in the tinderbox that is KwaZulu-Natal illustrates the point; one need only imagine the widespread political violence that would ensue were the NDPP to prosecute IFP leader Mangosuthu Buthelezi or other prominent IFP leaders. Both the underlying assumptions and the logic of this argument are certainly open to challenge, however: CSVR Senior Researcher Hugo van der Merwe took them on in an editorial in The Sunday Independent: "It would be a grave mistake to equate political stability with genuine reconciliation. It may have been necessary to grant amnesty for the sake of the transition to democracy, but we cannot justify the extension in response to veiled threats of violence from implicated political leaders."[109] Similarly, The Star editorialized:

> "If we are now going to accept the spurious argument that peace and reconciliation depend on a blanket amnesty for the warmongers of KwaZulu-Natal, and the torturers and murderers of the innocent, who had an opportunity to come clean, that would be a kick in the teeth for those who believed in the integrity of the process. And it would lend credence to the suspicion that vote-catching next year is everything to the political

> parties leading the crusade for blanket amnesty, and the country be damned."[110]

Many observers were surprised that talk of a general amnesty – in whatever guise – which had been dismissed in the context of the multi-party talks leading to South Africa's transition, resurfaced in late 1998. The scramble to come up with a politically-acceptable post-TRC amnesty provision would seem to suggest that the ruling party failed to think through what would happen to those high-profile alleged perpetrators against which the TRC would make derogatory findings. Perhaps the ANC leadership and other architects of the TRC just wrongly assumed that those very perpetrators would have applied for and received amnesty. At any rate, the ANC is not united on the question of general amnesty; those who lost loved ones – particularly to the orchestrated political violence between the ANC and IFP that swept KwaZulu-Natal and the East Rand in the early 1990s – may not be so quick to forgive their former adversaries, particularly if they shunned the amnesty process. Some commentators have even suggested that such a move could provoke a split within the ranks of the ANC.[111]

Although Mandela spoke out strongly against the idea, pledging to "resist a general amnesty with every power I have," the ANC has continued to flirt with the idea.[112] Whatever the mechanism, *de facto* or *de jure*, whether by extending amnesty deadlines, creating a new amnesty regime exclusively available to those who were party to political violence in KwaZulu-Natal, or by exercising political control over the NDPP, there are clear indications that the ANC is actively considering the options. Indeed, as recently as May 1999, Mbeki suggested in an interview that a mechanism for collective amnesty should be introduced to accommodate apartheid-era generals, among other groups; Omar later confirmed that Mbeki had asked him "to draft legislation that would allow groups of former soldiers and freedom fighters and members of political parties to apply for amnesty without specifying individual acts of human rights violations."[113] A skeptical Business Day editorial posed difficult questions about the proposed scheme: "What of the thousands of individuals who approached the commission in the belief that if they failed to get amnesty, they faced prosecution? And how does the idea of an indiscriminate pardon square with the government's professed commitment to rebuilding the rule of law and a human rights culture?"[114]

There have for some time been clear indications that the ANC leadership was leaning in this direction: In the Parliamentary debate on the TRC Final Report, for example, although both Mandela and Mbeki stated that a general amnesty should not be entertained, Mbeki also indicated that, "we will have to discuss such proposals as have been made on this matter with regard to KwaZulu-Natal and others put forward by the former generals of the SADF who have themselves confirmed their loyalty to the country and its Constitution..." In March 1999, Omar was reported to say that "the TRC process had by-passed the province of KwaZulu-Natal for lack of support, and there needed to be a response to the wounds caused by the human rights violations that took place there...there should be some process to allow the warring parties to come to terms with the past."[115]

As Business Day surmised, one can probably dismiss Mbeki's professed concern about enticing apartheid generals to come forward this late in the game as something of a "a red herring," as there is "no evidence that they continue to pose a threat to the state."[116] Rather, the ANC's motivations, appear to be two-fold: First, it wants to forestall the sharp increase in political violence that many commentators have predicted would engulf KwaZulu-Natal (and possibly other parts of the country as well) in the event of criminal prosecution of the IFP leaders who were implicated in gross human rights violations but who shunned the amnesty process. A second but related motivation is to facilitate the rapprochement apparently under way between the ANC and the IFP. In the run-up to the June 1999 elections, there has been widespread speculation that the ANC wishes to bring IFP supporters into its fold so as to help it secure a two-third's majority in Parliament. Presumably, aside from being offered the Deputy Presidency – something that has been widely forecast in the South African media, the IFP would insist on the non-prosecution of its leaders as one condition for any such arrangement. Many commentators have speculated that the repeated floating of trial balloons on the question of amnesty is evidence enough that a deal has already been cut between Mbeki and Buthelezi.

Providing for "Group" amnesties would seem to be just the creative mechanism the ANC was looking for so as to avoid the political fallout associated with "blanket" amnesties, while allowing it to effectively achieve the same political objective. However, it is not at all clear that such a mechanism, which would evidently favor some groups over others, could withstand a constitutional test. In the meantime, tough choices on whom to prosecute await Bulelani Ngcuka. It is not yet clear how much political influence he will be subject to. For its part, the TRC has submitted to the office of the NDDP a list of 100 alleged perpetrators for whom it recommends prosecution, and the Final Report indicated that the TRC would make available to the appropriate authorities relevant information (excluding privileged information from amnesty applications).[117]

Aside from what is desirable from a moral and political perspective, one must also consider the feasibility of bringing criminal prosecutions. The NDPP's choices on this matter will be influenced by practical constraints associated with a limited budget and opportunity costs. For every trial of an apartheid-era perpetrator, that many fewer resources will be available to try ever-increasing present-day criminal caseloads. Furthermore, having been stung by the failed prosecution of former Defense Minister Malan and his co-accused, the state will likely establish a high evidentiary threshold. The net result is that it is unlikely that more than a handful of prosecutions will proceed from the TRC process.

IV. Report Card

Noting the benefits and indeed appropriateness of the ad-hoc nature of truth commissions, which are designed to suit country-specific conditions, Hayner has suggested that that there is nonetheless a need for "minimal standards" that a truth commission should meet if it is to be considered "a serious, good faith effort and respectful of those who will be affected by its work."[118] Such standards, she points out, could also "facilitate appropriate international and national oversight."[119] Hayner built on the work of U.N. Sub-Commission for Prevention of Discrimination and Protection of Minorities Special Rapporteur Louis Joinet, who first proposed such guidelines in a document entitled, "Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity."[120] The International Criminal Court (ICC), once it is operational, will doubtless weigh in with its own criteria.[121] In the meantime, thinking on these questions will continue to evolve, and funders will, based on their own assessments, vote with their checkbooks. Those contemplating truth commissions in the future could also benefit from prospective consideration of such guidelines, along with an understanding of the potential pitfalls that necessitate them. Among other things, an honest exercise of this nature could help establish whether a society is, to borrow a concept from the field of conflict resolution, "ripe" for a truth commission, thereby forestalling a premature or otherwise inappropriate commission.[122] To the extent that other societies can learn from the South African experience, it would be useful to consider not only how South Africa measured up, but why. What circumstances in South Africa lent themselves to the relative success or failure in each area?

The assessment of the TRC below draws liberally from the guidelines suggested by both Hayner and Joinet to assign six benchmarks against which to "grade" the South African TRC.[123] A couple caveats are in order, though: First, it would be simplistic to confine the assessment process to the TRC, per se, without distinguishing among the different actors – the government, the TRC, political parties, NGOs, and others who have played a role. Second, it would be a mistake to focus only on the end product; the TRC has been a process, and that process is ongoing. The relevant actors have shouldered varying degrees of responsibility at different phases of the commission's life. The benchmarks below are grouped under philosophical/conceptual and practical/logistical categories, and they apply, as appropriate, to those who were responsible for decisionmaking in the formative stages, those who were responsible for carrying out its mandate, and those who are responsible for implementing its recommendations. Some of the benchmarks are, by definition, more subjective than others, and all of the grades, at this point, can only be considered preliminary.[124] It will take several generations before we can assess the long-term impact of the TRC. Finally, the examples cited below are illustrative, and where relevant, refer back to the preceding pages.

Philosophical/Conceptual Benchmarks

1. Public Ownership of the TRC: B

Hayner placed the criterion, "public participation in crafting the commission" at the top of her list, and she cites the South African model as the exception to the norm in its "extensive public participation."[125] Credit goes to a highly engaged, well-informed NGO community, veterans of similar exercises who shared their expertise with South African interlocutors, the funders who had the foresight to channel funds to support such efforts, and a responsive Ministry of Justice. Open hearings in Parliament also facilitated healthy public debate and input, evidenced most dramatically by the successful lobbying campaign to amend the legislation so that amnesty hearings would be held in public. Extensive media coverage, although not without bias, was instrumental in keeping the public informed throughout the process. In particular, daily South African Broadcasting Corporation (SABC) radio coverage of the TRC hearings, broadcast in South Africa's indigenous languages, made the TRC more accessible to South Africa's rural black population. In addition, SABC television scored high viewership of its weekly "Special Report," in which maverick journalist Max Du Preez highlighted important developments relating to the TRC.

Cumulatively, these factors contributed to a sense of public ownership, at least in the early stages. But Hayner's guidelines also explicitly provide that the lines of communication should be kept open throughout the process, "to allow public feedback on the methodology and impact of the commission's work."[126] It is on this score that the TRC seems to have faltered. Having played such an instrumental role in crafting the TRC, it came as a shock to some NGOs when the TRC, once it became operational, closed ranks. Although the TRC periodically called on NGOs to provide a variety of advisory or consultative capacities, the NGO community did not enjoy the access to or influence with the TRC that they had come to expect.[127] "From the point at which the Commission got up and running, it became a 'fairly exclusive club,'" according to Simpson.[128]

This is not to suggest that there was not significant public feedback—there was, through the media, through one-on-one representations by NGO representatives to individual Commissioners or staff, even through public demonstrations by victims' groups. But what seemed to be lacking was the requisite responsiveness on the part of the TRC. Van der Merwe et al. attributed this difficulty of engaging effectively with the Commission to a couple of different dynamics, including lack of capacity of many NGOs, particularly victims' groups and peace NGOs, which have not traditionally performed lobbying activities.[129] Perhaps more importantly, the TRC's posture vis-a-vis NGOs resulted from the internal politics of the deliberately representative Commission. Those commissioners who came from a politically-conservative background opposed engaging with human-rights oriented NGOs that were perceived as being too closely linked with the former liberation movements.[130] In addition, Van der Merwe et al. ascribed the relative success of the NGO community in the lobbying phase, compared to its failure to engage in the

operational phase as a function of political dynamics. When it was politically expedient, the political parties co-opted the NGOs: "The overlaps between NGO and political agendas were effectively exploited during the lobbying phase of the TRC. However, the failure of NGOs to develop the anticipated close relationship between themselves and the TRC possibly reflects a broader tension between the competing agendas of the state and NGOs."[131]

