

**AMNESTY AS A TOOL OF TRANSITIONAL JUSTICE: THE
SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION
IN PROFILE**

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DECLARATION

I, Kobina Egyir Daniel, hereby declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other university,

Signed:

Kobina Egyir Daniel

DEDICATION

To my parents for continued sustenance and support

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I alone am responsible for the deficiencies of this paper.

ABBREVIATIONS

AB	Afrikaner Broederbond
ANC	African National Congress
AWB	Afrikaner Weerstandsbeweging
AZAPO	Azanian People's Organisation
COSATU	Congress of South African Trade Unions
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFP	Inkatha Freedom Party
NP	National Party
PAC	Pan African Congress
TRC	South African Truth and Reconciliation Commission
UDF	United Democratic Front
UN	United Nations

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CHAPTER ONE

INTRODUCTION

1.1 Introduction to the Study

Transitional justice, as the phrase implies, refers to justice in societies emerging from political turmoil and civil strife with attendant gross abuses of human rights. There appears to be consensus among scholars that the objectives of transitional justice are the healing of victims and the prevention of future abuses,¹ but the question of how it should be achieved has failed to secure a convergence of opinion.

Simplistically and generally stated, the debate centres around the legal but especially emotive question of punishing or forgiving the perpetrators of gross violations of human rights. One school of thought argues that international law imposes a legal duty upon states to prosecute human rights abuses of a prior regime.² The other argues that there is no such clear duty and further that a case made to that effect is naïve and unappreciative of the practical difficulties of successor regimes.³ Increasingly however, it is perceived that amnesty for, or non-prosecution of gross human rights abuses of prior regimes constitutes a subjugation of “justice” to political compromise.⁴ The United Nations (UN), which stands accused of double standards in this regard, has failed to

¹ Sarkin 'Transitional Justice and the Prosecution Model: The Experience of Ethiopia' (1999) 3 *Law Democracy and Development* 253. Bassiouni 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9. Kumado 'Forgive us our Trespasses' (1993 – 1995) 19 *University of Ghana Law Journal* 83.

² Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537. Roht-Arriaza (ed) (1995) *Impunity and Human Rights in International Law and Practice*. Motala 'The Promotion of National Unity and Reconciliation Act, the Constitution and International Law' (1995) 28 *Comparative and International Law Journal of South Africa* 338.

³ Nino 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *Yale Law Journal* 2619. Dugard 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001.

⁴ Tejan-Cole 'Painful Peace: Amnesty under the Lome Peace Agreement in Sierra Leone' (1999) 3 *Law Democracy and Development* 239.

provide any definitive operative standards and therefore little assistance in settling the question.⁵

This dissertation seeks firstly to re-examine the merits of the competing philosophies on the role of amnesties in transitional justice. It seeks in particular to investigate the currently popular notion that justice is necessarily retributive and even beyond that, to determine the veracity of the claim that prosecution represents a necessary element of retributivist justice. The objective is to contribute to the ongoing debate by examining and drawing practical lessons from the case of South Africa, which emerged in 1994 from several generations of institutionalised gross violations of human rights. Accordingly the Amnesty Committee of the South African Truth and Reconciliation Commission (TRC), the law and the political philosophy undergirding its functions represent the focus of this study.

1.2 The Relevance of the Subject

Africa has been particularly vulnerable to conflicts of identity, which have decimated populations and violated numerous human rights norms.⁶ The cases of Liberia, Sierra Leone, Burundi, Rwanda and the Democratic Republic of Congo constitute frightful examples of this scourge. There now exist several initiatives for peace that can only hope to secure their mandates through an appropriate and effective model of transitional justice.⁷ Now more than ever, a model of transitional justice which takes into account the delicate balance between lasting peace and impunity, is required. Whether or not amnesties should be considered as an incentive for the cessation of conflict and for the institution of democratic systems of government thereafter, remains therefore a topical issue. The South American experiences, which over-emphasised

⁵ Support for amnesties in South Africa and rejection of same in Sierra Leone represents the focus of this accusation.

⁶ Report of the UN Secretary General to the UN Security Council: *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, April 16 1998. See also Mekenkamp *et al* (eds) (1995) *Searching for Peace in Africa*.

⁷ Examples of such initiatives can be found in the cases of Burundi and the Democratic Republic of Congo (DRC). Countries like Rwanda and Sierra Leone are yet to confront their own demons in devising an appropriate model for transitional justice.

political expediency,⁸ are largely considered inadequate models. Inadequate also, is a model that stresses a duty to prosecute and elbows issues of *realpolitik* out of consideration.⁹

In spite of enormous pressures upon it,¹⁰ South Africa had the courage to choose and implement a model that embraced limited amnesties because in *its* opinion, it represented the best means to maintain peace and to reconcile a deeply divided society.¹¹ This model is by no means beyond criticism or even representative of the ideals of all South Africans but it has arguably navigated a course through potential conflict. It has done this by upholding the virtues of forgiveness but eschewing amnesia of the victims' pain.¹² This dissertation argues that a principled regime of amnesties, such as the South African regime was, can achieve justice. The lessons of this experience lie in the political philosophy that validates it and the virtues and the shortfalls of the model. They represent a blueprint, which may be modified to fit the circumstances of various countries and to secure peace on the continent.

1.3 Methodology

This study is informed by both primary and secondary sources. Domestic statutes, international treaties and case law are used as primary sources, and as secondary sources, books, journal and newspaper articles, proceedings of conferences, the internet and documentary films are made use of. A factual, historical and descriptive method will be used to give the background to the process of transitional justice in

⁸ Asmal, 'Coping with the Past: The Latin American Experience' (1994) *UNISA Latin America Report* 22. See generally also Cassel 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities' (1996) 59 *Law and Contemporary Problems* 197.

⁹ Asmal 'Truth Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 *Modern Law Review* 1. Asmal 'Victims, Survivors and Citizens Human Rights, Reparations and Reconciliation' (1992) 8 *South African Journal on Human Rights* 491. Nino 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *Yale Law Journal* 2619.

¹⁰ Motala, 'The Promotion of National Unity and Reconciliation Act, the Constitution and International Law' (1995) 28 *Comparative and International Law Journal of South Africa* 338. Also Boraine (2000) *A Country Unmasked* Chapter 8 generally.

¹¹ The Promotion of Unity and National Reconciliation Act of 1995 created a Truth and Reconciliation Commission. For brief analysis of its provisions, see Motala (n 10 above) 341. Also Asmal (2000) (n 9 above) 23.

¹² As above.

South Africa and the workings of the Truth Commission. International law, political theory, domestic legislation and the amnesty process are also analysed.

1.4 Overview of Chapters

This dissertation unfolds into five parts. Chapter 1, as an introduction to the rest of the work, sets out the relevance of the subject under review, the methodology and a brief overview of the chapters.

Chapter two reviews the extensive literature on transitional justice and discusses the concepts that may be distilled therefrom. It discusses the contextual determinants of models of transitional justice and sets out the essence of the debate between vengeance and forgiveness as tools for achieving transitional justice. It also discusses the development of international law with respect to the permissiveness of amnesties and both the articulated and other justifications for their use.¹³

The burden of the third chapter is to first recount the factual circumstances of South Africa's transition and the factors that predicated the promulgation of the Promotion of National Unity and Reconciliation Act 34 of 1995. It then briefly examines the provisions of the statute and its implementation. It also engages in an empirical assessment of the almost 800 amnesties granted and employs a number of indices to determine whether the process was even handed and achieved its objectives. These indices are: the political affiliations of the awardees; whether or not the crimes for which they received amnesty involved the loss of life; whether or not they had already been punished for their transgressions and; whether or not they received forgiveness from the victims – actual or constructive.¹⁴

Chapter four focuses on some of the criticisms that the TRC received. It assesses their merits and determines to what extent they subverted the quest for justice in transitional South Africa. In particular it looks at the reasoning of the Constitutional Court in the *AZAPO Case*,¹⁵ the alleged lack of objectivity of the TRC, its almost exclusively

¹³ See for example article 7 of the Convention against Torture (CAT)¹³ on the one side and article 6(5) of Protocol II to the 1949 Geneva Conventions on the other.

¹⁴ Victims' families are also classified by the TRC law as victims. See Act 34 of 1995.

¹⁵ *AZAPO v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC).

Christian orientation and its almost exclusive focus on abuses of civil and political rights.

Chapter five concludes the dissertation by first determining whether or not there are any lessons to be learnt from South Africa's amnesty experience. It then outlines what the lessons are or should be. It closes by making recommendations as to what factors or particular considerations should guide the efforts and aspirations of abused societies that embark on the quest for transitional justice.

CHAPTER TWO

RETRIBUTION OR REMISSION: THE DILEMMA OF CRIMINAL JUSTICE IN TRANSITIONAL SOCIETIES

2.1 Introduction

This chapter is subdivided into five parts. The first reviews the converging points in the literature on transitional justice. The second part outlines what the contextual determinants of the models of transitional justice are. This is because what is deemed just in any transitional society is largely dependent on the circumstances – resources and limitations – of such society.¹ This leads onto the third part, which discusses the prosecution model of transitional justice. It sets out the rationale for prosecutions, provides an exposition of the law relied upon to support or mandate prosecutions, and ends with a critique of the model. The fourth part mirrors the divisions of the third but focuses on the amnesty model. The fifth and final subdivision, concludes the chapter by proposing a theory or model of the role of amnesties in transitional justice. This theory is intended to provide a standard by which the TRC shall be measured in the succeeding chapters.

