

Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission

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After almost three years of work, South Africa's Truth and Reconciliation Commission (TRC) delivered its final report to President Nelson Mandela on 29 October 1998. The delivery occurred amid considerable controversy as both former President F.W. de Klerk and South Africa's current ruling party, the African National Congress (ANC), launched last-minute legal proceedings in an attempt to block the publication of the report. The TRC agreed to temporarily excise a small section of the report, which implicated de Klerk in gross violations of human rights, pending final legal settlement of the matter in early 1999.

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The ANC's court application, in which it argued that the TRC had failed to properly consider its objections to the TRC's findings regarding the party's responsibility for human rights abuse, was rejected only hours before the report was scheduled for public release. The fact that both former and current rulers were distressed by aspects of the TRC's final report is perhaps the strongest evidence that the TRC fulfilled its mandate in a fair and impartial manner. It also demonstrates that any attempt to deal with past human rights abuse is likely to be both complex and contested.

The TRC can be characterized as representing a “third way” in dealing with a legacy of human rights abuse and attempting to institutionalize justice. This is because it steered a middle path between an uncompromising insistence on prosecution on the one hand, and a defeatist acceptance of amnesty¹ and impunity on the other. This article will examine the structure and mandate of the TRC and assess its contribution to an evolving discussion about the nature of international justice and the institutional mechanisms best suited to achieving it.

Drawing on the TRC experience, this article argues that new democracies emerging from periods of massive and/or systematic violations of human rights are unable, for a combination of practical and political reasons, to prosecute more than a tiny percentage of those responsible for human rights abuse. For this reason, strategies for dealing with the past must not become narrowly focused on attempts to prosecute. Rather, more expansive and creative strategies should be considered and employed in order to address the rights of victims and the needs of society as a whole.

DEALING WITH THE PAST

Why Amnesty?

The manner in which a successor government chooses to deal with those who have committed gross violations of human rights, during the tenure of a previous repressive regime is profoundly influenced by the balance of power between the old and new orders at the time of transition. The Nuremberg trials were possible in postwar Germany only because the Allies had militarily defeated the Nazi regime and therefore possessed sufficient power to ensure the prosecution of the leaders of the Third Reich.² Conversely, when the transition to democracy occurred in Chile, the newly established government was unable to prosecute those who had committed gross violations of human rights during military rule³ because the military still commanded considerable authority—so much so that former Chilean dictator General Augusto Pinochet was able to remain in office as head of the armed forces.

¹ This article defines amnesty as any measure that immunizes a person who has committed serious crimes from criminal and civil liability.

² See Gitta Sereny, *Albert Speer: His Battle with Truth* (New York: Knopf, 1995).

³ See Naomi Roht-Arriaza, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,” *California Law Review*, 78 (1990) p. 449.

The contrast between the postwar German and the Chilean approaches to those who have committed gross human rights violations indicates that a country's choice of policy has as much to do with power as it does with principle. The approach to amnesty adopted in South Africa confirms this fact: the transition from a nondemocratic to an elected government occurred in circumstances similar to those of the Chilean transition in which the former government maintained considerable power during the regime change. The South African liberation movements did not succeed in removing the apartheid government from office by military means. In fact, throughout the negotiation process, which resulted in South Africa's first democratic elections, the former government retained control over a formidable military and police force. If the former government had wished to dig in its heels and retain power at all costs, it could have done so for a prolonged period of time. However, the balance of power in South Africa did not exclusively favor the former government.

By the late 1980s and the early 1990s, liberation movements commanded the support of the overwhelming majority of South African citizens as hundreds of thousands of supporters mobilized to defy the government. This mobilization, though costly and disruptive, was unlikely to overthrow the government as it could be contained, for the most part, by security forces. Nonetheless, the liberation movements gained the support of the majority of the international community that had called for democracy in South Africa. As a result, the country was subjected to a concerted campaign of international isolation consisting of economic sanctions as well as athletic, academic, scientific and cultural boycotts. This isolation had tremendously detrimental effects on all aspects of South African life and placed the former government under considerable pressure to change its policies.

By the late 1980s, the major parties to the South African conflict realized that matters had reached an impasse that only negotiations could resolve. The government understood that it could no longer ignore or repress the massive domestic resistance to its rule, nor could it indefinitely defy world opinion or weather international isolation. The liberation movements recognized that even if they continued their military campaign against the former government, they were unlikely to win. Furthermore, the two sides realized that if a lasting and viable solution to the South African conflict were to be achieved, both would have to be accommodated in the new order.

The agreement to grant amnesty to those who committed gross violations of human rights must be understood in this context.