Borrowing now from Joinet, one should also consider under this rubric the publicity given to the Commission's report. Mandela, speaking of the Report that "today becomes the property of our nation," did the right thing in publicly releasing the report as soon as it was turned over to him by the TRC, despite the fact that some members of his party would have had him delay release for the two months that the Act would have allowed.[132] South Africa's Independent Newspapers group and the Institute for Democracy in South Africa did their part by publishing and distributing key sections of the report as newspaper supplements. The TRC also has maintained an outstanding web site (www.truth.org.za), which has played an invaluable role in keeping those with access to internet technology (granted a limited segment of the South African population) abreast of the TRC's proceedings. Unfortunately, the former webmaster of the TRC's site, faced with threatened legal action, removed the electronic version of the Final Report, which was previously available to the public free of charge.[133]

It is perhaps in the aftermath of the release of the Final Report that the public's involvement in the truth and reconciliation process is most critical. The hard part of the TRC process involves making choices – on individual and societal levels – accepting responsibility, and taking concrete steps to take on the legacy of apartheid to transform society. Tutu and Boraine certainly tried to get this message across by emphasizing in their public comments in the run-up to the hand over of the Final Report and at the ceremony itself that this event marked the beginning, not an end to the process. The Final Report, too, addresses this reality: "South Africans will need to continue to work towards unity and reconciliation long after the closure of the Commission," which, in the words of a participant in one of the TRC's public meetings, "could do no more than "kick start" the process.[134] As Mandela said in the Parliamentary debate of the Final Report,

> "Long after the Commission has folded and its offices closed, political leaders and all of us in business, the trade union movement, religious bodies, professionals and communities in general shall have to remain seized with the matters that the TRC process brought to the fore. In as much as reconciliation touches on every aspect of our lives it is our nation's lifeline."

Faith communities and community-based organizations are uniquely placed to perform outreach and organizing functions of this nature, but ultimately, it is on the individual level that reconciliation takes place and the seeds for societal transformation are planted.

The public's involvement in this phase obviously will be shaped by a variety of factors. At this early stage, it will suffice to mention three initiatives that are developing in response to the Final Report. First, aside from individual reparations grants, the TRC recommended and politicians have thus far seemed responsive to the idea of symbolic, community-based reparations, including monuments and memorials. To the extent that the public can be involved in making decisions such as these, so much the better. In addition, former TRC Director of Research Charles Villa-Vicencio is establishing an NGO that will be concerned with the follow-up to the TRC. Many have argued persuasively about the potential benefit of continuity that such an institute could provide by preserving the body of skill and expertise internal to the Commission. To be effective, this NGO will have to be more methodical than was the TRC in reaching out to and taking advantage of existing networks of community-based organizations. There have been some questions about the institute's credibility, however. To this end, the institute should avoid potential conflicts of interest in evaluating the TRC. Finally, Members of Parliament have stated their intention to have a national summit on reconciliation, as recommended in the Final Report. Ideally, such an exercise should be fed from the grassroots up in a transparent and inclusive process, and it should be focused on translating the TRC's recommendations into concrete programs of action to make tangible progress toward the long-term goals of reconciliation and transformation of society. [135]

2. The Mandate of the TRC: B+

Hayner rightly has called for a "flexible but strong" mandate, something for which, to the credit of the extensive public consultations referred to above, the architects of the TRC and those who provided input score high marks.[136] Charged with the following tasks, the TRC has, as many have pointed out, the most ambitious mandate of all truth commissions to date:

- establishing, as complete a picture as possible of the causes, nature and extent of the gross violations of human rights during a 34-year period;
- facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective;
- making known the fate and whereabouts of victims and restoring their dignity by affording them the opportunity to relate their own accounts of violations which they suffered; and
- producing a report, including recommendations for the prevention of future human rights violations.[137]

The mandate also includes exemplary "principles to govern the Commission's dealings with victims."[138] In practice, the TRC recognized that it could not carry out all of the components of its mandate simultaneously, so it endeavored to set the tone for the whole process by holding victims' hearings first, along with relevant statement-taking and investigations. If the restoration of victims' dignity was the TRC's top priority, this was

not always apparent to victims, however.[139] To be fair, the government and Parliament are due some share of the blame on this count: delays in implementing the TRC's recommended reparations program resulted in the first "urgent interim" reparations not being delivered until July 1998, and the individual reparations grants still hang in the balance.

The Act's definition of "gross human rights violation" was limiting, in that it precluded ex post facto criminalization of legally sanctioned apartheid activities, such as forced removals, and thus is not in conformity with Joinet's principles, which favor terms of reference that would give commissions the "jurisdiction to consider all forms of human rights violations."[140] Nonetheless, the Act did give the TRC significant leeway in tasking it with painting a backdrop of the "antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible."[141] The Final Report speaks with eloquence about these "everyday" victimizations inherent in the apartheid system:

> "Apartheid was a grim daily reality for every black South African. For at least 3.5 million black South Africans it meant collective expulsions, forced migration, bulldozing, gutting or seizure of homes, the mandatory carrying of passes, forced removals into rural ghettos and increased poverty and desperation... One did not need to be a political activist to become a victim of apartheid; it was sufficient to be black, alive and seeking the basic necessities of life that whites took for granted and enjoyed by right."[142]

The arbitrariness of the mandate's cut-off dates for amnesty eligibility was highlighted by Parliament's subsequent decision to extend the eligibility period from December 6, 1993 to May 10, 1994. A certain degree of arbitrariness was inevitable in the South African context, because, as the Final Report notes, "racism came to South Africa in 1652."[143] What is perhaps more troubling, as discussed above, is that the TRC itself lobbied Parliament on behalf of extending its mandate period.

3. Impartiality and Independence of the TRC: B

Hayner's call for "political backing but operational independence" for truth commissions complements the principle of "impartiality" Joinet specifies.[144] These elements are combined under this benchmark, because they address the question of independence from two different angles. Hayner pointed out that, to be effective, a truth commission must have official backing; this political backing sets the tone for the country's interaction with the truth commission. In addition, one can infer that it would translate, when appropriate, to operational support for the commission on the part of the government, for example, in facilitating access to government documents. But, if a truth commission is to be credible, it must also have the freedom to exercise judgment, even on controversial political issues, free from influence – direct or indirect – from the government and/or any other major political players. But this logic presupposes impartiality – operational independence is

rendered meaningless if the truth commission is not impartial to begin with and is not perceived to stay that way throughout the process.[145]

The TRC struggled with politics from day one, and accusations of bias dogged it through the end. A commendable vetting process for the commissioners, besides facilitating public input, helped ensure that individual commissioners were reasonably impartial, but the selection process entailed no small amount of political horse-trading. Whether or not as a result of the Commission's deliberate diversity, when the commissioners were around a table to make a decision, they often reverted to their "representative" roles, which was a recipe for paralysis.[146] Tutu and Boraine had the habit of saying that the Commission was a microcosm of South African society at large, and that any internal disputes were merely a reflection of that reality. But this excuse notwithstanding, the fact that certain commissioners were perceived – rightly or wrongly – as representing political (or racial) constituencies, reinforced this problem, and it made individual commissioners and the TRC as a whole easy targets for criticism of this nature.

An anecdote about a meeting between TRC Commissioners and President Mandela illustrates the integrity that Mandela brought to this equation, however. Consider this scenario: The top leadership of the TRC, including the 17 Commissioners, makes an appointment to meet with President Mandela. When Mandela learns that de Klerk and Buthelezi, whose parties were both then partners in the Government of National Unity (GNU), had not been included in the meeting, he becomes quite upset. Mandela permits the group to stay for a non-substantive courtesy call, but he lets the Commissioners know that in the future, he would insist that the others be included in any meetings. "I want you to be independent. I don't want you to be anything other than independent," he is quoted as saying.[147]

That said, political parties did, with increasing frequency over the lifespan of the Commission, try to exert pressure on the TRC, although they were usually savvy enough to do so indirectly.[148] Opportunistic leaks were apparently the favored vehicle for administering such pressure, and the media – some outlets more sensationally than others – often overplayed the political drama or controversy. It was not unheard of, particularly in the last act, for party representatives to pick up a telephone and call Commissioners directly. But if Commissioners and staff were not immune to political pressure, neither were they blameless. I know of at least one instance where Commission representatives tried to exert political pressure on NGO representatives to call off a demonstration organized by victims to protest the non-delivery of reparations.[149]

For political parties, the TRC process represented an excuse for good old-fashioned political hay-making. As such, their politicking was not so much directed at infringing on the independence of the Commission, as it was at using the TRC to score political points. At some point not long into the Commission's life, it became politically expedient for political parties to play to (if not foment) popular discontent with the TRC. This culminated in the unseemly politics of the endgame, which proved, if nothing else, that TRC was nobody's lackey. But at what cost to the long-term goal of reconciliation?

The partisan nature of much of the Parliamentary debate about the Final Report and the campaign politics in the run-up to the June 1999 elections also revealed this inclination. Ironically, the fact that the TRC was disparaged by all political parties served to contribute to its credibility as a body that was not subject to political influence. Although it cannot very well be addressed statutorily, future commissions may wish to consider how to tie the interests of political parties – usually focussed on short term political gain – to the long-term success of the TRC.

4. Legacy of the TRC: C-

Under this benchmark, one might consider the TRC's "deliverables" and the extent to which they are likely to make a lasting, positive difference in the lives of individual South Africans and society at large. The disappointing grade requires a couple of caveats: First, the borderline unsatisfactory mark is not so much directed at the end products that the TRC has delivered – these have been, by and large, well-conceived and executed – rather, it is a reflection of the less than auspicious circumstances in which those deliverables have been rendered. Second, the concept of "legacy" is laden with moral and political value judgments, and attempts at prognostication on the question of the TRC's legacy are premature, if not presumptuous; only with the passage of time can one begin to tackle issues associated with the TRC's long-term impact. In the meantime, however, one might consider the quality of the TRC's deliverables and their short- to medium-term prospects. This paper will confine itself to looking at four end products that have come out of the TRC process: the Final Report, amnesty, reparations, and recommendations. Reconciliation has purposefully been excluded from this early assessment of "deliverables." Despite its prominence in the TRC's title, it was never anticipated that reconciliation would be an immediate outcome of the TRC.