2.2 Literature Review

It must be acknowledged immediately, that this dissertation cannot match the depth of the insights presented in the writings to be reviewed. As earlier noted, this dissertation seeks only to present and argue for the view that the apologist discourse surrounding the use of amnesties in periods of transition is neither necessary nor accurate, and that amnesties can achieve justice depending on how granted. The premises and converging points of scholarly discourse upon which this study turns, need however to be reviewed in brief as a starting point.

Orentlicher² advocates an interpretation of international law to impose a duty upon states to prosecute the human rights abuses of prior regimes. She takes on board the

¹ Teitel (2000) *Transitional Justice*, 6

² Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

fears of successor regimes that such prosecutions may secure the demise of fledgling democracies but contends that the international outlawing of amnesties would be a sufficient tool to curb impunity and strengthen democracy.³ This is a view that is shared by Roht-Arriaza⁴ and Bassiouni⁵ among others.

On the other side of the divide, Nino⁶ presents a compelling case, which calls for a more realistic view of the difficulties faced by successor regimes with respect to prosecuting members of a prior regime. In essence however, and perhaps unwittingly, his views perpetuate the belief that prosecutions are preferable, for he argues only that the practical difficulties of successor regimes ought to be viewed with understanding.⁷

Tutu,⁸ Boraine,⁹ Asmal¹⁰ and Villa Vicenzio¹¹ from various perspectives, present a case on the role of amnesties in periods of transition. They argue that a preoccupation with retribution is unimaginative and representative of only a small portion of justice.¹² They contend also that amnesties may be able to achieve different types of justice and ultimately societal reconciliation. Again either within the context in which they are presented or expressly, these do not pretend to be more than apologist views that see amnesties as a useful tool only because of the unavailability of better.¹³

³ Orentlicher (n 2 above) 2543.

⁴ Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 45. Roht-Arriaza 'Combating Impunity: Some Thoughts on the Way Forward' (1996) 59 *Law and Contemporary Problems* 93. Roht-Arriaza (ed) (1995) *Impunity and Human Rights in International Law and Practice*.

⁵ Bassiouni 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9.

⁶ Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *Yale Law Journal* 2619.

⁷ Nino (n 6 above) 2619.

⁸ Tutu (1999) *No Future Without Forgiveness*.

⁹ Boraine (2001) *A Country Unmasked*.

¹⁰ Asmal 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 *Modern Law Review* 1. Asmal 'Victims, Survivors and Citizens Human Rights, Reparations and Reconciliation' (1992) 8 *South African Journal of Human Rights* 491.

¹¹ Villa Vicenzio 'Living in the Wake of the Truth and Reconciliation Commission: A Retroactive Reflection' (1999) 3 *Law Democracy and Development* 195.

¹² Tutu (n 8 above) generally, Boraine (n 9 above) chapter 8 generally, Asmal (n 10 above) 12, Villa Vicenzio (n 11 above) generally.

¹³ As above.

From Sarkin's¹⁴ prolific writings on justice in various transitional societies, several comparative insights are offered. His views on the South African amnesty experience are however limited also to the difficulties that prosecutions would have created, and are justified on that basis.

2.3 Contextual Determinants of Models of Transitional Justice

How a political transition occurs is the primary determinant of what model of justice – retribution, remission or a combination thereof – may be employed in any society emerging from a regime of human rights violations into one of liberal democracy.¹⁵ Political transition may occur in a number of ways that may be generally categorised into three on the basis of how profound a difference is introduced into the body politic by the change of regime.¹⁶ At the one end of the imaginary chart is illiberal autocracy or other potentially abusive political dispensation, and at the other end is liberal democracy. The two ends are separated by various shades of a combination of both.¹⁷

The most profound type of regime change is overthrow. This is the destiny of an abusive regime which refuses first to accommodate political opposition and secondly to change its oppressive ways. The opposition becomes progressively stronger as more people become disgruntled, and eventually topples the old order.¹⁸

The least profound type of transition occurs where an abusive or authoritarian government recognises the potential explosiveness of its rule, and because of a weak opposition, is able to diffuse potential conflict by engineering the shift to democracy in such a manner as to derive benefit. One of such benefits is immunisation from

¹⁴ Sarkin 'Promoting Justice Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal with the Past' (2000) 2 *International Law FORUM* 112. Sarkin 'The Development of a Human Rights Culture in South Africa' (1998) 20 *Human Rights Quarterly* 629. Sarkin 'Transitional Justice and the Prosecution Model: The Experience of Ethiopia' (1999) 3 *Law Democracy and Development* 253.

¹⁵ Asmal K (n 10 above) generally.

¹⁶ Sarkin 'The Trials and Tribulations of South Africa's Truth and Reconciliation Commission' (1997) 12 *South African Journal on Human Rights* 617.

¹⁷ Teitel (n 1 above). See Introduction generally.

¹⁸ This type of transition occurred in Rwanda and Ethiopia in 1994 and 1991 respectively. See Sarkin (n 16 above).

accountability for previous abuses. Another is control over the new nominally liberal political dispensation.¹⁹

The third type of transition finds middle ground between the two above-discussed models and occurs where both the opposition and the abusive government are equally matched and a political shift to a relatively liberal regime cannot be achieved one without the other. The resultant political change is necessarily therefore predicated upon a negotiated compromise.²⁰

A review of a number of cases of political transition suggests that the prosecution model is most frequently employed in cases of political overthrow; the sweeping amnesty model in cases of the reform variety of political change; and a combination of the two for a political transition that is the fruit of compromise.²¹

Other determinants of transitional justice models are founded upon various factors. One of the constraints facing any transitional society, especially where the abusive regime remained in power for a considerable period of time, is the pervasiveness of an illiberal and undemocratic mindset and the entrenchment of adherents thereto in the institutions of state.²² The most critical of these institutions are the military, the judiciary, the institutions of learning and the civil service. This is because their adoption of a policy to withhold cooperation from a new democratic government could result in an ungovernable country. Other difficulties that may be faced are those of a lack of financial resources,²³ and the emergence in the immediate aftermath of democratisation, of a vocal and rights conscious civil society that agitates for social equity. The delicate balancing of these various elements and the satisfaction of the politically conscious masses that secured the regime change, constitute essential

¹⁹ This type of transition occurred in Ghana in 1992. See Kumado 'Forgive Us our Trespasses' (1993 – 1995) 19 *University of Ghana Law Journal* 83.

²⁰ This type of transition occurred in South Africa from 1990 – 1994. Arguably South Africa is still in transition. See Sarkin (n 16 above).

²¹ Sarkin 'Trials and Tribulations' (n 16 above) 618 – 620.

²² Gillis 'Lustration and Decommunisation' in Piriban & Young (eds) (1999) *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* 56, 59. Also Sarkin (n 21 above).

²³ Asmal 'The South African Experience in Perspective' (n 10 above) 13. Sarkin 'The Experience of Ethiopia' (n 14 above) 257-258.

elements that must be considered in devising a model of transitional justice.²⁴ This has led to the realisation that every transition is *sui generis* and that no two can elicit the same models in the quest for justice.²⁵

However transition occurs, it is said that human psychology craves a degree of vindication and recognition for the pain suffered. Victims crave the prosecution of abusers because the infliction of punishment by law gives definite expression, solemn ratification and justification to the hatred that crimes induce.²⁶ When someone flouts the law, he is presumptively choosing to unbind himself from the common enterprise of living harmoniously together with other members of society under a common law and on equal terms. Fundamentally, his actions constitute a declaration that he has greater liberty than his fellow citizens. The role of societal sanction in that case is to disabuse him of such lofty presumptions.²⁷ Indeed it is the perceived prevention of such societal sanction through the granting of amnesties that fuels the debate about their legality. It is to this debate that this study now turns.

2.4 Prosecutions and Transitional Justice

2.4.1 The Rationale for Prosecutions

Various reasons are given for the use of prosecutions and punishment as tools of transitional justice. One of such justifications is that punishment by the state as a moral agent of the victims restores their dignity and limits their desire to mete out their own retribution.²⁸ This is a case made for the entrenchment of uniform standards as a

²⁴ Asmal (n 23 above) 14. Sarkin (n 23 above) 265.

²⁵ Bassiouni 'Searching for Peace and Achieving Justice: The Need for Accountability' (1996) 59 *Law and Contemporary Problems* 9, 13. Teitel (n 1 above) 7.

²⁶ Stephen A *History of the Criminal Law of England* (1883) Vol II, 81 – 82. Quoted in Markel 'The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States' (1999) 49 *University of Toronto Law Journal* 389, 404.

²⁷ Markel (n 26 above) 427. Mokgoro 'Ubuntu and the Law in South Africa' in *Seminar Report of the Colloquium on Constitution and Law* (1998).

²⁸ Kritz 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 *Law and Contemporary Problems* 127, 128 – 9; Markel (n 26 above) 425; Allen 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission' (1999) 49 *University of Toronto Law Journal* 315, 327.

necessary component of the rule of law.²⁹ Other proffered reasons are that punishment would deter against commission of future violations,³⁰ would provide an opportunity for victims' catharsis,³¹ would elicit the truth about past abuses,³² and would set new terms of a social contract between victims, perpetrators, onlookers, and the state.³³

To a considerable extent, these claims have influenced the development of human rights law. There is now an extensive body of international law that arguably requires prosecution of certain types of offences as a minimum state obligation.