The former government and its security forces never would have allowed the transition to a democratic order had its members, supporters or operatives been exposed to arrest, prosecution and imprisonment. The issue of amnesty bedeviled the constitutional negotiations until the last possible moment, such that the final draft of the interim Constitution⁴ was completed without agreement on whether an amnesty provision should be included. In fact, amnesty became the final obstacle to transition to democracy: only a few months before the scheduled elections, generals in command of the South African police delivered a veiled warning to the ANC that they would not support or safeguard the electoral process if it led to the establishment of a government that intended to prosecute and imprison members of the police force.

The ANC faced a massive dilemma. Without an amnesty agreement, the negotiations would collapse and the mass mobilization and politics of confrontation would return. The ANC also concluded that hostility and opposition from the security forces would have made it impossible to hold successful elections. Dullah Omar, a key ANC negotiator and current Minister of Justice, stated publicly that “without an amnesty agreement there would have been no elections.”⁵ The amnesty agreement occurred so late in the process that it had to be added onto the end of the interim Constitution in the form of a “Postamble.”⁶ It stated that:

...gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge...can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not for retaliation....In order to advance such reconciliation and reconstruction, amnesty shall be granted...⁷

⁴ Constitution of the Republic of South Africa, Act 200 of 1993 [hereinafter the interim Constitution], Postamble. South Africa’s first democratic government took office under the interim Constitution. It is referred to as “interim” because in addition to making provision for governance for five years, it also prescribed a process by which the democratically elected representatives of all South Africans drafted a “final” Constitution. This was necessary because an unrepresentative negotiating forum, consisting of parties not elected through a democratic process, agreed to the interim Constitution.

⁵ Dullah Omar, Informal remarks prior to speech, Justice and Impunity: Germany and South Africa Compared conference, Community Law Center (Cape Town: October 1994).

⁶ The Postamble can be found after section 251 of the interim Constitution.

⁷ Postamble.

The Postamble constituted a legally binding promise made at the negotiating table by those expected to win South Africa's first democratic election to grant amnesty to those who had committed political crimes. Both the former government and the ANC accepted the amnesty deal. The former government and its security forces were reassured that if they handed over power, they would not be automatically prosecuted. For the ANC, amnesty was acceptable for several reasons. First, the previous government would not be granting itself amnesty.⁸ The ANC believed that only a new legitimate order had the right to forgive the crimes of the old regime. Second, it permitted the new government to grant amnesty according to a set of objective criteria and preconditions, such as full disclosure of the crimes or the acknowledgment that a crime was politically motivated. In general, amnesties granted before democratic transitions have effectively foreclosed investigations into the crimes.

As outlined above, several historical factors influenced and shaped South Africa's amnesty agreement and thus enabled the country's transition to democracy. While I argue that the costs of indefinitely postponing the transition would have been extremely high, this assertion is by no means uncontroversial. In fact, the amnesty agreement has been severely criticized, particularly by certain victims and their families who have called for the prosecution of perpetrators. In the following section, I will consider whether prosecution constituted a viable alternative to amnesty.

The Possibilities of Prosecution

Those opposed to amnesty agreements generally base their arguments on the assumption that it would be both preferable and possible to prosecute perpetrators. However, even if the South African transition could have occurred without any form of amnesty agreement, thus leaving open the possibility of large-scale prosecutions, only a small fraction of those responsible for gross violations of human rights could have been prosecuted successfully. A number of arguments support this contention.

First, it is commonly accepted that South Africa's criminal justice system is virtually dysfunctional. Only four percent of

⁸ Self-amnesties are generally viewed as illegal under international law. The Permanent Court of International Justice held that "no one can be judge in his own suit." (Frontier between Iraq and Turkey Case, 1925 P.C.I.J. [ser. B], No. 12, p. 32 [21 November 1925]).

those who commit crimes such as murder, armed robbery, rape and serious assaults spend more than two years in jail.⁹ This demonstrates a collapse in the capacity of the police to investigate and arrest, attorneys general to prosecute, judges to convict and correctional facilities to imprison. The criminal justice system is struggling to cope with South Africa's enormous problem of *current* crime. If the police and prosecuting authorities were to devote a significant share of their resources to dealing with human rights violations, many of which occurred a decade or more ago, the country would almost certainly lose the current battle against ongoing crime.¹⁰

Second, political crimes committed by highly skilled operatives trained in the art of concealing their crimes and destroying evidence are difficult to prosecute. The South African police have an extremely small number of properly trained detectives. In certain jurisdictions more than a third of prosecutorial posts are empty and cannot be filled.¹¹ Even in those jurisdictions that are fully staffed, attorneys general complain that they do not have the prosecutorial resources to complete more than a small percentage of the cases ready for trial. As a result of acute staff shortages in one jurisdiction, several critically important "Third Force"¹² prosecutions have been delayed for more than three years.

Third, the government cannot afford the cost of thousands of political trials to prosecute those responsible for human rights abuse. The accused in many of these trials are former state employees—generally members of the police and military—and the government is therefore obliged to pay their legal defense costs. In the trial of the former Minister of Defence, Magnus Malan, and other high-ranking members of the South African Defence Force, the defense's legal costs exceeded 9 million rand (\$1.5 million),¹³ while the defense team in the trial of Eugene de Kock, a former police colonel, cost taxpayers more than 5 million rand

⁹ Nedcor National Crime Survey (Johannesburg: Nedcor, 1996).