- The Final Report. Mandated with compiling a "comprehensive report which sets out its activities and findings," the TRC obliged with a 3,500-page, five-volume report.[150] As Hayner has pointed out, the TRC's Final Report itself is probably less important in South Africa, where the whole process has been characterized by "an amazing degree of transparency," as were the final reports of truth commissions in most of the Latin American cases, where truth commissions operated behind closed doors.[151] This observation certainly holds true in the short term, when memories of the TRC's often graphic hearings are still fresh. The Final Report and TRC archives will assume a more important role as these memories fade.

Has the Final Report established the Truth? It's mandate, wisely, was more nuanced: "to establish as complete a picture as possible..." As Afrikaner poet, journalist and author Antjie Krog pointed out, truth can have different meanings, and "each narrative carries the imprint of its narrator."[152] The picture that emerges from the Final Report represents a monumental achievement. It includes an historical backdrop to contextualize its thorough documentation of apartheid-era atrocities, both within and outside South Africa. Complementing its depiction of the broad outlines and patterns of abuses, the Final

Report highlights illustrative cases, drawn largely from the TRC's human rights violations hearings. Although it does not lend itself easily to quantitative analysis, one should not underestimate the value of the process by which the TRC gave a voice to those who were victims of atrocities. Finally, as many commentators have pointed out, as a result of the TRC process and its documentation in the Final Report, it is no longer possible to plausibly deny the nature or extent of atrocities that took place in apartheid South Africa.

Among the Final Report's shortcomings are its often sketchy details about the Commission's operations and decision-making process, especially on controversial decisions, as well as the lack of significant detail on the pros and cons of such. And while the TRC was justified in applying the same standards of human rights across the board, in doing so, it occasionally lapsed into a language of moral absolutism that bordered on condescension, and it was this, perhaps, more than the judgments themselves, that so riled the ANC.[153]

- Amnesty. With regard to amnesty, there were a number of challenges and few were completely satisfied with the process. First, the TRC was confronted with a "barrage of litigation" pertaining to the question of amnesty.[154] The Azanian Peoples Organisation, along with the Biko and Mxenge families challenged the constitutionality of the amnesty provisions. As Sarkin noted, lack of clarity on the constitutionality of the Act "saw the Amnesty Committee's work delayed pending resolution of the question."[155] Second, everyone, it seems, was surprised by the fact that some 7,200 individuals applied for amnesty, and the Amnesty Committee was simply overwhelmed by the volume. Once the Amnesty Committee had a full complement of staff and resources, it was better able to deliver with timely investigations and hearings, but the pressure to work through the backlog, according to Pigou, resulted in the fact that "the vast majority of amnesty applications have not been subjected to an investigative process of any sort..."[156] Kader Asmal, et al. Faulted the Commission for not interpreting its mandate in such a way that perpetrators would have to apologize for their actions in order to receive amnesty.[157] On the other hand, Marius Schoon, whose wife and daughter were blown up by a parcel bomb sent by security force agents, objected strenuously to the "crocodile tears" proffered by one of the perpetrators.[158] Many victims also complained about the short turnaround time faced by perpetrators who received amnesty, compared to their own lengthy wait for reparations.

Objections to the very notion of amnesty have also persisted. Critics argue that, aside from contributing to an atmosphere of impunity, amnesty lends an aura of legitimacy to the heinous acts that were committed in the name of apartheid, revictimizes the survivors of horrific acts, and risks debasing the whole society in the process. A growing sense of repugnance on the part of South African people – particularly victims – toward the notion of granting amnesty to perpetrators, left Tutu on the defensive: "We did not decide on amnesty. The political parties decided on amnesty..."[159] His comments reflect an interesting dynamic that developed in this context: for the most part, political parties

escaped criticism for the amnesty provision to which they agreed. Instead, such criticism was directed primarily at the TRC

- Recommendations/Reparations. The TRC was specifically tasked with making recommendations regarding "the creation of institutions conducive to a stable and fair society and the institutional administrative and legislative measures" required to prevent human rights violations, as well as the "granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims." [160] It is useful to consider both the appropriateness of the TRC's recommendations and the extent to which one can have a reasonable expectation that they will be implemented.

Turning first to those recommendations that concern reparations, one should acknowledge that the TRC's recommended reparations regime is tempered by a greater degree of realism vis-a-vis budgetary and political constraints than are the Joinet principles.[161] For example, Joinet asserts the victim's right to and the state's duty to make reparations for "any human rights violation," compensation for which "must equal the financially assessable value of all damage suffered."[162] Among other things, the Joinet principles include similarly worded provisions for rehabilitative measures, such as medical or psychological care; and measures of collective reparation, such as commemorative ceremonies and monuments. Joinet also refers to the right of victims to "a readily available, prompt and effective remedy in the form of criminal, civil, and administrative or disciplinary proceedings," which, given the TRC's amnesty provisions, the Commission obviously cannot deliver.[163] Aside from these gaps, which are all attributable to political compromise or budgetary realism, one should recognize that the government and Parliament share the blame for the considerable lag time that has characterized the actual delivery of reparations. That the first payments of "urgent interim reparations" were not made until July 1998, for example, is appalling. When contrasted with the short turn-around that perpetrators faced in receiving amnesty, the seemingly interminable wait for reparations not only skewed the balance upon which the TRC was crafted, but also has created significant political problems for both the government and the TRC. To its credit, the TRC was able to play a positive role in exhuming bodies, identifying and turning over remains to victims' families for proper burial.

Depending on how one counts them, there are about 250 separate recommendations in the Final Report.[164] Unfortunately, the quantity of the recommendations is not always matched in their quality. Some, for example, are so vaguely worded, they risk trivializing the exercise. What does the TRC really mean, for example, when it recommends that "the Government must ensure that the rule of law, human rights practice, transparency, accountability and the rooting out of corruption and other forms of criminality at all levels of society *are seriously addressed*" (emphasis mine)?[165] Neither is it always clear to whom the recommendations are directed. While it may serve a useful purpose to use the passive voice – and thus avoid finger-pointing – recommendations to the effect that

"strategies be devised for reintegrating perpetrators into society" do not easily lend themselves to implementation or accountability.[166] Other recommendations reflect an expansive interpretation of the mandate, seemingly overstepping the bounds of preventing human rights violations. One might ask, for example, how the following assertion falls within the TRC mandate: "If organised crime is to be combated, those involved in crime syndicates will have to come forward. This is only likely if such persons are assured of comprehensive witness protection." [167] Finally, those recommendations that are accompanied by a brief explanation or rationale are significantly more useful than those that are not.[168]

That said, one could argue that if a Commission is to err in making recommendations, it is better to err on the side of too many over too few, and in an expansive rather than minimalist interpretation of the appropriate scope of the recommendations. In the South African case, at least, the pervasive legacy of apartheid may justify such an approach. The majority of the TRC's recommendations reflect a well thought-through response to both the glaring needs for societal transformation and more practical needs – particularly those of victims – that became apparent in the TRC process.

Whether these recommendations are implemented is, of course, another matter. The degree to which implementation is carried out is not only a function of political will, which would be hard to muster in any case, given that the recommendations are not prioritized, and most carry a costly price tag. Even in the best of circumstances, there would be fierce competition for South Africa's scarce resources, which are just as much needed to redress basic human needs gaps for South Africa's black population, not all of whom qualified for "victim" status under the Act. Sensitivity to this dilemma is at least partly responsible for the reluctance on the part of some politicians to authorize the individual reparations grants that the TRC recommended for victims of gross human rights violations. But the dynamics of the hostile political climate that pervaded at the endgame have exacerbated what would have already been bleak prospects for implementation. We are already seeing signs of dismissiveness on the part of some politicians towards some of the recommendations. As mentioned above, the ANC has been entertaining the idea of symbolic reparations in lieu of the individual reparations grants that the TRC recommended.

Similarly, despite Mandela's rejection of a blanket amnesty, the ANC's continued flirtation with the notion (*de facto*, if not *de jure*; "group," if not "blanket") flies in the face of the TRC's recommendation that, "in order to avoid a culture of impunity and to entrench the rule of law, the granting of a general amnesty *in whatever guise* should be resisted" (emphasis mine).[169] Indeed, a general amnesty would make a mockery of the whole TRC process. On top of that, to the extent that the example of the TRC and the lessons learned from it are studied by the architects of (and participants in) future commissions -- and as it has been argued above, there are a variety of reasons why this might be anticipated, not as a blueprint, certainly, but as a model nonetheless -- one should consider the possible implications for those future truth commissions in the event that South Africa fails to prosecute those who fall into this category.

Neil Kritz has pointed out, for example, that the failure to prosecute such perpetrators in South Africa would effectively emasculate future truth commissions of any credibility should they wish to adopt the South African model of threatening prosecutions against those who do not come forward.[170] Absent the leverage offered by the credible threat of prosecution, perpetrators would be emboldened to eschew the amnesty process, with potentially disastrous consequences for future commissions that aim to establish the facts about the past and to hold perpetrators accountable for their actions in at least some nominal fashion. And if the threat of political instability (let alone political expediency) can be wielded to effectively stymie prosecutions in a society that had all the benefits that South Africa had, including a well-established rule of law and a functioning (if flawed) judicial system, one need only imagine what the prospects of prosecution might be in societies without them. Clearly, these potential ramifications are not foremost on the minds of those responsible for making decisions on the question of whom (if anyone) should be prosecuted in South Africa, but they should at least not be ignored.

Of course, some recommendations will carry less of a political cost than others, and these may face better prospects. Many of the recommendations are directed at non-governmental actors, such as faith communities and the business sector. And while the TRC, or the government, for that matter, has little leverage with which to effect their implementation, it does not necessarily hurt to make them. The NGO sector will play a key role in the follow-up stage, particularly in performing advocacy and watch-dog functions regarding the implementation of the recommendations. Here, South Africa is in excellent hands.

Practical/Logistical Issues

5. Administration of the TRC: C-

Under this rubric, in addition to considering management issues, one might combine two separate guidelines of Hayner: "time and resources for preparation and set up," and "appropriate funding and staffing," as they are two sides of the same coin, at least in the South African case.[171] The harsh grade is a reflection, perhaps, of the high expectations that so many had for a truth commission that came into being with all the benefits this one had: Interested South Africans had done their homework, which was reflected in a well-crafted mandate. The TRC also had significant resources, in terms of both human capital and funding. At its height, the TRC had approximately 400 staff members. This compares with about El Salvador's 30-strong commission, Chile's staff of 60, and about 200 persons who staffed the Guatemalan Historical Clarification Commission.[172] In terms of funding, the TRC's total operating budget was about R165 million (about $27.5 million, or about $9 million a year), according to the Final Report.[173] Foreign funding amounting to several million rand augmented this budget. Thus, the TRC's funding far surpassed those of other truth commissions; for example, El Salvador's annual budget was $2.5 million, and Chile's was closer to $1 million.[174]

Why then, one might ask, were there chronic administrative problems? In its Final Report, the TRC asserts that one of its greatest challenges was the absence of a provision for a start up period, like that which Hayner recommends, during which "offices could be located and established, staff sought and appointed, and a *modus operandi* carefully developed. There was little time for reflection."[175] This sentiment was echoed by the Secretary of the Amnesty Committee, who, when asked what, if anything, he would recommend be done differently, said, "there should be a considerable time period in which to prepare for what will be forthcoming... if you had the full complement of 99 people in place two years ago, I think we would have been finished by now."[176] The TRC can perhaps be forgiven, then, for the ad-hocism that characterized its day-to-day operations in the early stages. As time went on, the TRC seemed to be plagued with one crisis after another, including a steady stream of litigation. As a result, the TRC operated in crisis mode much of the time, with predictable consequences for long-term management.