2.4.2 International Law and the Prosecution Model

The starting point for recognising an international obligation upon states to prosecute various offences is the Vienna Convention on the Law of Treaties. It states unambiguously that '[a state] party may not invoke the provisions of its domestic law as justification for failure to perform a treaty'.³⁴ This means that if there exists a duty to prosecute certain offences under treaty or customary international law, such obligation is not tempered by domestic law or political considerations – whatever the circumstances of the state upon which such a duty lies.³⁵

Scholars have identified a number of offences for which contemporary international law imposes an obligation upon states to prosecute. These are war crimes,³⁶ genocide,³⁷ torture,³⁸ gross violations of civil and political rights³⁹ and crimes against humanity.⁴⁰

²⁹ As above.

³⁰ As above.

³¹ As above.

³² As above.

³³ As above.

³⁴ Article 27 of the Vienna Convention on the Law of Treaties. Reproduced in Barry *et al* (1995) *International Law: Selected Instruments* 55.

³⁵ Orentlicher (n 2 above) 2551 – 2560.

³⁶ See article 51 of Geneva Convention I [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field]; article 52 of Geneva Convention II [Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea]; article 131 of Geneva Convention III [Geneva Convention Relative to the Treatment of Prisoners of War] and article 148 of Geneva Convention IV [Geneva Convention Relative to the Protection of Civilian Persons in Times of War]. For commentary on the foregoing, see Scharf 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute

In a seminal paper in which she presses the case of a legal duty upon states to prosecute human right abuses of prior regimes, Orentlicher contends that⁴¹

[t]he case for prosecutions, turns on the consequences of failing to punish atrocious crimes committed by a prior regime ... If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct. Societies recently scourged by violence need look no further than their own past to discover the costs of impunity. Their history provides sobering cause to believe ... that tyranny begins where law ends.

Her case is for a conclusion to be drawn that conventional wisdom and international law prohibit the granting of amnesties for certain types of offences. This is a conclusion that would derive support from legal developments since the early 1980s. With respect to disappearances in Uruguay,⁴² torture in Zaire⁴³ and extra-judicial killings in Surinam,⁴⁴ the Human Rights Committee, as the enforcement body of the ICCPR, has

Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41 43 – 59. Orentlicher (as above).

³⁷ Articles 4 and 5 of the Convention for the Prevention and Punishment of the Crime of Genocide 78 *United Nations Treaty Series* 277. Reproduced in Melander & Alfredson (eds) (1997) *The Raoul Wallenberg Compilation of Human Rights Instruments* 575.

³⁸ See articles 4, 5 and 7 of the Convention Against Torture and Other Cruel Inhuman or Degrading Cruel Inhuman or Degrading Treatment 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51(1984). Reproduced in Melander & Alfredson (1997) 549, 550 – 551.

³⁹ Covenant on Civil and Political Rights (1966). Reproduced in Melander & Alfredson (1997) 43.

⁴⁰ Taking its cue from the Nuremberg Charter [Charter of the International Military Tribunal annexed to the Agreement for the Prosecution of the Major War Criminals of the European Axis 1945 82 UN Treaty Series 279], article 7 of the Rome Statute of the International Criminal Court defines crimes against humanity to include murder, extermination, enslavement, deportation or forcible transfer of population, serious deprivations of international law guaranteed liberty, torture and other inhumane acts committed against any civilian population ... or persecutions on political, racial, or religious grounds in execution of or in connection with any crime under the jurisdiction of the court.

⁴¹ Orentlicher (n 2 above) 2537.

⁴² *Quinteros v Uruguay*, Comm No. 107/1981, 38 UN GAOR Supp (No 40) Annex XXII, UN Doc A/38/40 (1983). See also Scharf M (n 36 above) 48 – 49.

⁴³ *Muteba v Zaire*, Comm No. 124/1982, 39 UN GAOR Supp (No 40) Annex XIII, UN Doc A/39/40 (1984). See also Scharf M (n 36 above) 48 – 49.

⁴⁴ *Boaboeram v Surinam*, Comm Nos. 146/1983 and 148 – 154/1983, 40 UN GAOR Supp (No. 40) Annex X UN Doc A/40/40 (1985). Scharf M (n 36 above) 48 – 49.

consistently proclaimed a duty upon state-parties to investigate and punish the perpetrators of such offences. The 1992 General Comment of the Committee also held categorically that amnesties granted for acts of torture constituted violations of the obligations of state-parties.⁴⁵

Judicial authorities have also affirmed a legal obligation upon states to prosecute certain crimes. The first decision of the Inter-American Court of Human Rights in the *Velasquez Rodriguez Case*⁴⁶ declared such an obligation and in more recent times, the International Criminal Tribunal for the former Yugoslavia (ICTY)⁴⁷ and the English House of Lords have reiterated the principle.⁴⁸ The overriding jurisdiction of the recent *ad hoc* international criminal tribunals for the former Yugoslavia⁴⁹ and Rwanda⁵⁰ constitutes further affirmation that there exists a duty upon states to prosecute certain offences. For non-performance of this duty the international community may step in.

2.4.3 Criticism of the Prosecution Model

Although the ends that the prosecution model endeavours to serve are commendatory, they are certainly not beyond criticism.

The most penetrating criticism is that a *duty* to prosecute and sweeping prosecutions resulting from such a duty stand a very real risk of causing the disintegration of a fledgling democracy. Restive military troops or other members of an abusive prior regime who retain power within a new dispensation are unlikely to stand by and await penal sanction. Proponents of the prosecution model, argue to the contrary that through the re-assertion of law that an international duty to prosecute offers,

⁴⁵ Human Rights Committee General Comment No. 20 (44) UN Doc CCPR.C21/Rev1/Add 3 para 15 (April 1992).

⁴⁶ *Velasquez Rodriguez Case* (1988) Inter American Court of Human Rights (Ser C) No 4, p 165.

⁴⁷ *Prosecutor v Furundzija*. Case No IT – 95 –17 /I –T 0 (December 1998) Reproduced in 39 *International Legal Materials* para 151 – 157. See also Dugard 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001.

⁴⁸ *R v Bow Street Metropolitan Stipendiary Magistrate. Ex Parte Pinochet Ugarte* [1998] 4 All ER 897 (HL).

⁴⁹ Article 9(2) of the Statute of the ICTY, UN Security Council Resolution 827 (1993). Reproduced in Melander & Alfredson (eds) (1997) 583, 585.

⁵⁰ Article 8(2) of the Statute of the ICTR, UN Security Council Resolution 827 (1993). Reproduced in Melander & Alfredson (eds) (1997) 593, 595.

democracy stands to benefit.⁵¹ But such a view is at best, appropriate only for a regime change that occurs by overthrow,⁵² and in that case the spectre of victor's justice and its debilitating effect on the rule of law, presents itself.⁵³ Further, the view that a duty to prosecute is politically beneficial to a new democratic regime is potentially inaccurate to the extent that it assumes that good political judgment is *a priori* determinable.⁵⁴ Asmal refers to Orentlicher's model therefore as a 'well meaning but uncertain hybrid of international legal idealism and speculative *realpolitik*'.⁵⁵

Other criticisms question the legitimacy of the claims that the retributive appeal of criminal justice is necessarily achieved through prosecutions,⁵⁶ that justice is necessarily retributive or that criminal prosecution serves best to secure deterrence against future abusive conduct and to encourage societal reconciliation.⁵⁷ These assumptions that have influenced post-Nuremberg agitation for prosecutions as an essential element of transitional justice may be incorrect for a number of reasons.

Retribution for wrongdoing is ordinarily inherently justifiable because it treats both the perpetrator and the victim as responsible moral agents and thereby affirms their dignity. Criminal prosecution during periods of transition may not however achieve these ends because they may fail to take into consideration the fact that a substantial number of perpetrators acted within a legal system that prescribed, if not mandated their abusive conduct.⁵⁸ Such perpetrators would only feel victimised because retribution against

⁵¹ Orentlicher (n 2 above) 2543.

⁵² Sarkin (n 16 above) generally.

⁵³ Teitel (n 1 above) 13 – 15. Teitel contends that the entrenchment of the rule of law through prosecutions based on a natural law type of moral code, in the aftermath of political change satisfies only half the picture. This is because it fails to pay sufficient attention to commands issuing from a pre-existing legal regime. The spectre of victors' justice, which results therefrom, sends a potentially dangerous message that might is right. The Hart-Fuller exchange is especially relevant here. For full picture on seminal debate see Hart 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, and Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

⁵⁴ Asmal (n 23 above) 6 – 8. Nino (n 6 above) generally.

⁵⁵ Asmal (n 23 above) 8.

⁵⁶ Markel (n 26 above) 411 – 418.

⁵⁷ Allen (n 28 above) 321. See contrary view in Roht-Arriaza 'Punishment Redress and Pardon: Theoretical and Psychological Approaches' in *Impunity and Human Rights in International Law and Practice* (n 4 above) 13, generally.

⁵⁸ Teitel (n 1 above) 13 – 15.

them would be independent of the social value of reintegrating the punished into society. The expression of societal disapproval for abuse perpetrators that criminal prosecution is intended to secure may as easily, or even be better expressed in certain circumstances, by public shaming.⁵⁹ The deterrent value of criminal sanction may as easily also, be satisfied likewise.