¹⁰ The United Nations Truth Commission set up in El Salvador was confronted with an analogous difficulty. Faced with a dysfunctional criminal justice system, it noted the futility of trying to prosecute perpetrators identified through the course of its work. See Roht-Arriaza, p. 300.

¹¹ Testimony by Dr. Jan d'Olivera, attorney general of the Transvaal, before the Justice Select Committee (Cape Town: April 1995).

¹² The "Third Force" refers to covert operations carried out by government agents against political opponents.

¹³ Wyndham Hartley, "Marathon Malan Trial Cost R9m," *Business Day* (Johannesburg), 14 November 1996. During the Malan trial, the 17 accused were prosecuted for allegedly establishing and training a hit squad of Inkatha Freedom Party supporters to carry out attacks on members of the liberation movements.

(\$0.8 million).¹⁴ These figures do not include hidden costs to the state, such as the use of large teams of state attorneys and advocates, and the cost of supporting hundreds of state witnesses¹⁵ in extremely expensive witness protection programs.¹⁶ Thus, prosecuting thousands of former state employees would cost the government billions of rand.

Fourth, trial preparations and proceedings of this nature are extremely time consuming. The de Kock trial, for example, lasted over 18 months and only resulted in a single conviction. A specialized investigative unit, consisting of over 30 detectives and 6 civilian analysts, spent more than nine months conducting the investigation and preparing the indictment for the Malan trial.¹⁷ The trial lasted an additional nine months and resulted in the acquittal of all 17 accused. If the thousands of people responsible for political crimes committed over a period of several decades were to be prosecuted, it would take literally hundreds of years of pre-trial preparation and court time to complete these cases—and even that would not in itself guarantee convictions.

Thus, in South Africa, a prosecutorial approach would not have achieved the central rationale for choosing such a strategy—the punishment of those responsible for human rights abuse. The nature of South Africa’s transition, combined with the inability of its criminal justice system to deal successfully with those responsible for human rights violations, made it necessary to develop a more creative approach to deal with the past: the Truth and Reconciliation Commission.

AN OVERVIEW OF THE TRC

The establishment of the TRC is best understood as an attempt to restore moral equilibrium to the amnesty process. The Promotion of National Unity and Reconciliation Act¹⁸ (TRC Act)

¹⁴ Figure supplied by Dr. Torie Pretorious, deputy attorney general of the Transvaal. These costs exclude those for transportation and expert witnesses. During the trial, Eugene de Kock, the former police colonel who commanded a government assassination squad, was prosecuted for a number of political murders and assassinations carried out by himself and policemen under his command.

¹⁵ The de Kock trial used over 100 state witnesses to secure a single conviction.

¹⁶ Several of the state witnesses in the de Kock trial were placed on witness protection programs in Denmark and the United Kingdom.

¹⁷ Figure supplied by Howard Varney, head of the Investigative Task Board in Durban (1997).

¹⁸ The Promotion of National Unity and Reconciliation Act, No. 34 of 1995 [hereinafter TRC Act] (South Africa).

established a 17-member commission with the following objectives:¹⁹

- To establish as complete a picture as possible of the causes, nature and extent of gross violations of human rights²⁰ that occurred between 1 March 1960 and 10 May 1994;
- To establish the fate or whereabouts of victims of gross violations of human rights;
- To assist in restoring the dignity of victims by affording them an opportunity to testify about the violation of their rights or the death of their loved ones;
- To recommend a set of measures designed to provide reparation and rehabilitation to victims;
- To grant amnesty to persons who make full disclosure about the crimes they have committed;
- To make a set of recommendations to the president with regard to the creation of institutions conducive to a stable and fair society and institutional, administrative or legislative measures that should be taken to prevent the future violation of human rights; and
- To write a report publicizing the work and findings of the TRC.

To assist in meeting these objectives, the legislation established three committees within the TRC: the Committee on Human Rights Violations (HRV Committee), the Committee on Amnesty (Amnesty Committee) and the Committee on Reparation and Rehabilitation (R&R Committee). The TRC also had its own investigative unit and witness protection program.

The HRV Committee's primary function was to gather information from victims in order to establish as complete a picture as possible of past human rights abuse. The committee had to find whether each deponent should officially be declared a victim

¹⁹ For a more precise outline of the objectives of the TRC, see *ibid.*, sec. 3.

²⁰ Section 1(1)(ix) of the TRC Act defines gross violations of human rights as: "...the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), that emanated from the conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive."

according to the definition contained within the TRC Act.²¹ Names and relevant information of the victims were then forwarded to the R&R Committee.