Some have suggested that the TRC's seeming managerial deficit was largely a function of having two ministers at the helm. In exploring this line of thinking, one should not discount that both Tutu and Boraine had impeccable credentials in terms of moral integrity. The TRC could well have faltered without such strong moral leadership. Krog characterized Tutu as the compass of the Commission: "The process in unthinkable without Tutu. Impossible."[177] Krog noted, however, that there was considerable baggage associated with his ecclesiastical leadership style: "Tutu from the beginning unambiguously mantled the Commission in Christian language... he finds it difficult to move from the strong hierarchy of the Church to the democracy of the Commission."[178] In retrospect, therefore, one might question the legislation's stipulation that commissioners be vetted on the basis of their political suitability and moral integrity, without any comparable managerial litmus test. Indeed, the very vetting process for commissioners which seemingly valued representivity over all else was a recipe for bottlenecks on difficult policy questions. It is interesting to recall Zalaquett's advice in this regard: "There may sometimes be a tension between ideal representativeness and quality. One should try to have both but if this is not possible it is preferable to sacrifice the perfect balance for the sake of quality."[179] Finally, if one accepts the frequently-proffered excuse that, as a microcosm of broader South African society, the TRC reflected that society's tensions and difficulties, that hardly bodes well for the future, because it is that society which is expected to act on the TRC's work.

Finally, the TRC's operating budget was allocated as a separate line item out of the Department of Justice's budget, as approved by Parliament on a fiscal year basis. One might ask how this squares with Hayner's urging that, "the question of continued funding cannot be used, or be perceived to be used, as a point of leverage to influence the Commission's work."[180] While there is no indication that government tried to leverage the TRC's revenues for influence, the Final Report does state clearly that, "the Commission operated under strained financial conditions virtually all the time."[181] The TRC turned to foreign and domestic donor funding to help make up the shortfall, but in the interim, such budgetary constraints forced the TRC's to make financial compromises

that proved costly, for example, in terms of its investigative capacity. Finally, the failure on the part of government and Parliament to promptly authorize disbursement for reparations also marks a missed opportunity that was costly in terms of goodwill toward both the TRC and the government on the part of victims. The cumulative political impact of these "administrative" problems and resulting delays should not be understated. Wasted time and resources at the time of the Commission's start-up meant that the TRC lost many of the benefits associated with the New South Africa's honeymoon period, including a certain degree of momentum. With each extension of its lifespan, the TRC came closer and closer to campaign season. Rather than being viewed as the product of the transition, the TRC came to be viewed instead as an element of political stalemate, and increasingly, as a tool to be manipulated to win votes. Daley addressed this dynamic:

> "There were delays in getting the Commission started and several extensions have been needed. The result is that the Commission is finishing its work long after the euphoria of a peaceful transition has worn thin. Instead, the report is landing just as the country is gearing up for what promises to be a vicious and combative election year."[182]

6. Safeguards of the TRC: B

This benchmark encompasses two of Joinet's principles, which address a truth Commission's protective obligations vis-a-vis victims, witnesses and perpetrators. Victims and witnesses may be endangered and perpetrators (or alleged perpetrators) may be implicated as the truth comes out in the course of human rights violations hearings or the investigatory process. With regard to alleged perpetrators, Joinet stipulates both that, in the process of establishing the truth about past abuses, the Commission should attempt to corroborate the information it gathers, and that persons implicated in past abuses should have the opportunity to make a statement or submit relevant documentation setting out his or her version of the facts. [183] The TRC's investigative unit, comprised of 60 local investigators and 12 specialists from foreign police services, fulfilled the corroborative requirement, though it did not always do so in the most efficient manner or without controversy.

The Act addressed the obligations toward implicated persons by affording them "an opportunity to submit representations to the Commission within a specified time... or to give evidence at a hearing of the Commission."[184] Many have bemoaned the "legalization" of the TRC process that resulted from too rigorous a protection of the interests of perpetrators, but, to be fair, this resulted more from the legal challenges mounted by alleged perpetrators than from the Act itself. Sarkin has pointed out, however, that, had the Act been submitted to the Constitutional Court for abstract review before it came into operation, the constitutional challenges could have been avoided; and that even absent that review, the TRC could have avoided much of the costly legal wrangling if it been more attentive to the long-term ramifications of the legal issues at play.[185] Finally, with respect to protecting perpetrators, the Act provides that, in the event

of the Amnesty Committee's refusal to grant amnesty, "no adverse inference shall be drawn by the court."[186]

With regard to the need to protect victims and witnesses who endanger themselves in coming forward with the truth, Joinet asserts, though without elaboration, that truth commissions should guarantee the security and protection of witnesses and victims. [187] The TRC was the first truth commission to provide for a witness protection program (WPP) to meet this need.[188] Details of its implementation are sketchy, perhaps out of necessity, but it is clear that the WPP suffered as a result of the TRC's chronic funding shortfalls. That said, over 150 individuals were able to take advantage of the program.

V. Extrapolating from the TRC

The purpose of the above stock-taking exercise is two-fold. First, even a preliminary assessment may offer significant indicators as policymakers ponder the larger question that frames this paper. Of course, it is too early to predict with any certainty what kind of staying power truth commissions will have for societies that are grappling with the question of how best to deal with past human rights abuses. But, given that there are several countries in which some variation of the idea is currently being contemplated, it is safe to assume that new models will continue to crop up, at least in the short- to medium-term.[189] In addition, to the extent that such mechanisms offer a viable alternative to transitioning societies wrestling with the tough questions associated with abuse, accountability and justice, it is hoped that post mortem assessments like the one above can contribute to an awareness of the kinds of political obstacles such mechanisms may be up against, and be of benefit to ongoing policy debates about how to make such bodies more effective in the future. Just as South Africa benefited from a well-greased learning curve on truth commissions, the paper now turns to some of the key lessons learned from the TRC process that might be of benefit to other countries contemplating truth commissions. Embodying this spirit of constructive criticism, Boraine commented: "We had insights into the strengths and especially the weaknesses of other efforts. I hope others will learn from our weaknesses, because I think we made some mistakes."[190]

Ripeness

To start with, picking up on the idea of "ripeness," mentioned above, it is useful to consider some of the aspects of the South African socio-political context that were conducive to or positively informed the proceedings of the TRC. Without suggesting that such factors assume *sine quo non* status with regard to future truth commissions, one can nonetheless make the case that a society's ripeness for a truth commission may be enhanced if such aspects are manifest.

- Critical Mass. One might first consider the relative balance of power between the former apartheid regime and the former liberation movement-turned-democratically-elected government. Clearly, "victor's justice" in the form of Nuremberg-type trials in South Africa was not an option in the face of a threatened right-wing insurrection. But neither would the ANC have been prepared to accept a self-amnesty on the part of the former regime. That the TRC developed out of the process of a negotiated settlement between former adversaries is reflected in many of the compromises that shaped the TRC's mandate, most notably the amnesty provision in the postamble to the Interim Constitution. That the power balance shifted over time is clear, when one looks at the many provisions that were subsequently introduced, in particular, those that were concerned with truth seeking and accountability, as well as reparations. Once the TRC was operational, the dynamics continued to evolve; the upswing in party political bickering that accompanied the NP's withdrawal from the GNU to become an opposition party is a illustration of this point. The idea here is not to suggest that South Africa's

political power dynamics offer a blueprint. But there is some value in considering whether, in future power balance scenarios, there is a "critical mass" among those who have political (and military) power who are in favor of a truth commission, will support it, participate in it, and be willing to pay a political cost for it. On the flip side, one might consider the availability of appropriate mechanisms to help keep in check those who might be inclined to undermine it. Some of the following aspects that contributed to a permissive environment in South Africa address the latter issue.

- Civil Society. Perhaps most importantly, South Africa had the advantage of a strong civil society, whose skills were honed through many years of contesting apartheid. A plethora of NGOs and community-based organizations had long been engaged at the grass-roots level in activities such as investigating and compiling data to document human rights violations; challenging the apartheid system through the court system, public campaigns and demonstrations, and human rights education; and providing legal and other assistance to victims of human rights. As discussed above, many such groups contributed to the conceptualization and indeed the legislation of the TRC, and they also provided oversight during the TRC's lifespan. These same NGOs, and a new one, under the leadership of former TRC Research Director Charles Villa-Vicencio, will be critical in carrying out a watch-dog function, both monitoring the government's response to the TRC's recommendations, and lobbying when that response is deemed to be inadequate. That the TRC failed to take full advantage of NGO networks – particularly in the areas of victim outreach and post-trauma counseling represents a missed opportunity which future commissions would be well advised to remedy.

- Independent Media. Second, the existence of a strong and independent media has been a net positive to the TRC process. The very fact of intense media scrutiny, it can be argued, helped keep in check any fallibility on the part of the Commission. As discussed above, public hearings created an environment conducive to the widespread media coverage that accompanied the process. And if, as some have argued, the existence of TV cameras at hearings is responsible for the TRC's deviation into a "Kleenex Commission," as it was derisively called, that is perhaps one cost of the unprecedented transparency that also contributed to public awareness of, debate about, and scrutiny of the TRC process. This, despite the fact that the content of some of the media coverage was slanted – the Afrikaans press, in particular, was often gratuitously vindictive toward the TRC – and the media tended to sensationalize conflicts associated with the TRC. Finally, while it may have been disappointing to those who support the idea of a truth commission, it is hardly surprising that outside parties would try to use the media as a vehicle to manipulate perceptions about the Commission, if not the Commission itself. The existence of competing and independent media outlets might also help keep this practice in check.