Yet another critique of the prosecution model lies in its proponents' assertion that the "truth" about past abuses shall be elicited in the courtroom and that knowledge of the truth as well as punishment of the perpetrators shall start the process of healing for the victims.⁶⁰ The reality is that truth of only a particular variety – that which establishes the accused's culpability or innocence of the crime *as defined*⁶¹ – is likely to emerge from the adversarial setting and processes of criminal prosecution. The brutal cross-examination of victim-witnesses could lead to their injuries being re-visited upon them and to their potentially incoherent stories being disbelieved.⁶² Added to this is the reality that prosecutions could result in acquittals in which case, the new legal order stands at risk of losing its legitimacy.⁶³

A final critique of the prosecution model rests on its claims upon substantial financial resources.⁶⁴ To have any legitimacy, trials will have to ensure the due process rights of the accused and this is by no means an inexpensive endeavour.⁶⁵ The potential for selective prosecutions that this situation presents might ultimately do more harm for society's appreciation of the rule of law.⁶⁶ Further, such resources could arguably be

⁵⁹ Hampton 'An Expressive Theory of Punishment' in Cragg (ed) (1992) *Retributivism and its Critics* 1, 16.

⁶⁰ Markel (n 26 above) 394. Bassiouni (n 5 above). Also Akhavan 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal' (unpublished) 38, quoted in Llewellyn & Howse (n 61 below) 358.

⁶¹ Llewellyn & Howse 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission' (1999) 49 *University of Toronto Law Journal* 355. 363.

⁶² Llewellyn & Howse (n 61 above) 363 – 364. Also Sarkin J (n 23 above) 264.

⁶³ Sarkin (n 23 above) 264. Also Boraine (n 9 above) 282.

⁶⁴ Asmal (n 23 above). See also Sarkin (n 23 above).

⁶⁵ As above.

⁶⁶ Teitel (n 1 above) chapter 1 generally. See also Boraine (n 9 above) 282. With a yearly budget of over 80 million dollars and over 800 staff positions, the ICTR has succeeded in concluding prosecutions of less than 10 people since it was established six years ago. The folly of Rwanda in choosing an exclusively prosecutorial model is shown by the fact that their prisons hold more than 100,000 persons who seven years after the genocide, are yet to be tried.

better spent in providing schools and health care, facilitating development and correcting social inequities.⁶⁷ The regressive view that the prosecution model perpetuates the superiority of civil and political rights over social and economic rights might find unintended justification from a preoccupation with prosecutions.⁶⁸

2.5 Amnesty and Transitional Justice

2.5.1 Rationale for Amnesties

The use of amnesties as tools of justice in periods of transition has been justified on a number of grounds. One justification is that a process of widespread prosecutions could put the life of the new democracy at risk, as adherents of the *ancien regime* might take their chances in destabilising the state rather than await punishment.⁶⁹ The impossibility of engaging in prosecutions has also been argued for transitions secured by a political compromise and a resultant policy to let 'bygones be bygones'.⁷⁰

Another reason for amnesties is that the dwelling on the past and the pointing of fingers that prosecutions engender, are counter-productive to reconciliation. It is believed in this regard that a door needs to be shut on the past so that the new democracy may move ahead with a clean slate.⁷¹ Other reasons are that the elicitation of truth requires some inducement and that amnesties could constitute such an inducement;⁷² that the resources that prosecutions demand shall be better employed in compensating victims and giving them access to social justice;⁷³ and that successful prosecutions may be

⁶⁷ Asmal (n 23 above).

⁶⁸ As above. Legal aid for indigent accused, witness maintenance and the cost of hiring security interpreters and investigators are some of the factors that result in expensive trials.

⁶⁹ Nino (n 6 above) generally. Also Landsman 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' (1996) 59 *Law and Contemporary Problems* 81, 84 – 85. Boraine (n 9 above) 285.

⁷⁰ Asmal (n 23 above) 9 – 15. Also *AZAPO v President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC) 1028 para 19 and 1041 para 50.

⁷¹ *AZAPO* (n 70 above) 1040 – 1041 para 49.

⁷² Asmal (n 23 above) 12 – 13. See also Boraine (n 9 above) 283. Also US Delegation Draft Proposals to ICC Prep Con (August 1997). Referred to in Scharf (n 36 above) 41, fn 4.

⁷³ As above.

impossible where evidence is obscured or destroyed by the previous regime, before the transition occurs.⁷⁴

2.5.2 International Law and the Amnesty Model

For its flirtations with encouraging impunity, human rights activists have condemned the use of amnesty as a tool of transitional justice. They argue that international law prohibits it. This is a largely exaggerated contention however for there is a substantial body of law and scholarly opinions that refute the claim.

The treaty provision most relied upon to substantiate the legitimacy of amnesties after the human rights abuses of intra-state conflict is article 6(5) of Protocol II to the 1949 Geneva Conventions. It stipulates that

[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict or those deprived of their liberty for reasons related to the armed conflict whether they are interned or detained. (own emphasis)

The International Committee of the Red Cross (ICRC) and some scholars have sought to temper the language of this provision by arguing that it aims only to excuse combatants in intra-state armed conflict from penal sanction which is imposed merely because they were combatants.⁷⁵ They argue that it does not give relief from war crimes or crimes against humanity. To a considerable extent however, such a distinction is academic because a peculiarity of intra-state conflict is the difficulty in making clear distinctions between combatants and non-combatants. Strict categorisation between “casualties of war” and “crimes against humanity” is therefore difficult to make.⁷⁶

Other treaties that are said to impose an obligation upon state-parties to punish breaches thereof are upon closer examination, inapplicable to political conflict and attendant abuses of human rights, or otherwise not averse to principled amnesties.⁷⁷

⁷⁴ Boraine (n 9 above) 285 – 286.

⁷⁵ Roht-Arriaza ‘Combating Impunity’ (n 4 above) 93, 97. Robertson (2000) *Crimes Against Humanity: The Struggle for Global Justice* 263.

⁷⁶ Kalshoven *Constraints on the Waging of War* (1987) 28 – 29, 40 – 42.

⁷⁷ Scharf (n 36 above) 60 – 61. Dugard (n 47 above) 1003.

The first of these is the Genocide Convention, which only requires prosecutions for crimes that meet its limited definition of genocide. This definition excludes acts committed against members of a *political group*, which acts would be punishable if perpetrated against members of a national, ethnical, racial, or religious group.⁷⁸

Notwithstanding the *aut dedere aut judicare* formulation within the Torture Convention,⁷⁹ scholars have contended persuasively that it accommodates principled amnesty.⁸⁰ In the 1990 decision of the Committee against Torture on Argentina's sweeping amnesty laws⁸¹ it was held firstly that communications presented against Argentina were inadmissible because Argentina had acceded to the Convention only after the promulgation of the impugned laws.⁸² The Committee also held, albeit *obiter*, that states *should* prevent and punish acts of torture.⁸³ Of this view, Scharf notes that⁸⁴

[t]he Committee's statement should not be mistakenly construed as suggesting that amnesties for persons who commit torture are invalid ... By using the word "should", the Committee indicated that its statement was aspirational rather than a declaration of binding law. On the basis of its decision, the Committee [only] **urged** Argentina to provide remedies for the victims of torture and their surviving relatives; **it did not suggest that international law required that Argentina do so. Nor did it specify that the remedy should be prosecution of those responsible ...**

Judicial authorities have also expressed the view that international law permits amnesties as tools of transitional justice. In the *Pinochet* case, Lord Lloyd held that⁸⁵

[f]urther light is shed on the practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971, India and Bangladesh agreed not to pursue

⁷⁸ See article II of the Genocide Convention (n 37 above).

⁷⁹ Articles 4 – 7 of Torture Convention (n 38 above) 550 – 551.

⁸⁰ Dugard (n 47 above) 1013 – 1015. Scharf (n 36 above) generally.

⁸¹ Decision on Admissibility, dated November 23 1989, Regarding Communications Nos. 1/1988, 2/1988 and 3/1988 (OR, MM and MS v Argentina) Report of the Committee Against Torture, UN GAOR 45th Session Supp No 44 at annex VI, UN Doc A/45/44 (1990) 111.

⁸² As above.

⁸³ As above.

⁸⁴ Scharf (n 36 above) 47– 48. Own emphasis

⁸⁵ *Ex Parte Pinochet* (n 48 above) 929.

charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government. [...] It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.

The use of amnesties in Sierra Leone to end an almost decade-long war and the failure of Senegalese and South African authorities to prosecute Hissein Habre and Mengistu Haile Mariam respectively, give recent context to Lord Lloyd's claims.

The Rome Statute for the International Criminal Court, which was negotiated precisely to put an end to impunity for international crimes,⁸⁶ is arguably also not averse to amnesties.⁸⁷ Under article 15 of the Statute, the Court's Prosecutor may recognise amnesties by exercising discretion not to prosecute certain persons. By article 17(1)(b), the Court may declare a case inadmissible if the State that has primary jurisdiction over it decides *bona fides* not to prosecute the perpetrator(s). By article 53(2)(c) also, the Prosecutor may, subject to review by the Pre-Trial Chamber, refuse to prosecute a case because it is not in his opinion, in the interests of justice.

2.5.3 Criticism of the Amnesty Model

The objections to amnesties as tools of transitional justice are usually represented as the justification for use of the prosecution model and have been above discussed. It is perhaps useful however to recap the case made.

The most obvious drawback of the amnesty model lies in its capacity to encourage impunity for heinous violations of human rights. Such impunity harms society's appreciation of the rule of law because an essential precondition for the effectiveness of law is that it shall display an independence from gross manipulation and shall not treat any sector of society as being untouchable.⁸⁸

⁸⁶ Leanza 'The Rome Conference on the Establishment of an International Criminal Court: A Fundamental Step in the Strengthening of International Criminal Law' in Lattanzi & Schabas (eds) (1999) *Essays on the Rome Statute of the International Criminal Court* (Vol I) 7, 9 – 10.