The Amnesty Committee included members from the TRC and the legal profession and its task was to consider amnesty applications. To qualify for amnesty, two basic preconditions needed to be satisfied: the person's crime had to meet the definition of acts associated with a political objective as contained in the TRC Act, and the person had to provide full disclosure of the act for which amnesty was sought.²² The TRC Act specifies several categories of people who may apply for amnesty including members of political organizations, liberation movements²³ and members of state security forces. It was further required that these protagonists were engaged in a struggle against the state or a "former state"²⁴ or countered such acts of resistance.

Once a person was eligible for amnesty, the committee had to consider the person's motive as well as the nature and context of the act.²⁵ The TRC Act specifies that any person who acted for personal gain²⁶ would not qualify for amnesty, except if that person received money or anything of value for being an informer. Furthermore, a person who had committed a crime motivated by personal malice, ill will or spite²⁷ was not granted amnesty. If the crime was a gross violation of human rights, the Amnesty Committee had to conduct a public hearing before granting amnesty.²⁸

Once amnesty was granted, any entry or record of the conviction for the crime for which amnesty had been granted was expunged

²¹ *ibid.*, sec. 1(1)(xix).

²² *ibid.*, sec. 20(1)(c).

²³ The phrase "another publicly known political organization or liberation movement" was included to allow members of political organizations who committed crimes against members of other political organizations to apply for amnesty.

²⁴ "Former state" refers to any state or territory that was established by an act of Parliament or by proclamation in terms of such act before the interim Constitution took effect and the territory of which now forms part of South Africa. These "independent states," created as part of the former government's policy of separate development, were not recognized by the international community and ceased to exist after the interim Constitution was adopted.

²⁵ TRC Act, sec. 20(3).

²⁶ *ibid.*, sec. 20(3)(i).

²⁷ *ibid.*, sec. 20(3)(ii).

²⁸ *ibid.*, sec. 19(3)(b)(iii). Also note that according to section 33 of the TRC Act, all hearings of the commission shall be open to the public. However, if it is in the interests of justice, or if there is a likelihood that a person may be harmed if proceedings are held in public, then the commission may direct that its hearings be held behind closed doors.

and that conviction was deemed not to have taken place.²⁹ The person's name and information about the act³⁰ were then published in the *Government Gazette*, the official government publication.

The R&R Committee members were mostly medical doctors and mental healthcare professionals. People found by the HRV Committee to be victims could, along with their families, apply to the R&R Committee for reparation. After considering these applications, the R&R Committee made a set of policy recommendations to the president regarding how to restore the human and civil dignity of victims.

The TRC's Investigative Unit consisted of 60 local investigators drawn from the police service, the legal profession and human rights organizations. Approximately 12 investigators, transferred from foreign police forces, also assisted the unit. The Investigative Unit carried out investigations, subpoenaed and questioned people who appeared before the TRC and had authority to seize or retain any evidence or objects relevant to the investigation.³¹

The TRC Act also provided for the establishment of a limited Witness Protection Programme³² that protected those who wished to testify before the commission and, as a result, were in some form of danger. Over 150 witnesses joined the program.

JUSTICE IN THE WAKE OF GROSS OR SYSTEMATIC HUMAN RIGHTS VIOLATIONS

There is a respectable and growing set of literature devoted to defining what constitutes justice in the wake of gross or systematic violations of human rights.³³ I do not intend to engage in the debate regarding which steps, if any, a newly established democracy is obliged to take when confronted by a legacy of human rights abuse. Rather, I intend to outline what I believe to be the four basic obligations such a state must fulfill under

²⁹ *ibid.*, sec. 20(10).

³⁰ *ibid.*, sec. 20(6).

³¹ *ibid.*, sec. 29.

³² *ibid.*, sec. 35.

³³ See, for example, Carlos S. Nino, "The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina," *Yale Law Journal*, 100 (June 1991) p. 2619; Diane F. Orentlicher, "Settling the Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," *Yale Law Journal*, 100 (June 1991) p. 2,535; Roht-Arriaza (1990); and Michael P. Scharf, "Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?" *Texas International Law Journal*, 31 (Winter 1996) p. 1.

international law, and then review the extent to which the South African government has fulfilled these obligations by establishing the TRC.³⁴ A state is required to:

- Take steps to establish the truth regarding gross violations of human rights, including the fate and whereabouts of victims, and the identity of those directly or indirectly responsible for human rights abuse.
- Take steps to reform state institutions to ensure that human rights abuse does not reoccur.
- Take steps to provide victims with reparation for the harm they have suffered.
- Punish perpetrators of human rights abuse.