- Functioning Judicial System. In addition, South Africa came to the table with a functioning judicial system, something that cannot be taken for granted in transitioning societies. This had practical effect in the South African model, for example, in that the

TRC had a pool of experienced judges from which to draw its Amnesty Committee judges. In addition, the TRC relied on the threat of criminal prosecution in that judicial system as an inducement for perpetrators to apply for amnesty. This is not to suggest that the new South Africa's inherited legal system left nothing to be desired. As the Final Report states, many in the legal profession – including many of its judges and magistrates – were complicit in lending apartheid "the aura of legitimacy," and contributed to "the entrenchment and defense of apartheid through the courts."[191] There did exist, nonetheless, a strong basis for the rule of law under the new dispensation. In the absence of which, the public might not have confidence in a quasi-judicial process, such as the amnesty process, let alone the judicial system itself, without which, the stick of prosecution would have little credibility.

- Moral Leadership. Finally, it is worth acknowledging that, throughout this process, South Africa has had the unparalleled advantage of Nelson Mandela's moral leadership. The importance of this advantage should not be understated, though it would be patently unfair to hold other societies to such a standard. Tutu has referred to Mandela as "an icon of reconciliation."[192] Indeed, Mandela embodied the spirit of reconciliation adopted by the TRC and articulated a vision for national unity, reconciliation, and societal transformation. In doing so, he set an amazing example not only for all South Africans, but for the whole world. At the same time, South Africa was fortunate to have had individuals with the impeccable credentials and moral authority of Archbishop Tutu and Alex Boraine to lead TRC and set the tone for the process.

Translating Concepts in Practice

The TRC scored high marks above for its well-conceived mandate. But any commission whose mandate includes such lofty principles as promoting "national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past..." is bound to encounter difficulty in giving those ideals practical effect.[193] Because future commissions will likely face similar difficulties, it is useful to consider briefly the TRC's experience in grappling with three such concepts.

- Justice vs. Reconciliation. Compared to either domestic or international prosecution of the perpetrators of gross human rights violations, truth commissions – especially if they are accompanied by an amnesty provision, are often criticized for sacrificing justice in pursuit of truth or reconciliation. Unpalatable and morally repugnant though it may be, this paper has accepted as a given the political compromise that resulted in the TRC's amnesty concession. Rather than restating the moral, legal, political, and philosophical arguments against granting amnesty that are already on record in the extensive body of literature on the subject, or, for that matter, the arguments put forward in favor of the strenuous truth-seeking and accountability function of the South African model, this paper has examined some of the political ramifications that this devil's bargain has had in South Africa.[194] It is worth acknowledging, however, that the relative costs and benefits

of justice, truth, and reconciliation have been hotly debated in South Africa and that such questions are sure to be revisited wherever future truth commissions crop up.

In bringing a court challenge against the constitutionality of the TRC's amnesty process, the families of Steve Biko and Griffiths Mxenge, for example, made a compelling case against the state's right to indemnify the killers of their loved ones. Not only did the case strike "at the heart of the Amnesty Committee's very existence," as the Final Report commented; it represented a fundamental challenge to the TRC as a whole.[195] Ultimately, although Constitutional Court Judge Mahomed indicated that he sympathized with the families' desire to see the perpetrators vigorously prosecuted and punished for their callous and inhumane conduct, the Court upheld the constitutionality of the amnesty provision.[196] To the extent that future truth commissions successfully meet the objective benchmarks discussed above, they will be better equipped to withstand not only domestic political and legal challenges that arise in their respective domestic contexts, they will also be better prepared to defend their actions against opponents who may also have recourse to extraterritorial accountability processes – whether through extradition to another country's national courts, as in the current Pinochet case, or under the auspices of the ICC.

- Even-Handedness. In retrospect, it is interesting to note that the word "even-handed" is not used in the Act; clearly, however, the Commissioners concluded that it would smack of bias if they did not hold agents of the government and members of the liberation movements to the same objective standards of human rights. This issue was particularly sensitive in the South African context, because of the ANC's strongly-held belief that the struggle against apartheid constituted a "just war," a perception that was both echoed and fueled by the international community's condemnation of apartheid as a crime against humanity.[197] In addition, the ANC is the only liberation movement to have explicitly embraced the Geneva conventions, a move which gave it considerable moral high ground over a government that not only abrogated its duty to protect its citizens from such abuse, but actively oppressed the majority of them. Not all liberation movements are as conscientious as was the ANC in trying to adhere to international norms and standards of human rights, nonetheless, the politics of even-handedness will likely pose difficulties wherever future truth commissions are mandated to examine a past in which atrocities have not been confined to one side of a conflict. In making the politically-loaded judgment calls on how to handle the relative responsibility of the different parties – whether they are government agents, paramilitaries, members of liberation movements, or guerrillas – future commissions would do well to heed Tutu's advice that, "it would be the height of stupidity as well as being self-defeating for the Commission to subvert its work by being anything less than fair and even-handed."[198]

- Victim-Friendly Orientation. To the extent that future commissions may want to follow the TRC's lead in incorporating in their mandates principles for dealing with victims, it may be also be useful to consider the pitfalls the TRC faced in realizing those principles. First, as stated above, to the extent that there is a significant portion of the

population that passively benefited from the policies of the former repressive regime, future truth commissions would do well to avoid the pitfalls in focussing on victims and perpetrators to the exclusion of beneficiaries. Second, the TRC was hamstrung by a mandate that reserved for the government, in consultation with Parliament, the power to make final decisions and disbursement of reparations to victims, which would have represented the most tangible evidence of the supposed victim-friendly orientation. The reasons behind political intervention in such decisions is discussed above. One such concern, the reluctance to create a hierarchy of victimization, is likely to be replicated in other societies. As Van Zyl has pointed out:

> "Successor regimes inevitably face a multitude of demands from constituencies who expect their quality of life to improve under democracy. Reparations paid to victims of gross violations of human rights represent a diversion of resources from developmental spending on housing, education or health care – all areas that would benefit a broader section of society. This prioritization of a specific category of victims over a more general group of disadvantaged citizens is more difficult to defend when the policies of the prior regime resulted in both poverty and human rights abuse."[199]

One possible solution might be to incorporate in the reparations package a system that would give designated victims of gross human rights violations priority in making claims before other bodies that the successor regime might have in place to help redress the more general poverty and basic needs issues. Such a system could incorporate a means test to ensure that assistance to victims of gross human rights violations does not unfairly displace assistance directed at the more generally disadvantaged.

Aside from recommending a reparations package that is apparently too generous for politicians to swallow, one other unforeseen consequences of the TRC's victim-friendly approach was an inclination on the part of the TRC to be generous in designating victim status to those who came forward to make statements. Victims would not have been eligible for any reparations without a finding that they had been subjected to a gross human rights violation. The logical conclusion for the TRC was that when the perpetrator of the act for which the victim is recognized as such was known, the perpetrator would automatically be considered guilty of a gross human rights violation, with the TRC making a finding to that effect. Thus the desire to compensate the victim – even in a situation, for example, when a victim is caught in crossfire between guerrillas and police forces – resulted in a finding against the perpetrator(s), in this case, those engaged in the shooting. The ANC's objections to the substance of the Final Report stemmed in large part from this automaticity, which resulted in many of the damning findings against it.

VI. Conclusion

Advocates of human rights and victims' rights and others who stand to benefit from future truth commissions will likely study the South African model for applicable features, while those who will be asked to financially support future commissions will doubtless consider the extent to which the South African model provided a good return on donors' investments and whether it is a model worthy of replication. Meanwhile, those who have played or who will assume political roles in societies contemplating a truth commission might be most interested in the bottom line political significance of such an exercise. This paper has not tried to argue that the TRC offers a blueprint in any of these respects. Rather, to the extent that the TRC represents something of a harbinger for the direction future truth commissions – assuming they are not just a fad – might take, this paper has attempted to examine the TRC process, and in particular some of its more politically-controversial aspects, for potentially applicable indicators and lessons learned. Just as South Africa benefited from a well-greased learning curve on truth commissions, the South African model should be subjected to analysis of the dynamics at play and the way in which they contributed to or detracted from the process and its long-term objectives. As stated above, it would be premature to attempt to assess the end result at this stage, but it is not too early to begin taking stock of the process and considering the potential implications.

Praising the TRC process as "enormously successful," Constitutional Court Justice Richard Goldstone opined that "history will judge it as a very important process."[200] South Africa had unprecedented advantages which contributed to a well-crafted commission and to that society's "ripeness" for a truth commission. To underscore the value of the exercise, one need only contemplate the unrest, vigilantism, and/or civil war that might have ensued in the absence of a truth and reconciliation commission. Nonetheless, the report card above shows clear room for improvement. Some of the disappointment with the TRC can be attributed to the unrealistic expectations that some had of what it could achieve. Indeed, many of the TRC's problems were largely a function of competing priorities: Different constituencies had distinct aspirations for the commission, and they were not necessarily mutually-reinforcing. A TRC that tries to be all things to all people will ultimately disappoint everyone.

Like most critiques of this process, this one pertains as much to the TRC's mandate and the politicians who crafted it, as it does to the Commission itself and the socio-political environment in which it played out. Much, of course, will depend on what South Africa does with the recommendations put forward by the TRC. The importance of whether – and whom – the state chooses to prosecute those who were denied amnesty or did not even bother to apply for it will have enormous consequences, as discussed above, not only in South Africa, but in future scenarios, as well.

A final note on the politics of the TRC: Truth commissions are not only concerned with the past; they are just as much about the future. The South African TRC is no exception. Given the high stakes involved, it is hardly surprising that political hay-making

accompanied the TRC process. It will be critical, however, for those who wish to advance to the truth and reconciliation process to work together to move beyond the acrimony that was epitomized by the politics of the endgame. It is hoped that the post-election political climate will be more conducive to that goal, but it is not at all clear that the political parties have an exit strategy. It may fall, then, to non-partisan NGOs and community-based organizations to jump-start this process. Clearly, the work has just begun, if South Africa is to fully realize the "once in a lifetime/... longed-for tidal wave/of justice," where "hope and history rhyme," about which Seamus Heaney so eloquently wrote in The Cure at Troy.

END NOTES

[1] The Five volume Truth and Reconciliation Commission of South Africa Report (subsequently referred to as the Final Report) was handed over to President Mandela at a nationally-televised ceremony on October 29, 1998 and was released to the public the same day. There was widespread media coverage of the event and the last minute court challenges launched by both former President F.W. de Klerk and the ANC. Unless otherwise stated, quotes are from the texts of publicly-released speeches.

[2] I discuss the politics of these court challenges in greater detail later in the paper. Although the hand over ceremony was not derailed, as was threatened, the atmosphere was significantly soured. As Suzanne Daley wrote in the October 30, 1999 The New York Times, "far from being the salve for South Africa's wounds that some had hoped it would be, the Truth and Reconciliation Commission's final report on this country's brutal past was released Thursday in the bitter atmosphere of court challenges and political bickering."

[3] Familiar themes included the TRC as circus, as witch hunt, and as an institution lacking in credibility. Ironically, those who had disparaged the TRC for being the lackey of the ANC did not seem to appreciate the significance of the TRC's resoluteness in fighting the ANC court challenge.