⁸⁷ Dugard (n 47 above) 1013 – 1015.

⁸⁸ Teitel (n 1 above) chapter 1. Borraine (n 9 above) 282.

Another critique is that a failure to deal with the past inevitably haunts the future.⁸⁹ Institutionalised amnesia of the victims' pain, and the failure to ensure the revelation of the truth about past abuses prevents the victims' catharsis and inhibits the society's education on the reasons for and the extent of abuses in the previous regime. Failure to obtain an accurate record of the truth might also encourage its revision to suit political motives. It also does away with a basis for providing compensation to victims and might even encourage vigilantism as the only avenue left to victims to reclaim their dignity.

2.6 Towards a Theory of Amnesty as a Tool of Transitional Justice

The models of transitional justice that have been discussed above are both imperfect and give rise to substantial criticism. International law being unsettled on either side of the coin,⁹⁰ this section of the dissertation endeavours to theorise on how amnesties may be used as a tool of transitional justice without recourse to apology or insensitive reference to *realpolitik*. It contends that the use of amnesties within a principled and objectively rational regime may not only achieve as much justice as abused societies are legitimately entitled to, but also satisfy international law.

I proceed from the aspirations underlying prosecutions. These are that prosecutions shall achieve justice for the abused, entrenchment of the rule of law, truth and a path towards reconciliation of a divided society.⁹¹

These premises proceed from assumptions that are not necessarily accurate. They assume that all societies are the same, that justice is necessarily retributive and that prosecutions and incarceration are the only means of satisfying retributive justice. They assume also that a court can always reveal the truth; that the acts of abusive regimes were impermissible within the legal dispensation, and that victim catharsis and hence reconciliation may only be achieved through penal sanction for the abusers. In order to contest the fascination with prosecutions, it is necessary to point out the inaccuracies upon which the premises are based and through that, to contend that the proclaimed objectives of prosecutions are capable of being achieved otherwise.

⁸⁹ Kritz (n 28 above). Sarkin (n 23 above) 265.

⁹⁰ Dugard (n 47 above) 1015.

⁹¹ Orentlicher (n 2 above) 2542 – 2544. Also Markel (n 26 above) 425.

2.6.1 Entrenchment of the Rule of Law

The primary assumption of this objective of prosecutions is that the acts of the prior regime were illegal. The role of criminal sanction as proclaimed then, is to re-affirm a culture of legality.⁹² This cannot however be the sole justification for criminal trials because the rule of law existed as much in South Africa as it did in Nazi Germany and in cold war East Germany.⁹³ A more plausible explanation for criminal trials in this context would be the desire to entrench a moral code that affirms humanity and categorical condemnation for human rights abuses. If this is the objective then it cannot be true to say that it can be achieved only through prosecutions.

2.6.2 Achievement of Justice

Although everyone seems to have an innate sense of justice and to know what it is not, few are able to define it. In his *Dictionary of Law*, Curzon explains the concept in reference to the insights of philosophers.⁹⁴ He quotes Justinian who defines it as “the virtue which results in everyone receiving his due”.⁹⁵ Curzon’s own contribution to explaining the illusive concept is that justice is “the basic value underlying a system of law or the objective which that system seeks to attain”.⁹⁶

This dissertation does not dwell on the inadequacies of the insights presented above. Instead it employs a view of justice, albeit circular, as that which vindicates a sense of right and wrong. Retribution is undoubtedly therefore an important component of justice because it reaffirms society’s standards of right and wrong. By exacting retribution, society cuts down to size a wrongdoer who is *deemed* to have consciously treated his victims as unequal. This is the reason why an incompetent perpetrator who does not meet the requirement of *mens rea* in criminal justice, suffers no retribution.⁹⁷ The act of retribution constitutes hard proof to the criminal that his sentiments of superiority are

⁹² Motlala ‘The Promotion of National Unity and Reconciliation Act, the Constitution and International Law’ (1995) 28 *Comparative and International Law Journal of South Africa* 338.

⁹³ Markel (n 26 above) 422 – 423. Teitel (n 1 above) Chapter one generally.

⁹⁴ Curzon (1979) *A Dictionary of Law* 186.

⁹⁵ As above.

⁹⁶ As above.

⁹⁷ As above.

unsustainable.⁹⁸ Retribution's vindication lies in the affirmation of a moral code – a rule of law, which reaches out to natural law and morality. Markel notes in this regard that, “by upholding [a] commitment to the rule of law, retribution itself provides internal justification of retribution”.⁹⁹

Social philosophy asserts contrary to popular perceptions that retribution need not require punishment that involves pain or incarceration.¹⁰⁰ This is a legitimate view for if the object of retribution is to annul a criminal's sense of superiority and to redeem the victims' dignity, then it should be capable of attainment otherwise. The revealing the truth about the role a perpetrator played in past abuses, the resultant revulsion of society, the perpetrator's apprehension of his wrongdoing and remorse for same, could surely achieve the anticipated fruits of retribution.¹⁰¹

Beyond retributive justice, there are several other types of justice, none with a necessarily greater claim to legitimacy over the other. For present purposes, the view of Asmal sufficiently illustrates the point:¹⁰²

The forms of transitional justice are diverse; it is unimaginative to think that criminal trial processes exhaust the means of achieving justice ...[There are] at least five divergent forms that justice can take including justice as the affirmation of human dignity, ...deterrent justice, ... compensatory justice, rehabilitative justice [and retributive justice]

2.6.3 The Revelation of the Truth about Past Abuses

Obtaining the truth about past abuses is a primary objective of transitional justice for it permits victims to bring closure to the past and to commence a process of healing. The preoccupation with criminal trials as a means of obtaining truth is incomprehensible

⁹⁸ Markel (n 26 above) 428. Also Llewellyn & Howse (n 61 above) 376 – 378.

⁹⁹ Markel (n 26 above) 426.

¹⁰⁰ Hampton 'Forgiveness' in Cragg(ed) (1992) *Retributivism and its Critics* 16. Also Developments in the Law 'Alternatives to Incarceration' (1998) 111 *Harvard Law Review* 1863. Markel (n 26 above) 431. He refers to the biblical story of Paul who said that rather than lash out at one's enemies one should feed and quench their thirst for to do so would be to heap coals of fire upon their heads (Romans 12: 20 – 21).

¹⁰¹ 'Alternatives to Incarceration' (n 100 above) generally.

¹⁰² Asmal (n 23 above) 12.

however because the inadequacy of the court process to achieve this end is legendary. This is compounded by the standard of proof in trials.¹⁰³

Notwithstanding oaths of witnesses to tell “the whole truth and nothing but the truth” in criminal trials, there is no quest for the whole truth. What is sought is truth that establishes guilt or innocence of the crime for which a person stands accused.¹⁰⁴ In a study by Alvarez of the *Tadic Case* before the ICTY, he found through empirical evidence that very little “truth” emerged that was not predictable on the basis of the origins of the witnesses.¹⁰⁵ The proof of events often depends on the testimony of one group of witnesses against another and there is little incentive in the absence of potential amnesty to tell the truth.¹⁰⁶ Llewellyn and Howse legitimately contend that the copious documentary evidence that were available in the Nuremberg and Tokyo trials have misled people into believing that trials can reveal the whole truth.¹⁰⁷ The reality is that in the cases of Tokyo and Nuremberg, the truth would have emerged even in the absence of trials, because of the documentation that was available. These trials therefore provide little assistance as precedents of models that facilitate the revelation of truth.

2.6.4 Victim Catharsis and Reconciliation

The very quest for transitional justice is motivated by a need to heal victims and to reconcile a divided society.¹⁰⁸ For societies that were deeply divided by social injustices however, a preoccupation with prosecutions and the subjugation of social equity to the attendant costs of such prosecutions might have precisely the opposite effect. Can prosecutions possibly serve the ends of justice better than education, housing, healthcare and employment?¹⁰⁹ The reality of prosecutions is that convictions cannot be guaranteed if due process is followed. For such a divided society, an acquittal and

¹⁰³ Markel (n 26 above) 394. Proof of difficulty in establishing truth in court lies in the use of plea-bargains, which operate on the same principle of total or partial reprieve for revealing the truth.

¹⁰⁴ Llewellyn & Howse (n 61 above) 362 – 363.

¹⁰⁵ Alvarez ‘Rush to Closure: Lessons of the *Tadic Judgment*’ (1986) 96 *Michigan Law Journal* 215 This study is briefly discussed in Llewellyn & Howse (n 61 above) 362.

¹⁰⁶ Llewellyn & Howse (as above).

¹⁰⁷ As above.

¹⁰⁸ Sarkin (n 16 above) generally.

¹⁰⁹ Asmal (n 23 above) 16.

adherence to the due process rule of *ne bis in idem*, could put reconciliation and victim healing beyond reach.

An international “duty” to prosecute, is for its assumption that all societies are the same, potentially counter-productive to the very ends that transitional justice proclaims to serve – victim healing and national reconciliation.¹¹⁰ It has thus been rightly pointed out by Dugard that:¹¹¹

International opinion, often driven by NGOs and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution; and to the argument that wounds are best healed at home, by national courts, and truth commissions ...