Pursuing the Truth

The TRC attempted to uncover the truth in a number of ways. First, it held hearings where victims testified about the abuse they suffered. The HRV Committee held more than 120 hearings in locations throughout South Africa, at which approximately 4,000 victims testified. Second, the TRC also addressed accountability for human rights abuse from a broader perspective by examining the roles played by various professions and institutions in resisting or facilitating human rights abuse. For example, by holding hearings on the role of the medical and legal professions under apartheid, the TRC focused national attention on issues such as professional codes of conduct. Third, it supervised the collection of over 22,000 statements from victims of human rights abuse. Finally, the HRV Committee supervised the gathering of evidence on gross violations of human rights. The work of the TRC helped uncover the fate of hundreds of victim whose deaths and disappearances had remained mysteries, and identified patterns of abuse such as the widespread torture of detainees held without trial. As a result of the disclosures made in amnesty applications, the identities of those responsible for hundreds of deaths have now been revealed.³⁵ During the apartheid era many investigations and prosecutions of political crimes failed, either due to deliberate

³⁴ A clear articulation of these principles is to be found in the landmark Velásquez-Rodríguez Case, 1988 Inter-American Court of Human Rights, ser. C, 4 (1988).

³⁵ Members of the security police have applied for amnesty for the deaths of prominent anti-apartheid activists, including the “Cradock Four,” the “Pebco Three,” Stanza Bopape and Steve Biko. Furthermore, scores of amnesty applications for bombings and acts of sabotage, carried out by the security forces, have also been received.

cover-ups or an absence of commitment to properly investigate these crimes.

This examination prompted a series of reforms to ensure that gross violations of human rights do not occur in the future. Thus, the TRC uncovered the truth not only about perpetrators of murder or torture but also about the intellectual authors who provided political or operational authority for such crimes.

Nonrepetition

The information gathered by the TRC was central to fulfilling one of its most important functions—the official acknowledgment of human rights abuse. Acknowledgment is crucial because the government and its people must recognize not only the occurrence of human rights abuse, but more fundamentally, its wrongfulness. Once the wrongfulness of assassinations, torture and disappearances is admitted, then the moral space that previously permitted their occurrence is considerably narrowed. Knowing the truth about violations of human rights and building a national consensus that such acts are illegitimate are essential in preventing their recurrence.

An important function of the TRC was to recommend to the president a set of legal, administrative and institutional measures designed to prevent human rights abuse in the future. 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, as I have asserted above, it is unlikely that perpetrators would be prosecuted successfully, even in the absence of an amnesty process. The creation of a culture of impunity in South Africa is more a result of the crisis in its criminal justice system than to the granting of amnesty. The fact that a small percentage of those responsible for past human rights abuse in South Africa can be prosecuted successfully means that the prevention of such abuse in the future must be conceptualized in terms far wider than simply the securing of convictions.

For this reason, the power of the TRC to make recommendations to prevent human rights abuse in the future is extremely important. While a functioning and effective criminal justice system is certainly vital for preventing human rights abuse, it should not be seen as the only means to achieve justice. Prosecution is only an *ex post facto* solution to human rights abuse. Equally important is a series of proactive initiatives to prevent such abuse

in the first place. The recommendations of the TRC—on subjects such as human rights training for the security forces and human rights education in schools and universities—will be as important in preventing human rights abuse as the establishment of an effective criminal justice system.

Finally, the TRC's report reaffirmed the widely accepted view that apartheid was a crime against humanity under international law. This finding will help guard against revisionist attempts to depict apartheid as either a benign or well-intentioned policy. The classification of institutionalized racism as an internationally condemned crime diminishes the likelihood that those who advocate such policies will gain widespread support, or that their views will be accepted as part of mainstream political discourse.

While national acknowledgment of human rights violations serves as insurance against future abuse, the acknowledgment of personal suffering is crucial to healing and the restoration of individual dignity. The information provided by victims has not only helped the country to acknowledge that widespread human rights abuse did occur, it has also helped ensure that individual victims feel that their suffering has been acknowledged. Scores of victims have commented that they found the experience of testifying before the TRC to be extremely therapeutic.³⁶ The TRC took particular care to ensure that victims who appeared before it were provided with professional psychological assistance before, during and after their testimony. This should be contrasted with the adversarial nature of the prosecutorial process. Torture or rape victims who testify in criminal trials, for example, often complain of revictimization when defense lawyers attempt to discredit their testimony and deny their suffering.³⁷

Another way in which the TRC sought to address the needs of victims was by recommending that the government provide them with limited financial assistance. Following the submission of the TRC's reparation policy to the president, the government allocated 600 million rand (\$100 million) to pay reparation to victims over three years. This recommendation was accepted partially because the criminal justice system has been so unsuccessful in providing victims with compensation. Only a small percentage of victims have managed to successfully pursue civil claims against those

³⁶ For example, the wife of murdered activist, Matthew Goniwe, has said that after testifying before the TRC she felt for the first time that she could put the past behind her and look to the future.