[4] Consider, for example, this comment of DP Delegate Peter Leon, which was carried in The Star, November 18, 1998: "The reactions of the ANC have been like Tweedledum and Tweedledee."

[5] Particularly noteworthy in the comparative literature are three volumes edited by Neil Kritz, Transitional Justice: How Emerging Democracies Reckon With Former Regimes (Washington: U.S. Institute of Peace Press, 1995); several articles by independent researcher Priscilla Hayner, including: "Fifteen Truth Commissions – 1974 to 1994: A Comparative Study," in Human Rights Quarterly 16:4 (1994), pp. 598-655, "Commissioning the Truth: Further Research Questions," in Third World Quarterly, 17:1 (1996), pp. 19-29, and "International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal," in Law and Contemporary Problems 59:4 (Autumn 1996), pp. 173-180 (Hayner is currently working on a book on these questions, as well.); Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice (New York: Times Books, 1998); and Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston: Beacon Press), 1998. On the South African TRC, in particular, see Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance (second edition) (New York: St. Martin's Press, 1997); Antjie Krog, Country of My Skull (Johannesburg: Random House, 1998); Paul Van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," in Journal of International Affairs, 52:2 (Spring 1999), pp. 647-667; a series of monographs published by the Centre for the Study of Violence and Reconciliation in Johannesburg, South Africa; Timothy Garton Ash, "True Confessions," in The New York Review of Books 44:12 (1997), pp. 33-38; and Lyn S. Graybill, "Pursuit of Truth and Reconciliation in South Africa," in Africa Today 45:1 (1998), 103-134.

[6] See Hayner's "Fifteen Truth Commissions" as well as her subsequent work.

[7] See The National Unity and Reconciliation Act, Act No. 34, 1995, Republic of South Africa, Government Gazette, vol. 361, No. 16579 (Cape Town: July 26, 1995). Hereafter referred to as the Act.

[8] I also made this argument in "TRC is a Prayer for South Africa's Future," in The Star, March 11, 1999; an unedited version was also carried in The Pretoria News on the same date. See also Priscilla B. Hayner's "Commissioning the Truth: Further Research Questions," pp. 19-28. As Hayner points out, "truth commissions can sometimes be set up as a whitewash, projecting the image of a concern for human rights, satisfying the donors who provide aid, but representing no will to change."

[9] See Hayner, "International Guidelines..." Hayner builds on suggested guidelines in the reports of Special Rapporteur Louis Joinet to the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1996/18, E/CN.4/Sub.2/1997/20).

[10] Timothy Garton Ash, "The Truth About Dictatorship," in The New York Review of Books, February 19, 1998, p. 36.

[11] There is a wealth of literature on the negotiations that led to multiparty democracy in South Africa. See for example Patti Waldmeir, Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa (New York: W.W. Norton & Company, 1997) and Alistair Sparks, Tomorrow is Another Country. See also Peter Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting," in Human Rights Law Journal 17:1-2 (30 April 1996), pp. 1-12.

[12] Ash does not give a citation for the Rosenberg quote, but her analysis would be familiar to South African participants in the IDASA conference referred to in footnote 16, because Rosenberg also attended and addressed the conference.

[13] Ash, p. 36.

[14] Kader Asmal, "Fears & Hopes," in (Alex Boraine and Janet Levy, eds.) The Healing of a Nation, (Cape Town: Justice in Transition, 1995), p. 27.

[15] Graeme Simpson, Proposed Legislation on: Amnesty/Indemnity and the Establishment of a Truth and Reconciliation Commission, a June 1994 submission on behalf of the Centre for the Study of Violence and Reconciliation to Minister of Justice Omar, (Johannesburg: CSVR, 1994), p. 12.

[16] In 1992, IDASA sponsored a group of South Africans to visit several Central European countries to observe the issues those societies in transition from totalitarianism to democracy were confronting. In 1994 and 1995, IDASA and Justice in Transition organized two conferences which brought together delegates from countries ranging from Argentina and Chile to Bulgaria and Germany, along with journalists, academics, and opinion leaders, to reflect on the experiences other countries had with transitional justice issues and possible implications for South Africa. See the conference proceedings: Alex Boraine, Janet Levy, and Ronel Scheffer (eds.) Dealing with the Past: Truth and Reconciliation in South Africa, (Cape Town: IDASA, 1994), and Boraine and Levy (eds.) The Healing of a Nation?

[17] For an assessment of the overall role of NGOs in the TRC process, see Van der Merwe et al. Among other things, the authors point out that some NGOs felt marginalized from this process.

[18] Author's interview with Alex Boraine, February 3, 1999.

[19] In addition to Boraine, Van der Merwe et al. also cite (p. 5) C.A. Norgaard (European Commission on Human Rights) Andre du Toit (University of Cape Town), Arthur Chaskalson and Albie Sachs (Constitutional Court), John Dugard (University of the Witwatersrand), Lourens du Plessis (University of Stellenbosch), and George Bizos and Mohamed Nasvat (Legal Resources Center) as playing important roles in the drafting process.

[20] Johannes Rantete, The African National Congress and the Negotiated Settlement in South Africa (Pretoria: J.L. van Schaik/Academic, 1998), p. 64. Rantete cites the ANC Executive

Committee's response to the Motsuenyane Commission's report, 29 August 1993. See also Final Report, 1:4, p. 49.

[21] Author's interview with Willie Hofmeyr, Cape Town, December 5, 1998. See also Van Zyl. Reflecting the ANC's mindfulness of the NP's position, Van Zyl (p. 650) quotes Dullah Omar, a key ANC negotiator and current Minister of Justice as stating that, "without an amnesty agreement there would have been no elections."

[22] Jose Zalaquett, "Why Deal With the Past?" in Dealing With the Past: Truth and Reconciliation in South Africa, p. 15.

[23] Specifically, this balance would be achieved by conditioning individual amnesties on full disclosure, which would help meet the victims' need for truth, on the one hand, and on the other, offering victims a platform to tell their stories, along with some sort of reparations on the other.

[24] Under the heading, "National Unity and Reconciliation," the postamble reads:

"This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

"The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

"The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

"These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

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

"With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

"Nkosi sikelel' iAfrika. God seen Suid-Afrika
Morena boloka sechaba sa heso. May God bless our country
Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika"

[25] I am aware of three forthcoming books on the TRC from the following authors: TRC Chairperson Desmond Tutu, TRC Deputy Chairperson Alex Boraine, and University of Cape Town political science professor Andre du Toit.

[26] Jose Zalaquett, "Why Deal with the Past?" p. 11.

[27] Final Report, 1:4, p. 54.

[28] Martha Minow, p. 57.

[29] Eligibility and criteria for granting amnesty are spelled out in section 20 (1), (2), (3), and (4) of the Act. If an act meets the definition of having a political objective, the Amnesty committee would then weigh criteria, including, the applicant's motive, the context in which the act took place, whether the act was committed at the behest of an organization, the nature of the act, the objective of the act, and the proportionality of the act with the political objective pursued. Parker

(pp. 4-5) points out that the TRC's definition of political objective represents something of an amalgamation of the Norgaard principles (named for Professor Carl Norgaard, President of the European Commission of Human Rights, who had been asked to advise on disputed cases concerning political violence in Namibia), along with the definitions used in both the 1990 Indemnity Act, which borrowed heavily from the Norgaard principles, and the 1992 Further Indemnity Act, which gave inordinate discretion to the State President.

30 Author's interview with Willie Hofmeyr, Cape Town, December 5, 1998.

31 Graybill, p. 118.

32 Timothy Garton Ash, p. 38.

33 Max Du Preez, "Blanket Amnesty: Act of Betrayal," in The Sunday Independent, November 8, 1998.

34 Jose Zalaquett, "Chile," in Boraine and Levy (eds.), p. 52.

35 Simpson, p. 12.

36 Van Zyl, p. 652.

37 The Act, Section 4 (d).

38 Final Report, 1:11, p. 332.

39 Piers Pigou, who was addressing a seminar organized by the Centre for the Study of Violence and Reconciliation, was quoted in "Truth Commission's Failed, says a Former Star Investigator," in Electronic Mail & Guardian, April 28, 1998.

40 Author's interview with Dumisa Ntsebeza, Cape Town, December 3, 1998.

41 Author's interview with Graeme Simpson, Johannesburg, December 9, 1998.

42 Jose Zalaquett, "Chile," in Boraine and Levy (eds.), p. 52.

43 The Act, Sec. 4 (a)(ii).

44 Author's interview with Paul Van Zyl, New York, February 3, 1999.

45 Final Report, 1:6, p. 148-9.

46 Author's interview with Paul Van Zyl, New York, February 3, 1999.

47 Final Report, 4:4, pp. 107-8.

48 Ibid., 4:2, pp. 21. See also Final Report, 4:2, p. 20 for Old Mutual's self-exemption.

49 From the ANC Submission, as cited in the Final Report, 4:2, p. 22.

50 Final Report, 5:8, p. 318-9.

51 Mahmood Mamdani is credited with pushing the envelope on this issue by distinguishing between "perpetrators and victims" on the one hand, and "beneficiaries and victims" on the other. See "Reconciliation Without Justice," Southern African Review of Books, November/December 1996. See also Krog, pp. 109-13. Drawing from a panel discussion about reconciliation at the University of Cape Town, Krog writes, "Where reconciliation for Tutu is the beginning of a transformative process... for Mbeki reconciliation is a step that can follow only after total transformation has taken place;" Mamdani "cuts the whole debate loose of the hazy black and white distinctions stifling most of the current thinking, by asking, "If truth has replaced justice in South Africa – has reconciliation then turned into an embrace of evil?" Contrasting South Africa's situation ("few perpetrators, but lots and lots of beneficiaries") with Rwanda ("a lot of perpetrators and a few people who benefited"), Mamdani asks "whether it is not easier to live with perpetrators than with beneficiaries?"

52 Krog, p. 113.

53 See Gunnar Theissen, Between Acknowledgement and Ignorance: How White South Africans have Dealt with the Apartheid Past (a research report based on a CSVR public opinion survey conducted in March 1996), (Johannesburg: CSVR, 1997). Theissen writes (p. 82) that "only few white South Africans feel that those people who supported the National Party in the past, have at least, to a certain degree, been responsible for the repression of black communities.

Instead of reflecting their own participation in the former political system, the responsibility for the atrocities is mainly placed on the doorsteps of anti-apartheid activists and 'troublemakers' in black communities and to a lesser degree on the security forces and former NP governments." It is interesting to consider differences within the white population regarding their willingness to acknowledge responsibility to try to undo the damage inflicted to the black community as much as possible (p. 70): "Female respondents were less eager to deny responsibility than their male counterparts and nearly twice as many English speaking whites admitted responsibility compared to Afrikaans speaking respondents. Respondents with post-matric education were more inclined to acknowledge than deny that the past regime and its executive organs were responsible. The younger generation (under the age of 30) were also far more likely to acknowledge responsibility."