2.7 Conclusion

The choice of criminal prosecution for gross abuses of human rights and as a means to curb impunity is a knee jerk reaction. As this chapter has sought to show however, amnesties, depending on how granted, could also avoid impunity and achieve justice. A regime that does this could have a further advantage of strengthening democracy and responding to pressing social needs of an abused society. In this regard, amnesties that are self-granted by previous regimes before they relinquish power or amnesties that are the product of coercion or intimidation should not be countenanced. Nothing could possibly send a stronger message into society that perpetrators of abuses are above the law.¹¹² The examples of Chile and Argentina have a special resonance in this context.

The usefulness of truth commissions as an intermediate device between mass prosecutions and amnesties has long been recognised and even been endorsed by the UN. The linking of amnesties to the revelation of truth has however been pioneered by South Africa’s Truth Commission. I submit that a principled regime for amnesties that is effected through such an enterprise is capable of achieving justice. It is in essence, little different from the plea-bargaining that is employed so liberally in most domestic criminal systems.

¹¹⁰ Kumado (n 19 above) generally.

¹¹¹ Dugard (n 47 above) 1006. See also Llewellyn & Howse (n 61 above) 360.

¹¹² Markel (n 26 above) 440 – 445.

CHAPTER THREE

TRUTH AS JUSTICE: *FORGIVE US OUR TRESPASSES AS WE ...*

3.1 Introduction

The burden of this chapter is to examine South Africa's use of amnesties. To this end, it provides a brief historical account of South Africa's transition in a rendition that is purposefully uncontroversial and consistent with the most frequently given versions. Following from the backdrop provided by the context of South Africa's transition, this chapter examines the provisions and the implementation of the Promotion of National Unity and Reconciliation Act 34 of 1995. The relevance of this chapter lies in the truisms that what is deemed just in any society is contingent upon and informed by prior injustice, and that its content is informed by a society's self-understanding of the nature and sources of human rights abuses in its past.¹

3.2 South Africa's Transition in Historical Context²

In 1948, the National Party won an election that was limited only to whites exercising a franchise. This led to the entrenchment of a racist model of governance called apartheid. The agitation of the blacks and people of colour against the white minority led to the brutal suppression of black political activity, the banning of black political parties such as the African National Congress (ANC) and the imprisonment or the exiling of several black leaders. The student uprising of 1976, which resulted in the "Soweto Massacre" served however to change the political landscape and represented one of the focal points for black political agitation of the 1980s.

¹ Teitel (2000) *Transitional Justice* 6.

² Considerable reliance is placed in this account upon the clear renditions of several authors: Borraine (2000) *A Country Unmasked*; Asmal, Asmal and Roberts (1997) *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance*; Asmal 'Truth, Reconciliation and Justice: The South African Experience in Perspective' (2000) 63 *Modern Law Review* 1; Sarkin 'The Development of a Human Rights Culture in South Africa' (1998) 20 *Human Rights Quarterly* 629; Sarkin 'The Trials and Tribulations of South Africa's Truth and Reconciliation Commission' (1997) 12 *South African Journal on Human Rights* 617.

From a myriad of points of local opposition to apartheid grew the United Democratic Front (UDF), which in its own words had the mission of making South Africa ungovernable.³ This policy enjoyed considerable success and failed to be derailed by successive states of emergency called by an increasingly frantic government. Local agitation, the anti-apartheid stance of the international community and the consequent damage done to South African business interests led to the realisation among the business community that a dismantling of the prevalent form of apartheid would be economically and financially prudent.⁴

In a usurping manoeuvre, FW De Klerk took over the reins of government from PW Botha in 1989. His agenda after the failure of coercive methods was to establish a “legitimate” government with nominal black representation that would be able to diffuse the coalesced international opposition and local political unrest.⁵ This led to the release of Nelson Mandela from prison in 1990, and the commencement of negotiation for a political transition. A government of national unity was proposed. It was intended through all these activities however that the position of whites in the political, social and economic orders would be maintained secure.

From the viewpoint of the ANC, the proposed government of national unity represented an opportunity to effect change from within the halls of government authority. They were justifiably fearful that the military, the civil service, the judiciary and indeed most spheres of public life were filled with adherents of the apartheid ideology and that their decision to withhold support could cripple the new government.⁶

Added to these considerations was the threat of the country imploding as a consequence of the power battles that had been induced by the imminence of a new political dispensation. Terrorist activities carried out by white-sponsored or self-sponsored blacks against blacks, by blacks against whites and by whites against blacks heightened tensions and created potential for chaos. To the stakes also were added the legitimate expectations and increased agitation of the previously disenfranchised for social equity.

³ Asmal ‘The South African Experience’ (n 2 above) 9.

⁴ As above.

⁵ As above.

⁶ As above.

As South Africa negotiated its way through a political transition it was clear that the process could only be successful if it was guided by a constitution which set reasonable perimeters for a new order and to which all stakeholders could pledge fidelity.

After a few failed constitutional negotiations and their recommencement, the Interim Constitution (IC) was ready. This document which paved the way for the first truly democratic elections that ushered Nelson Mandela into the presidency, contained the following post-amble:⁷

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 need for understanding but not vengeance, a need for reparation but not for retaliation, a need for *ubuntu*⁸ 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 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.

Read with Section 232(4) of the same Constitution, the post-amble is of the same and not lesser status than the rest of the Constitution.

The National Party wanted general amnesties but the ANC insisted on an amnesty process that tested the atrocities committed against a proportionate political objective.⁹

⁷ Own emphasis. This post-amble is unique to the South African Constitution and according to political and constitutional commentators represents the essence and spirit of the South Africa's transitional philosophy. See *AZAPO v President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC).

⁸ Explained as a word, which represents the African philosophy of humanity. Krog (1998) *Country of My Skull* vi.

⁹ Sarkin 'Trials and Tribulations' (n 2 above).

The Justice Portfolio of the new parliament, chaired by Johnny De Lange, spent several hours on a proposed draft of the Truth Commission Bill and then several more hours listening to the public's comments on what the law should contain. When the bill was put before parliament, it was debated amidst high emotion and eventually passed with the Inkatha Freedom Party (IFP) abstaining. It then went to the Senate where the TRC's composition received further attention and consideration.¹⁰ On 19 July 1995, President Nelson Mandela signed the Truth Commission Bill into law.

3.3 The South African Truth and Reconciliation Commission (TRC)

3.3.1 Promotion of National Unity and Reconciliation Act 34 of 1995

The TRC was composed of 17 Commissioners that were nominated in an open and transparent process in which the views of the public were taken into account. As part of the selection process, the nominees had been interviewed in public sessions by panels comprising representatives from all political parties. From these sessions, a shortlist had emerged and in consultation with his union government cabinet, President Mandela had made his choices from the shortlist.¹¹

The statute establishing the TRC created three committees. The first was the Committee on Human Rights Violations.¹² Its task was to lead an inquiry into human rights violations,¹³ secure evidence on and provide a record of such violations.¹⁴ It had also to ascertain human rights violations that had been kept from becoming public,¹⁵ and determine which violators had already been given reprieve in the interests of reconciliation.¹⁶ The Committee was empowered further to make recommendations pertaining to reparations for and rehabilitation of victims as well as recommendations for witness protection and the development of national institutions that would ensure that the abuses of the past were never repeated.¹⁷

¹⁰ Krog (n 9 above) 10.

¹¹ Sarkin 'Trials and Tribulations' (n 2 above) 620.

¹² See section 12 of the Promotion of National Unity and Reconciliation Act 34 of 1995.

¹³ Section 14(1)(a)(i).

¹⁴ Section 14(1)(a)(ii) and (v).

¹⁵ Section 14(1)(a)(iii) and 4(d).

¹⁶ Section 14(1)(a)(iv).

¹⁷ Sections 14(1)(b)(ii) 4(f), (g) and (h).

The Committee on Reparations and Rehabilitation¹⁸ was charged with gathering evidence on the identity of the victims, what abuses they had suffered and whether or not they were still alive.¹⁹ It was required also, for inclusion in a final report, to consider proposals and to make recommendations for the rehabilitation and compensation of the victims,²⁰ and in so doing to work in tandem with the other committees established under the statute.

The Committee on Amnesty²¹ was charged to consider, on an individual basis, the merits of each application and to provide or to deny relief.²² This was to be done according to a list of several determinants that were provided for under section 20 of the TRC law. Succinctly stated, the determinants ensured that amnesties could be available for acts or omissions that would otherwise constitute crimes or delicts and that were perpetrated between 1 March 1960 and 10 May 1994.²³ They had to have been perpetrated in pursuance of a political objective²⁴ and full and frank disclosure had to be made.²⁵ The Committee was the final authority on whether amnesties would be granted,²⁶ and the amnesties, if granted, ousted both the civil and the criminal jurisdiction of all South African courts with respect to those matters.²⁷

The TRC statute also created a unit that was charged with investigating human rights abuses.²⁸ Its mandate was to corroborate the stories that were told by victims and perpetrators and to provide a factual basis for amnesties and victim compensation.

¹⁸ Section 23.

¹⁹ Sections 25(1) and 4(d).

²⁰ Section 25(2).

²¹ Section 16.

²² Sections 19 and 20 and chapters 6 and 7 generally.

²³ The original date of 6 December 1993 was changed in response to considerable political pressure. This was because the original date disqualified all persons who'd committed acts of violence in the run up to the elections, and it remained a sore point for several persons and the Commission itself. The day to which it was changed – 10 May 1994 – was held to be more appropriate because it was the day on which Mandela took power and represented a decisive break from the past.