³⁷ Brandon Hamber, clinical psychologist, interview by author, Center for the Study of Violence and Reconciliation (29 April 1996).

responsible for violating their rights. In cases where the identity of the perpetrator is unknown, victims seldom have a remedy. Furthermore, victims of crimes such as torture often have considerable difficulty presenting sufficient proof, due mainly to the lack of physical evidence left by sophisticated torturers.

Further, since civil claims in South Africa are subject to a two-year statute of limitations, the vast majority of victims are presently unable to pursue such claims. In addition, most victims who furnished the TRC with information are poor, and could not have afforded the services of an attorney or an advocate. In summary, civil trials offer only a small percentage of victims of human rights abuse a reasonable prospect of obtaining redress.

In contrast to civil trials, the TRC's reparation and rehabilitation policy will likely provide some form of assistance to almost all people found to be victims. This is because in order to be found a victim, a person was not required to establish who was responsible for the abuse suffered. The wife of a murdered activist did not have to establish the identity of the assassin to qualify for reparation, but only had to show that her husband was killed for political reasons. In the majority of instances where activists died in detention, inquests found that no one could be held criminally or civilly liable. The TRC was entitled, however, to declare such a person a victim, thereby rendering relatives or dependents eligible for reparation. In addition, the victim of any person to whom amnesty was granted was automatically eligible for reparation.

Many political killings that occurred in South Africa during the apartheid era were perfectly lawful in terms of the country's laws existing at the time. The Criminal Procedure Act³⁸ granted members of the security forces extremely wide powers regarding the use of deadly force.³⁹ It also permitted capital punishment for a range of political offenses.⁴⁰ As a result, neither the relatives of a person killed by security forces during a protest march nor the dependents of a person executed for treason would have been entitled to compensation. The TRC was able to declare such people victims, thereby entitling them to apply for reparation.

The provision of reparation is also far wider in scope than simply the receipt of damages pursuant to a successful civil claim. As part of its general commitment to reparation, the TRC recommended a series of initiatives to provide victims with symbolic reparation. For example, in cases where the TRC

³⁸ The Criminal Procedure Act, Act 51 of 1977 (South Africa).

³⁹ *ibid.*, sec. 49.

⁴⁰ *ibid.*, sec. 277.

discovered the bodies of activists who were killed and secretly buried by the security forces, it has assisted the families of these victims in reburying the bodies in an official and dignified way. The TRC has also proposed the establishment of a monument to pay tribute to victims and suggested other ways in which the whole country can commemorate their suffering. Reparation granted by the TRC is a fairer, more nuanced and holistic means of redress than that which could be obtained through the courts.

Prosecutions and Punishment

While the work of the TRC appears to satisfy the first three requirements of international law—establishing the truth, preventing future violations and providing reparation—its amnesty provisions seem to constitute a *prima facie* violation of the obligation to punish those responsible for gross violations of human rights. A number of factors should be considered, however, before such a conclusion is drawn.

The political and historical circumstances that prevailed at the time of South Africa's transition made it virtually impossible for the leadership of the liberation movements to refuse to agree to some form of amnesty. Criminal justice systems, even those that have many resources and function efficiently, are designed for societies in which the violation of law is the exception and not the rule. Once the violation of the law becomes the rule, criminal justice systems simply cannot cope. The fair investigation and prosecution of crime in order to establish a person's guilt beyond reasonable doubt is time-consuming and resource-intensive. No criminal justice system can function if, as a result of a change in power and policy arising from a political transition, it is suddenly required to prosecute tens of thousands of crimes committed in the past.

If efficient criminal justice systems cannot cope with mass or systemic crime, criminal justice systems in transitional societies are even less likely to succeed in convicting more than a tiny fraction of perpetrators. The alarming implication of this assertion is that even in those transitional societies in which there is no *de jure* amnesty, the scale of past criminality combined with the nature of their criminal justice systems often results in a *de facto* amnesty. Although South Africa created a legally binding amnesty agreement, the absence of such an agreement would have made no real difference in the number of perpetrators successfully prosecuted.

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: uncovering the truth, transforming state institutions and providing reparation to victims. Furthermore, the public nature of the amnesty process resulted, to some extent, in the shaming of perpetrators. This considerably reduced their prospects for promotion in the civil service, causing many of them to retire from public service and reducing their prestige and public authority. This marginalization of perpetrators reduced their power and therefore has helped reduce their capacity to commit or orchestrate human rights abuse in the future.

PARADOXES OF TRUTH AND RECONCILIATION

It would be misleading to argue that while achieving convictions is complex, difficult and often impossible, the objectives of the TRC have been clear-cut, unproblematic and easy to achieve. There have been some difficulties encountered by TRC that, when explored more thoroughly, allow those considering similar initiatives to appreciate the strengths, weaknesses and criticisms of this approach to dealing with the past.