54 Michael P. Scharf, "Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide," Journal of International Affairs, 52:2 (Spring 1999), pp. 626-7.

55 The Act, Section 7 (1) and (2)(a).

56 Ibid., Section 7 (2)(b).

57 Two of the original 17 commissioners stepped down midway through the process (Denzil Potgieter did so to serve as a judge on the Amnesty Committee).

58 The Star, October 26, 1998.

59 Author's interview with Paul van Zyl, New York, February 3, 1999.

60 Author's interview with Alex Boraine, New York, February 3, 1999.

61 Ibid.

62 Tutu does refer to such tensions in his introduction to the Final Report, but he seems to indicate that they were more prevalent in the Commission's early stages. See also Final Report, 1:4, paragraph 36, p. 58, for example: "In the process of interpreting the mandate, a number of difficult and often highly contested decisions had to be made." Of course, the fact that Commissioner Wynand Malan chose to submit a "Minority Position" also speaks volumes about these undercurrents.

63 These indemnifications, given without disclosing what the amnesties were for, as required in the Further Indemnity Act of 1992, were subsequently declared illegal. See Lourens Du Plessis, "Legal Analysis," in Boraine et al (eds.), pp. 108-112. See also Peter Parker (op.cit.)

64 The Act, Sec. 33.

65 Author's interview with Alex Boraine, New York, February 3, 1999.

66 Graybill, p. 117.

67 Author's interview. N.B.: Although I cannot confirm that the paraphrased exchange took place, if one goes back to look at the press releases from the early amnesty decisions, one can imagine, more or less, when such an exchange might have taken place.

68 Author's interview with Paul Van Zyl, New York, February 3, 1999.

69 Ibid.

70 Author's interview with Dumisa Ntsebeza, Cape Town, December 3, 1998.

71 Author's interview with Paul Van Zyl, New York, February 3, 1999.

72 ANC legal head Mathews Phosa was left insisting, "the ANC did not grant itself amnesty and we did not apply for a blanket amnesty."

73 TRC Statement, March 4, 1999.

74 SAPA, "ANC Applications Did Not Comply with Law: TRC," March 4, 1999.

75 Ibid.

76 Cape Times, April 28, 1999.

[77] TRC Statement, "Amnesty Denied to Hani Killers," April 7, 1999. See also "Accusations of Bias after White Extremists Refused Amnesty," International Herald Tribune, April 9, 1999; and "Demo Against TRC Planned," Cape Times, April 30, 1999.
[78] Interview with Martin Coetzee, Cape Town, December 1, 1998.
[79] Ibid.
[80] Final Report, 1:5, paragraph 63, p. 120.
[81] Author's interview with Graeme Simpson, Johannesburg, December 9, 1998.
[82] Author's interview with Paul Van Zyl, New York, February 3, 1999.
[83] The Act, Sec. 4 (f) and Sec. 27.
[84] Final Report, 1:9, pp. 253-4, and 5:5, paragraph 3, p. 170.
[85] For an admittedly non-scientific sampling of victims' perspectives, see, for example, Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report – Submission to the TRC, compiled by the Centre for the Study of Violence and Reconciliation and the Khulumani Support Group, Johannesburg: CSVR, 1998).
[86] Final Report, 5:5, paragraph 68, p. 184.
[87] Ibid., 5:5,75, p. 185.
[88] Author's interview.
[89] See "ANC Cash Shock for Victims of Apartheid," in Sunday Times, February 7, 1999.
[90] "Mankahlana Denies Decision Made to Refuse Cash to Apartheid Victims," SAPA, February 7, 1999.
[91] Author's interview with Graeme Simpson, Johannesburg, December 9, 1998.
[92] See "Truth Commission 'Needs More Teeth," in Business Day, April 22, 1998.
[93] See the TRC's 1998 publication: A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President.
[94] Although the text to this effect was redacted from the publicly-released Final Report, the substance had been leaked to the press and is well-known. See "What FW Did Not Want You to See," in Mail & Guardian, October 30 to November 5, 1998. Many have made the point that in launching his court challenge, the findings on de Klerk received much more public scrutiny than would have been the case otherwise. The same argument can be made with respect to the ANC's failed court bid.
[95] The Cape High Court is to issue a final decision on de Klerk's case this year.
[96] Omar is quoted in "TRC Plan 'On Track,'" in Sowetan, October 27, 1998.
[97] Submission of the African National Congress to the Truth and Reconciliation Commission in Reply to the Section 30 (2) of Act 34 of 1996 on the TRC 'Findings on the African National Congress,'" October 1998, paragraph 4.0.
[98] See TRC Statement, "Reaction to Mail & Guardian Article," October 9, 1998: "The reason for refusing the meeting is that we have laid down a procedure in terms of which all who receive Section 30 notices must respond by way of written representation. We have refused meetings to others who have asked for them. If we had a private meeting with the ANC over our findings, the inference could be drawn that we gave a liberation movement an unfair advantage over others. It would be a very sad day if the public were to develop the perception that we gave the ruling party such an advantage."
[99] "ANC Clashes with Truth Commission over Final Report," in Electronic Mail & Guardian, October 9, 1998.
[100] "I Didn't Struggle Against Tyranny to Substitute it," in The Star, October 30, 1998.
[101] "Tutu Used his Casting Vote Against ANC," in The Sunday Independent, November 1, 1998.
[102] "ANC Blunders with TRC Interdict," in Mail & Guardian, October 30 to November 5, 1998.

103 "Mbeki 'OverRuled' Mandela on TRC," in Saturday Star, October 31, 1998.
104 This interpretation of the internal political dynamics is based on information from a number of the author's interviews.
105 "Mbeki 'OverRuled' Mandela on TRC," in Saturday Star, October 31, 1998. See also "ANC Blunders with TRC Interdict," in Mail & Guardian, October 30 to November 5, 1998, which highlights the fact that "the two party officials most closely involved with the issues raised in the TRC – Minister of Justice Dullah Omar and Mpumalanga Premier Mathews Phosa, who heads both the ANC's legal department and its TRC unit – were only notified of the decision to take court action. Their opinion on the matter was not sought."
106 Author's interview.
107 Final Report, 5:8, paragraph 14, p. 309.
108 This comment was widely reported. See, for example, "Perpetrator-Friendly Politicians are Threatening to Hold Justice to Ransom Again," in The Sunday Independent, November 8, 1998.
109 Ibid.
110 The Star, November 11, 1999.
111 This was a common theme in several interviews I had with various South African political commentators.
112 See "Mandela on Evil, Amnesty and the Death Sentence," in The Sunday Independent, December 6, 1998.
113 "Proposed Blanket Amnesty Worries Lawyers and Former TRC Staff," in The Star, May 26, 1999.
114 "Blanketing the Truth," in Business Day, May 25, 1999.
115 "Amnesty Plan Sought for KwaZulu Natal," in Cape Argus, February 26, 1999. Justice Minister Omar's remarks are paraphrased.
116 "Blanketing the Truth," in Business Day, May 25, 1999.
117 See "TRC Sends Names to Prosecutor," in Cape Argus, April 28, 1999. See also TRC statement of the same date, in which the TRC confirms having "working discussions" with the NDPP's office, and that a list was handed over. The TRC said that it would be inappropriate to discuss the names on the list or their exact number. See also Final Report, 5:8, paragraph 14, p. 309.
118 Hayner, "International Guidelines," p. 173.
119 Ibid.
120 See the reports of Special Rapporteur Louis Joinet to the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1996/18, E/CN.4/Sub.2/1997/20) in which Mr. Joinet recommends 50 principles to combat impunity. Joinet's principles, which are unapologetically ambitious and leave no room to accommodate political constraints, are broken down into a right to know, a right to justice, and a right to reparations. In August 1998, rather than endorsing the Joinet principles and/or proposing that the General Assembly adopt the principles, the Sub-Commission merely recommended that the Commission on Human Rights "establish follow-up machinery..." thus effectively moving the principles to the back burner. In drawing from the Joinet principles, this paper confines itself to those principles that are concerned with extrajudicial commissions of inquiry. The underlying principle of a state's duty to prosecute human rights violations, which Joinet takes for granted under the "right to justice" rubric would restrict states from granting amnesty for gross human rights violations. I leave it to others to debate this issue. See for example, Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," in The Yale Law Journal 100:8 (June 1991). See also, Yves Beigbeder, Judging War Criminals: The Politics of International Justice (New York: St.

Martin's Press, Inc., 1999). Van Zyl (p. 658) frames the issue in refreshingly non-absolutist terms: "One of the central criticisms of amnesty is that by preventing the prosecution and punishment of perpetrators, it removes the primary deterrent to criminal activity and therefore increases the likelihood of a recurrence of human rights abuse. The logic of this assertion collapses if... it is unlikely that perpetrators would be prosecuted successfully, even in the absence of an amnesty process." He goes on to note that, "in agreeing to the amnesty, South Africa's leaders failed to comply with the obligation to punish perpetrators under international law. They did, however, attempt to minimize the most offensive features of amnesties by structuring the process so that it would help achieve the other obligations prescribed by international law." (pp. 661-2) Joinet's principles on reparations are similarly absolutist. See also E/CN.4/1997/104, the appendix of which is a former Special Rapporteur of the Sub-Commission, Theo van Boven's Note on the "Basic Principles and Guidelines on the Right to Reparation for Victims of (Gross) Violations of Human Rights and International Humanitarian Law," 16 January 1997.

[121] See Neil J. Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights," in Law and Contemporary Problems 59:4 (Autumn 1996), pp. 127-152. Kritz points out, among other things, that the ICC "will need to deal with the application of non-criminal sanctions in the context of the ICC's principle of complementarity. If a society reckons with its past demons through a non-prosecutorial accountability mechanism, such as administrative vetting and civil sanctions, should that preclude the international court from investigating and prosecuting the same cases?" (NB: The South African model does not even go this far.) Kritz continues: "Administrative penalties, after all, are not the same as impunity. Or should this be precisely the sort of situation that might trigger ICC involvement, given that national authorities may have settled for administrative measures because criminal prosecution was politically impossible? A framework needs to be developed to assist that assessment, because the issue will surely confront the ICC," (pp. 140-141). See also Final Report, 1:4, Appendix A: The TRC is explicit that, in sharing the international community's moral and legal position that apartheid was a crime against humanity, it is not calling for international criminal prosecution of those who formulated and implemented apartheid policies. "Indeed, such a course would militate against the very principles on which this Commission was established" (p. 94).