²⁴ Section 3(1)(b).

²⁵ Section 3(1)(c).

²⁶ Section 19(5)(a) and chapter 7.

²⁷ Sections 20(7)(c), 8, 9 and 10.

²⁸ Pursuant to sections 5(d) and 28.

3.3.2 *The Self Understanding of the Commission*

The self-understanding of the TRC is briefly but aptly represented by a passage in Tutu's foreword to the *Report of the Truth and Reconciliation Commission*. He contends that²⁹

[c]ertainly amnesty cannot be viewed as justice if we think of justice only as punitive and retributive in nature. We believe, however, that there is another kind of justice – a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation.

This view of the TRC's task permeated its activities. In order to get a full picture of the extent of abuses perpetrated during the 34 years under investigation, it focused on gross violations of human rights and especially violations that were systemic. It sought to identify the nature, causes, context and extent of such violations as well as the identities of the institutions and individuals that had perpetrated, and or condoned such violations.

Through mainly public hearings that were organised thematically or with geographical emphasis,³⁰ the TRC delved into the delicate task of unearthing the truth about the past. Victims were generally not cross-examined and their oral testimonies were, barring patent falsehoods, accepted as true. State institutions,³¹ professional bodies³² and political parties³³ were also heard, and their roles – active or passive – in the abuses of the past assessed and put into context.³⁴ The aim was for the testimonies of

²⁹ Chapter 1 of Volume I of the *Report of the Truth and Reconciliation Commission* para 36.

³⁰ Some of the thematic hearings covered women, conscription, children and youth, and the geographically focused hearings covered among others, the cycle of violence in the Kwazulu-Natal Province.

³¹ Some of the institutions of state that had special hearings were the army and the police service

³² Professional and other bodies such as the medical health profession, the legal fraternity, the media, churches and private business received an opportunity also to comment on the roles they played in the maintenance or reversal of the status quo and the abuses of the past.

³³ All the political parties and liberation movements in existence at the time were required also to render themselves accountable in the interests of reconciliation and the development of an accurate historical record.

³⁴ Chapter 6 of Volume I of the *Report of the Truth and Reconciliation Commission*. See generally.

complicity and expressions of remorse, or the articulation of justification to engender public debate and to facilitate victim identification with the process.³⁵

3.4 A Study of South Africa's Amnesties

3.4.1 The Amnesty Committee

The Amnesty Committee originally comprised of two members of the TRC that were appointed by the Commission and three other members appointed by the president.³⁶ In his exercise of discretion in appointments, and in order to ensure objectivity in a largely judicial process, president Mandela appointed three judges. The Committee conducted its activities through public and *in camera* hearings and, in order to deal quicker with several of applications before it, heard applications relating to the same subject matter together.

3.4.2 Sample Findings of the Committee

The findings of the Committee went beyond a mere determination of eligibility for amnesty, but sought also to put the abuses of the past in context. The result has been an account that recognises that abuses were perpetrated by both sides and that seeks not to make overt moral judgments. The contexts provided however serve to vindicate some of the human rights abuses through the criminal defence tools of provocation and *tu quoque*.

Decision No. AC/99/0031 of the Amnesty Committee made findings on the circumstances in which police atrocities were committed.³⁷ The findings were largely dependent on the testimony of Vlok who as Minister for Law and Order, had established the dreaded Security Police *Vlaakplas* Unit and had virtually given it *carte blanche* in its operations. As a prelude to its decision, the Committee found that almost all policemen that had given evidence before it had referred to their background and at the end of their testimony had expressed regret for what they have done. It decided

³⁵ As above.

³⁶ This was later enlarged to 13 and then to 19 members. See Promotion of National Unity and Reconciliation Amendment Act 18 of 1997 and Promotion of National Unity and Reconciliation Second Amendment Act 84 of 1997.

³⁷ Jan Hattingh Cronje: Amnesty Application No. AM 2773/96. Case was considered with applications of Venter (AM 2774/96), Mentz (AM2775/96), Hechter (AM2776/96) and Van Vuuren (AM2777/96).

therefore to examine the background to police atrocities in such general terms as to expedite its decision-making when other policemen came before it.

The Committee found that most policemen that had applied for amnesty had joined the police force after the National party became the government of South Africa in 1948 and implemented the apartheid policy. They were brought up under this doctrine which was supported by schools and all the Afrikaans churches. There was rarely any voice of dissent in the circles they moved in. The churches even proclaimed the policy to be in accordance with the scriptures and took action against preachers like Beyers Naude who condemned its doctrines.

As policemen they were indoctrinated to defend the policy and the government of the day even with their lives should it be necessary. They accepted the legally enforced environment as the accepted social structure of the country and believed it to be the best way of dealing with the issues of a multi-racial society. On the other hand, the black people found the social and political structures that asserted their inferiority unacceptable. A revolution that was largely modelled on communist egalitarian ideology became inevitable. The intransigent government had to rely on the security forces in order to maintain its power and the *status quo*. The army was used against the forces that represented Black Nationalism, at first in operations outside the borders of the country, and subsequently internally. This escalated into a full-scale, albeit undeclared war.

The involvement of the police, ostensibly in a battle against terrorism and communism followed. The Police Act No. 7 of 1958 was amended and in terms of Section 5 thereof, the police was made responsible for internal security. Their functions were extended beyond the primary police function of combating crime and a security branch was created with the ultimate task of keeping the government in power so as to enable them explore the possibility of a political solution. Policemen were sent to Botswana, Zambia, Zimbabwe and Namibia where they were engaged in battles against exiled guerrilla liberation forces. Violence escalated after the 1976 Soweto incident and during the 1980's a full-scale revolutionary war developed in South Africa. It became the primary task of the police and more specifically the Security Police, to counter what was then seen as a total onslaught by the liberation forces.

The Committee found on the evidence before it that the police found it impossible to counter the onslaught by using customary methods. An espionage network was

consequently set up, the liberation movements were infiltrated, informers were used, so-called terrorists were captured and turned into informers or even became members of the security police as so-called *askaris*. The liberation movements replied with equal force and a number of deaths were caused after discovered informants were forced to drink spirits or petrol and were then set alight.³⁸ The result was that few witnesses were prepared to give evidence against apprehended activists.

Activists, who had been arrested and detained without trial under Section 29 and the emergency regulations of the Security Act No 64 of 1972,³⁹ became heroes once they were released. It also became more difficult to extract information from detainees because of the growing support for the struggle and the fear of what may happen to them if on release they were branded as police informants or *impimpis*.

On the other hand the police were pressured to maintain "law and order", to deal with terrorists and to guarantee the safety of ordinary citizens against incidents such as the Church Street Bomb, the Magoo's Bar bomb, the St James Church Massacre, the murder of farmers and hundreds of other incidents of terrorism and killings. This pressure did not only come from politicians but also from the business sector, farmers and ordinary citizens. Black expressions of defiance and self-empowerment such as "eliminate them"; "take them out", "one *boer* one bullet" and "pay them back in their own coin" were used. These were mirrored among the whites and the security forces and were perceived to constitute authorisation to use bombs and hand grenades against perceived enemies. The tacit endorsement of such activities as the bombings of Cosatu and Khotso Houses by politicians led to a growing perception that the deeds met with the government's approval.⁴⁰ In certain instances members of the security forces were even decorated for their actions in combating the onslaught.

In the end the conflict ended in a vicious circle - a gruesome attack would lead to gruesome counter measures, which would in turn lead to even more gruesome acts of revenge. The Committee found that the words used to convey instructions or suggestions to counter "terrorism", the tacit condonation of illegal methods and the subsequent praise and decorations extended, led the ordinary lower rank policeman to

³⁸ Ian Ndibulele Ndzamela *et al*: Amnesty Application No. AM5051/97 Decision No. AC/98/0034

³⁹ Security Intelligence and State Security Council Act No. 64 of 1972.

⁴⁰ Adrian Johannes Vlok *et al*: Amnesty Application No. AM 4399/96 Decision No. AC/99/0242.

believe *bona fide* that any act, even illegal ones, could be carried out if the purpose was to frustrate the revolution and to keep the government in power.

The worth of these kinds of findings cannot be overestimated. They put a substantial part of the conflict into context and set perimeters for what was reasonable or unreasonable within that context. They facilitated also the understanding, if not forgiveness, of the victims.

3.4.3 *Patterns Emerging from the Award of Amnesties*⁴¹

Although the TRC has submitted its report, the Amnesty Committee is yet to conclude its examination of applications and compile a list of granted and rejected applications. From a reading of the decisions so far rendered, it is possible to make comments on some patterns that have emerged from the amnesty process. These comments can only be in general terms however because the information available from the truth commission is not so organised as to permit exactitude in numbers.

Among the difficulties in compiling exact numbers has been the fact that some persons submitted several applications that were separately considered and decided on.⁴² In other cases, some persons were both granted and denied amnesties and although a person could be granted amnesty for killing a political opponent, breaking and entering into his house to commit the said offence could be a crime for which amnesty would be denied.⁴³ It has also been impossible to compile figures on the basis of the offences for which amnesties were granted because only incomplete details are available. In some cases the amnesties were expressly extended to all implied inchoate offences and in other cases, not.⁴⁴

In all, 7112 amnesty applications for amnesties were received. Of these, about 250 were withdrawn and over 40 were found to be duplications. Several more applications had been apparently filled by prison inmates, whose expectations that the prison

⁴¹ Such patterns as are discussed have been obtained from reading the decisions of the Amnesty Committee in which amnesties were granted. For details see <<http://www.truth.org.za>> [Accessed between July and November 2001]

⁴² Eugene de Kock for example, submitted over eight applications that were separately considered.