Many who support truth commissions argue that there can be no reconciliation without truth. They contend that victims cannot forgive until they know whom to forgive. While this argument is supported by those cases in which groups or individuals, upon discovering the truth, feel resolved about the past or forgive those who violated their rights, it is as forcefully rebutted by those instances where the revelation of truth leads to greater division, acrimony and bitterness. While truth may lead to reconciliation, it is a myth to presume it automatically does so. In many cases the manner in which truth is sought and presented has as much influence on whether it leads to reconciliation as the content of the revelations themselves.

Not only is the relationship between the pursuit of truth and the attainment of reconciliation by no means clear-cut, but the concept of "reconciliation" is equally difficult to define. It is extremely hard to embark on initiatives aimed at promoting reconciliation when different political groups and individuals define reconciliation in different ways. Certain South African parties stress that reconciliation will only occur once black citizens are adequately compensated for years of discrimination in the areas of health care, housing and education. Others argue that a

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preoccupation with past injustices is an obstacle to reconciliation, and that a unified nation can only be built by focusing on the future. Still others argue that the return of land from which Africans were forcefully removed is central to reconciliation, while some contend that the creation of a whites-only *Volksland* (homeland) for Afrikaners is the only way to ensure peaceful coexistence.

Additionally, there is often no unanimity as to what constitutes reconciliation among the primary constituency of truth commissions—the victims. In South Africa certain victims stated that they would be reconciled once they discovered the truth about human rights abuse. Others said that reparation and monetary compensation for past abuse were indispensable to reconciliation. Some victims felt extremely embittered about amnesty for perpetrators, stating that they would not be reconciled unless justice was done, while other families stated they would be satisfied if the perpetrators made a sincere apology and showed genuine remorse. The pursuit of reconciliation is an endeavor fraught with contradiction and is made more difficult by the fact that there can be no blueprint that satisfies a wide spectrum of citizens. Even among those who have suffered, there is often no consensus as to what is required to promote unity and healing.

By uncovering lies and official misconduct, which form the cornerstone of the abuse of power, truth commissions aim to lay the foundation for the reestablishment of the rule of law. Truth has a democratizing effect because it is more difficult to sustain arbitrary and repressive rule in a society comprised of citizens who know the terrible costs of human rights abuse. However, truth commissions often occur in the context of amnesties, which represent a fundamental subversion of the rule of law. Impunity for gross violations of human rights corrodes respect for the law and the institutions designed to uphold it. It may also breed cynicism about equality under the law because it is usually the powerful who escape the consequences of their actions and therefore benefit disproportionately from amnesties. The tension between truth as a guarantor of the rule of law and amnesty as its antithesis is nowhere more apparent than in the work of South Africa's TRC. At the heart of the TRC lies the paradox that while truth is essential to the restoration of the rule of law, it can often only be obtained by an amnesty that, in turn, undermines this restoration. This dilemma presents those who support truth commissions with a contradiction that they must seek to diminish, but can never entirely eliminate.

Reparation: Who Pays and Who Benefits?

Reparation programs are almost always approved and financed, not by repressive regimes or the perpetrators themselves, but by their democratic successors. Ironically, newly established governments, comprised in many instances of opponents of the old order and victims of past abuse, pay for policies under which they suffered and against which they actively resisted. Reparation payments also entail difficult decisions about how to allocate scarce resources. 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. To reduce this potentially divisive outcome, truth commissions should be accompanied by other remedial measures or initiatives designed to address not just individual injustices, but structural injustices as well.

Truth commissions can help in restoring the relationship between citizens and the state by demonstrating that the present government acknowledges the injustices of the past and is determined not to allow a repetition of abuse. But, the task of building a new rapport can be complicated by constant public revelations about past abuse. If accounts of human rights abuse by the police and military are reported constantly in the media and form a significant part of public discourse, it is difficult for communities to decide how to characterize the local police force. Are they the hit squads of the past or the bona fide investigators of neighborhood crime? Thus, dealing with the past requires a careful balancing of forgiving but not forgetting, and accountability.

Finally, those contemplating the establishment of a truth commission as a mechanism to deal with the past should consider the following factors:

- Is there a significant degree of multi-party support for the initiative?
- Will the truth commission be provided with adequate resources to fulfill its mandate?
- Will the truth commission be given real powers or

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will it have to rely on voluntary cooperation from state officials and private individuals?

- Will the truth commission be independent both in law and in fact?
- Will the truth commission be provided with a mandate and terms of reference, allowing it to adequately address past human rights abuse?

While this list of considerations should not be regarded as exhaustive, they should not be discounted. In certain cases it may be more damaging to establish a fundamentally flawed truth commission than to pursue an alternative strategy.