[122] The notion of "ripeness" is usually associated with circumstances, such as a hurting stalemate, which lend themselves to third-party mediation. The notion may have value/applicability in this context, as well. See, for example, William I. Zartman, "The Unfinished Agenda: Negotiating Internal Conflicts," in Roy Licklider (ed.), Stopping the Killing: How Civil Wars End (New York: New York University Press, 1993) and I. William Zartman, "Pre-negotiation: Phases and Functions," in Janice Gross Stein (ed.), Getting to the Table: The Processes of International Pre-negotiation (Baltimore: The Johns Hopkins University Press, 1985). In the truth commission context, one would have to factor into the equation the likelihood that those responsible for abuses will single-mindedly make the case that society is not yet "ripe" so as to postpone any reckoning as long as possible.

[123] The benchmarks I use are drawn from, and in some cases, expanded on those proposed by Hayner in "International Guidelines," in addition to the Joinet principles, which Hayner had used as her point of departure. Given the particularities of the South African model, I have taken the liberty of combining or otherwise modifying some of Hayner's and Joinet's principles, and I have dropped or downplayed elements from both. I try to flesh out where benchmarks apply strictly to the TRC, to the government, political parties, or other actors; some can and should be applied across the board.

[124] The grading scale I use is one that seeks a happy medium between the grade inflation that often characterizes American marks and the "you are lucky if you pass" mentality that is more characteristically South African. Since the TRC is the only truth commission being evaluated here, I do not grade on a scale. I am fully aware that some of the pre-existing truth commissions were less than raging successes.
[125] Hayner "International Guidelines," p. 178.
[126] Ibid.
[127] See Van der Merwe et al.
[128] Author's interview with Graeme Simpson, Johannesburg, December 9, 1998. See Ibid.
[129] Ibid., p. 10.
[130] Ibid., p. 23.
[131] Ibid., p. 32.
[132] The Act, Sec. 44.
[133] Juta publishing house, which was awarded an exclusive contract to disseminate the Final Report, does so to the tune of R750 (about $125) for a bound copy or the same amount for a one year subscription to its electronic version—a prohibitive price for the average South African. Although the TRC website no longer carries the text of the Final Report, it does provide links to other sites where users can access the Final Report electronically free of charge.
[134] Final Report, 1:4, p. 49.
[135] See Final Report, 5:8, p. 304: "We request the President of South Africa to call a National Summit on Reconciliation, not only to consider the specific recommendations made by the Commission, but to ensure *maximum involvement by representative of all sectors of our society* in the pursuit of reconciliation" (emphasis mine).
[136] Hayner, "International Guidelines," p. 179.
[137] The Act, Sec. 3 (1).
[138] Ibid., Sec. 11.
[139] See the Centre for the Study of Violence and Reconciliation's Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report – Submission to the TRC.
[140] E/CN.4/Sub.2/1997/20, p. 17. While sympathetic to complaints about this shortcoming in the TRC's mandate, I can hardly fault the decision to observe the *ex post facto* principle, especially in light of time and resource constraints that necessitated some limitation of the TRC's terms of reference. In addition, aside from the TRC, South Africa has other mechanisms (e.g., the Land Claims Tribunal) in which such other categories of victims (e.g., of forced removals) can find redress.
[141] The Act, Sec. 1(ix).
[142] Final Report, 1:2, pp. 34-5.
[143] Ibid., 1:1, p. 16.
[144] Hayner, "International Guidelines," p. 179; E/CN.4/Sub.2/1997/20, p. 17.
[145] The Act stipulates, in Sec. 36 (1) that "the Commission, its Commissioners and every member of its staff shall function without political or other bias or interference and shall be independent and separate from any party, government, administration or any other functionary or body directly or indirectly representing the interests of any such entity."
[146] I base this judgment on comments to this effect made in numerous personal interviews with a variety of interlocutors affiliated with the TRC.
[147] I heard this anecdote on two different occasions from two different interlocutors—both of whom were there.
[148] Information based on personal interviews.

[149] This came much to the shock of the NGO representatives in question, the CSVR and the Khulumani ("Speak Out") Survivor Support Group, who considered themselves "on the same side" as the Commission on many matters. A better strategy might have been for the TRC to let such demonstrators serve a "bad cop" role to reinforce their own "good cop" representations to Parliament on reparations.

[150] The Act, Sec. 4 (e).

[151] See Priscilla Hayner's remarks on "The Truth and Reconciliation Commission: The South African Experience," at the Woodstock Colloquium on Forgiveness in Conflict Resolution: Reality and Utility – The Experiences of the Truth Commissions, Washington, D.C., March 11, 1998.

[152] Krog, p. 88.

[153] In Mbeki's Parliamentary Address regarding the Final Report, he criticized the Final Report's "unfortunate and gratuitous insults" to the armed struggle."

[154] Final Report 1:7, paragraph 1, p. 174. The Final Report goes on to vent, "During its lifetime, the Commission was so often involved in litigation that one could be forgiven for thinking that it was under siege."

[155] Sarkin, "The Trials and Tribulations of South Africa's Truth and Reconciliation Commission," in South African Journal on Human Rights 12:4 (1996), pp. 638.

[156] "Truth Commission's Failed, says a Former Star Investigator," Electronic Mail and Guardian, April 28, 1998.

[157] Asmal, et al., pp. 17, 23.

[158] See transcript from Craig Williamson's amnesty hearing, November 5, 1998.

[159] Krog, p. 23.

[160] The Act, Sec. 4 (f) and (h).

[161] In addition to E/CN.4/Sub.2/1997/20, see the former Special Rapporteur Theo Van Boven's Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms," in E/CN.4/Sub.2/1993/8.

[162] E/CN.4/Sub.2/1997/20, p.25.

[163] Ibid., p.26

[164] Many of the recommendations are grouped together under subject headings in 115 paragraphs. See Final Report, 5:8, pp. 304-349.

[165] Ibid., 5:8, p. 313.

[166] Ibid., 5:8, paragraph 16, p. 310. See also paragraph 31 at p. 315, which assigns "responsibility for developing and implementing these recommendations..." does not fully clarify the question. Who should "assist communities preparing to accept such persons back into their midst"? How?

[167] Ibid., 5:8, p. 326.

[168] Consider, for example the contrast between a recommendation regarding public order policing, which gives some context and rationale, and the non-recommendation on lustration, which does not: "The police be issued with new equipment and apparel to improve their safety and protection – the more protected the police officials feel, the less likely they are to use force or act aggressively." vs. "The Commission decided not to recommend lustration because it was felt that it would be inappropriate in the South African context."
See Ibid., 5:8, p. 331 and p. 311.

[169] Ibid., 5:8, p. 309.

[170] Neil Kritz made comments to this effect at an informal discussion at the U.S. Institute of Peace on May 18, 1999, at which a draft of this paper was discussed.

[171] Hayner, "International Guidelines," pp. 178-9.

172 These numbers from Hayner's remarks at the Woodstock Colloquium, p. 58, in addition to the author's conversations with staff members of the TRC and the Guatemalan CEH.
173 See Final Report, 1:11.
174 Hayner's remarks at the Woodstock Colloquium, p. 58
175 Final Report, 1:6, p. 137.
176 Author's interview with Martin Coetzee, Cape Town, December 1, 1998.
177 Krog, p. 152.
178 Ibid., p. 153.
179 Zalaquett, "Chile," in Boraine and Levy (eds.), p. 51.
180 Hayner, "International Guidelines," pp. 179-180.
181 Final Report, 1:11, p. 300.
182 Suzanne Daley, New York Times, October 30, 1998.
183 E/CN.4/Sub.2/1997/20, p. 18.
184 The Act, Sec. 30 (2).
185 Sarkin, "The Trials and Tribulations of South Africa's Truth and Reconciliation Commission," in South African Journal on Human Rights 12:4 (1996), pp. 631-8.
186 The Act, Sec. 21.
187 E/CN.4/Sub.2/1997/20, p. 18.
188 The Act, Sec. 35.
189 Of course, just because a truth commission is being contemplated does not mean one will be created. That said, there are ongoing discussions in several different parts of the world about the feasibility and appropriateness of truth commissions. For example, for some time, there have been discussions about a truth commission in the former Yugoslavia that would complement the work of the International Criminal Tribunal for the Former Yugoslavia. In the aftermath of the arrest of former Chilean President Pinochet, some Chileans began calling for a more thorough accounting of their past. According to Priscilla Hayner, other countries where either governmental representatives or NGOs have called for the establishment of a truth commission include Nigeria, Sierra Leone, Lesotho, Indonesia, Peru, and Colombia, though each of these would likely take very different shapes, if they come into existence at all. Though there may be some adherents of a truth commission in Northern Ireland, the 1998 Good Friday Agreement purposefully excluded any such provision. Similarly, while there are proponents for some kind of truth commission for Cambodia and/or for Rwanda, neither country is likely to be "ripe" for a truth commission in the near term.
190 Author's interview with Alex Boraine, February 3, 1999.
191 Final Report, 4:4, paragraphs 32-3, p. 101.
192 This quote was in the context of a statement Archbishop Tutu delivered at a benefit for St. Barnabas College, Washington DC, May 14, 1999.
193 The Act, Sec. 3 (1).
194 In addition to Diane Orentlicher's "Settling Accounts," and Aryeh Neier's War Crimes, and see Law and Contemporary Problems 59:4 (Autumn 1996), which is devoted to questions of "Accountability for International Crime and Serious Violations of Fundamental Human Rights." See also Van Zyl's well-argued defense of the TRC approach.
195 Final Report, 1:7, paragraph 1, p. 174.
196 For a summary of the Constitutional Court's decision in this case, see ibid., 1:7, paragraphs 10-11, p. 176. See also Sarkin, pp. 625-631.
197 See Submission of the African National Congress to the Truth and Reconciliation Commission in Reply to the Section 30 (2) of Act 34 of 1996. See also papers from the TRC's just war debate, which are posted on the TRC's website: www.truth.org.za. Several scholars of

just war theory have pointed out an important distinction between *jus ad bellum* (justice of war) and *jus in bello* (justice in war). In other words, the ends do not justify the means in war. Thus, just war doctrine would dictate that, while the struggle to end apartheid was just, the actions of the liberation movements to do so are not automatically considered just; they would have to be weighed against *jus in bello* principles, including the protection of non-combatants, proportionality and last resort. Interestingly, many amnesty applicants who had been agents of the apartheid state indicated that they, too – at least at the time the acts were committed – believed they had been fighting a "just war" against communism, terrorism, and/or anarchy.

198 Final Report, 1:1, paragraph 55, p. 13.

199 Van Zyl, p. 664.

200 Author's interview with Justice Goldstone, November 13, 1998.