TRUTH COMMISSIONS, INTERNATIONAL TRIBUNALS AND TRANSITIONAL JUSTICE POLICY

Any attempt by a society to deal with a legacy of mass or systemic human rights abuse must be as comprehensive as possible. Properly confronting the past cannot be accomplished successfully by any single institution or approach. This article has argued that criminal justice systems in general, and particularly those in societies emerging from a period of war or repressive rule, cannot cope with mass or systemic human rights abuse that occurred in the past. This does not imply that the prosecution of perpetrators should be abandoned either in principle or as a central component of transitional justice policy. Nor does it belittle the superhuman efforts of domestic and international investigators, prosecutors and judges working in difficult circumstances to ensure that justice is done. What is crucial about these facts is that they demonstrate that any attempt to prevent a recurrence of abuse and build a culture of human rights in a society that has recently emerged from a period of massive abuse cannot rely solely on a prosecutorial approach to the past. In the concluding section, I outline what I believe are the key components of a holistic approach to transitional justice.

International Prosecutions

The prosecution of perpetrators by an international tribunal or court will send a signal to political and military leaders that if they authorize or participate in certain forms of conduct they will be subject to prosecution. The indictment of leaders or high-ranking officials often leads to diplomatic isolation and diminishes their authority both at home and abroad. This can bolster efforts

to end conflict and human rights abuse. However, international prosecutions face two significant challenges. First, because they tend to focus on powerful leaders responsible for egregious crimes, it is often difficult to obtain jurisdiction over those indicted.⁴¹ More significantly, because of resource constraints, they are only able to prosecute a very small percentage of the total number of perpetrators. One only has to count the total number of perpetrators indicted, prosecuted and convicted in the tribunals for Rwanda and the former Yugoslavia. Even in the most optimistic scenario, the International Criminal Court—approved by a majority of nations in July 1998—will struggle to convict more than a few hundred perpetrators in the next decade.

Domestic Prosecutions

It is extremely important for new democracies, even those with virtually nonexistent criminal justice systems, to attempt to prosecute those responsible for human rights violations. It is equally important to devote significant resources to the rebuilding and strengthening of judiciaries and the retraining of investigators and prosecutors. These efforts will help to reestablish faith in the rule of law and demonstrate that the government is committed to ensuring some form of accountability for human rights abuse. However, as I have argued throughout this article, there are a number of reasons why emerging democracies are unable to prosecute successfully more than a small percentage of perpetrators. The total number of perpetrators prosecuted and convicted in domestic courts in Chile, Argentina, South Africa, Haiti, Guatemala, Rwanda, Ethiopia and Cambodia represent a tiny fraction of those culpable.

Truth Commissions and Other Domestic Human Rights Initiatives

The difficulties entailed in a criminal justice approach to the past underscore the importance of augmenting this approach with other human rights initiatives. An increasing number of emerging democracies have set up truth commissions as a means to deal with the past and prevent future human rights abuse. The achievements of truth commissions in Chile, Guatemala and South

⁴¹ The arrest of General Pinochet is a landmark in the effort to ensure international accountability for human rights abuse. However, it is likely to cause those responsible for international crimes to exercise much greater caution in their travels to foreign countries, thus increasing the challenges of obtaining jurisdiction over such individuals.

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Africa have elicited a call for similar initiatives in countries throughout the world, including Nigeria, Northern Ireland, Israel and the future Palestine and Bosnia. Truth commissions can play a crucial role in forging reconciliation, fostering mutual understanding and providing assistance to victims. By providing victims with a platform to tell their stories of suffering, they reveal the terrible human cost of war and dictatorship. Often people from one side come to realize that mothers and children from the other side feel the same pain and suffer the same loss. They come to learn that ordinary people, not leaders and demagogues, pay the price for ideological and ethnic mobilization.

Truth commissions also allow for a broader examination of culpability beyond the narrow and often legalistic definitions of guilt. They generate a process of national introspection that requires that everyone—soldiers, civilians, lawyers, doctors, clergy, journalists, etc.—examine their role in the conflicts of the past. They allow for creative discussion about proactive measures to prevent abuse. By placing victims, rather than perpetrators, at the center of public attention, they often mobilize civic and governmental support for initiatives to provide them with much needed reparation. Commissions are generally covered extensively in the media and are discussed in schools, at work, at home and in places of worship. Far from handing down clear-cut judgments about guilt or innocence regarding complex conflicts, commissions force people to think critically about the past, and in so doing, make it impossible for them to glibly dismiss the suffering of victims. Uncovering the truth about human rights abuse also provides a society with insights into the mechanics of repression. This assists new governments in focusing their reform efforts on those individuals and institutions responsible for violations of human rights. Finally, truth commissions allow governments to pursue proactive strategies aimed at promoting reconciliation along ethnic, racial, linguistic or religious lines in societies in which the conflict occurred. By promoting tolerance, cooperation and integration, truth commissions can help bridge divisions that constantly threaten unity and peace.

Prosecution and punishment are important components of justice, but they are only post hoc interventions. Justice encompasses the truth, reform of state institutions, reparation for victims and creative initiatives to forge reconciliation. Courts are crucially important in combating impunity, but we dare not confine the struggle for human rights to one set of institutions or one approach to deal with the past. ♣