⁴³ Mandla Wellington Fokazi: Amnesty Application No AM 3119/96 Decision No. AC/99/0229.

⁴⁴ Petrus Casparus Snyders: Amnesty Application No AM 5286/97 Decision No. AC/2001/0085.

authorities would send them in were unfulfilled.⁴⁵ The result was that the Committee had to turn away people who, but for missing the deadline, would have qualified for amnesties.

By November 2001, close to 5500 amnesty applications had been refused and close to 900 granted. Members of the ANC topped the list as constituting about 40 percent of the recipients. The Security forces comprising members of the police force, the army and other specialised security units within these forces received about 25 percent of amnesties granted and the IFP, the PAC, AZAPO, UDF, COSATU and the AWB/AB made up about 34 percent of the amnesty recipients. Persons of indeterminate political affiliation made up the remaining one percent.

Of the offences for which amnesty was received, over 60 percent were for crimes that had not resulted in the loss of life. Such crimes included arson,⁴⁶ public violence,⁴⁷ unlawful possession of arms,⁴⁸ belonging to a banned organisation or attending unlawful gatherings,⁴⁹ robbery⁵⁰ and causing harmless explosions so as to facilitate infiltration of freedom movements.⁵¹ Some of the offences from which loss of life had ensued had been particularly gruesome but were deemed upon a consideration of all the circumstances to be proportionate to the political objective pursued.⁵²

Another significant observation from the amnesties granted is that over 60 percent of the persons who received amnesties, had already been prosecuted and were serving or had already served their sentences.⁵³ Others were on bail from the courts pending the decision of the Amnesty Committee⁵⁴ and yet others had been tried and acquitted

⁴⁵ Marvin Maesela *et al*: Amnesty Application No AM 3149/96 Decision No. AC 2000/0199.

⁴⁶ Richard Joseph Crowe: Amnesty Application No AM 2478/96 Decision No. AC/96/0010.

⁴⁷ Ben Sepato Lehloo: Amnesty Application No AM 3360/96 Decision No. AC/98/0056.

⁴⁸ Abell Bhila: Amnesty Application No AM 1190/96 Decision No. AC/97/0011.

⁴⁹ Hanif Mohammed Vally: Amnesty Application No AM 3262/96 Decision No. AC/99/0270.

⁵⁰ Zakhele Jan Simelane: Amnesty Application No AM 3122/96 Decision No. AC/99/0209.

⁵¹ Willem Coetzee *et al*: Amnesty Application No AM 4122/96 Decision No. AC/2001/0050.

⁵² Siphon Biko *et al*: Amnesty Application No AM 2916/96 Decision No. AC/99/0251.

⁵³ Petros Sosibo: Amnesty Application No AM 1099/96 Decision No. AC/2000/0006.

⁵⁴ Siphon Wellington *et al*: Amnesty Application No AM 3202/96 Decision No. AC/1997/0040.

of the offences for which they had submitted applications.⁵⁵ Members of the security forces had however generally received no sanction for crimes committed

There were several applicants whose offences were crimes for which there were no identifiable victims. Most of the hearings that were held to decide on applications for crimes with victims were attended by family members of deceased victims or by the victims themselves. In the greater number of cases, these persons were not opposed to the applicants receiving amnesty and there were several model instances of reconciliation and victim forgiveness.⁵⁶ In cases where there were objections to amnesty applications, the common reason was that the applicants had not disclosed the whole truth. This has been explained as representing victims' displeasure with a persistent failure to acknowledge wrongs done to them in the terms that they occurred.

3.5 Conclusion

A reading of the transcripts of amnesty decisions does show that the process was even handed. The Amnesty Committee granted relief for atrocities committed across the board and showed no extra accommodation for any party. The observation that ANC members received more amnesties than the other groups is testament only to the fact that they submitted more applications. More of its members had been active in the struggle against apartheid and had been incarcerated by the apartheid government and for them the TRC was a means to regain freedom.

The question as to whether justice was done can also be answered in the affirmative. The Amnesty Committee strictly abided by its limited authority and amnesties were awarded only where the offences committed could rationally show a proportionate political objective.⁵⁷ In some cases therefore amnesty was granted for the murder of a political opponent but not for subsequent and lesser acts of common criminality. It was organised along the lines of judicial inquiry and some of the judges disagreed with the rest of the bench in some of the cases.⁵⁸ Applicants also had to take personal and individual responsibility for offences and give specific details before they became

⁵⁵ Patrick Mabuya Baleka: Amnesty Application No AM 5929/97 Decision No. AC/2001/0021.

⁵⁶ Patrick Mzingisi Ndlumbini: Amnesty Application No. AM 0184/96 Decision No. AC/97/0030.

⁵⁷ Paul Jacobus Jansen van Vuuren: Amnesty Application No. AM 2777/96 Decision No. AC/99/0032.

⁵⁸ Emmanuel Nkosinathi Mavuso: Amnesty Application No AM 7921/97 Decision No. AC/2000/0212.

eligible for amnesty.⁵⁹ Most of the amnesty recipients had also served prison sentences and had already received societal retribution in its most conventional form.

It is true that some of the amnesty awardees had committed truly heinous offences but the real pity lies in the fact that the society had so degenerated as to warrant brother killing brother.⁶⁰ Oppression and opposition to such oppression had necessitated the atrocities for which people received reprieve from the Committee.⁶¹

⁵⁹ Johannes Geldenhuys *et al*: Amnesty Application No AM 5461/97 Decision No. AC/2000/0192. Also Jacques Hechter: Amnesty Application No AM 2776/96 Decision No. AC/99/0030.

⁶⁰ Nicholas Dobo Ntanzi *et al*: Amnesty Application No AM 4070/96 Decision No. AC/2001/0087.

⁶¹ Maynard Khandizwe Nhlabathi: Amnesty Application No AM 6485/97 Decision No. AC/2000/0243.

CHAPTER FOUR

THE TRUTH COMMISSION ON TRIAL

4.1 Introduction

Human rights law has been remarkably advanced by the recent case of Pinochet before the English courts.¹ This is notwithstanding his 'fortuitous' illness-induced subsequent release. This case shows that although every state has the power to pardon or give amnesty to offenders of its laws, the oft-asserted but recently acknowledged universal jurisdiction for such crimes as torture, now arguably renders such pardons and amnesties recognisable only in the granting countries. Foreign countries may wish to be accommodating of the circumstances that motivated such amnesties,² but even in such countries, similar accommodation from vociferous human rights NGOs cannot be counted on. Whatever the domestic justification for South Africa's amnesties, the awardees could easily find themselves in foreign jails if there is a sense within the international community that the amnesties constituted breaches of international law, or that the process of which they formed a part was flawed.³

For this reason, this chapter assesses the failings and difficulties of the TRC. It endeavours to explore serious criticisms that have received scant attention, to assess the merits of such criticisms and to determine to what extent, if at all, they subverted the process of justice in transitional South Africa. To this end, this chapter starts off with the reasoning of the Constitutional Court of South Africa in the *AZAPO* case.⁴ The focus is not on the merits of the case – because the conclusions were largely correct – but on the shortcomings of the amnesty process that the judgment set in motion. Such other articulated criticisms as the TRC's lack of objectivity,⁵ the inordinate infusion of

¹ *R v Bow Street Metropolitan Stipendiary Magistrate and Ors. Ex Parte Pinochet Ugarte* [1998] 4 AllER 897 (HL).

² Robertson (2000) *Crimes Against Humanity: The Struggle for Global Justice* 256 – 265.

³ Dugard 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001.

⁴ *AZAPO v President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC).

⁵ De Klerk (1998) *The Last Trek: A New Beginning*.

Christian ideology into the process,⁶ and the emphasis of the process on violations of civil and political rights as opposed to economic and social rights,⁷ are also discussed.

4.2 AZAPO v President of the Republic of South Africa

In 1996 the Azanian Peoples Organisation (AZAPO), acting in concert with the relatives of some of the best-known victims of apartheid era atrocities applied to the Constitutional Court to set aside section 20(7) of TRC's constitutive statute.⁸

The applicants argued that Section 20(7) of the TRC law was inconsistent with section 22 of the IC, which guaranteed to all persons the right to have justiciable disputes settled by a court of law or other impartial adjudicatory tribunal. The Amnesty Committee was neither a court nor a tribunal and did not have the competence to settle disputes. Their contention therefore was that it could not have been within the contemplation of the IC. They claimed that victims of apartheid atrocities had the right to insist on prosecution for the perpetrators and compensation from such perpetrators (or the State whose servants they were). Amnesties' ouster of both criminal and especially civil claims would therefore infringe their rights to legal remedies.⁹

The applicants asserted further that section 108(1) of the IC gave exclusive competence to the Attorney General and his proxies to determine whether or not a person should be prosecuted for crimes they had committed. The TRC statute sought however to do away with such competence and had in so doing, compromised the constitutional principle of separation of powers.¹⁰

The applicants also contended that the amnesties contemplated by the TRC law would represent a violation of South Africa's obligations under international law to prosecute and punish perpetrators of gross violations of human rights.¹¹

⁶ Meiring (1999) *Chronicle of the Truth Commission* 30. Some of the applicants were relatives of Steve Biko, Dr. and Mrs Ribeiro and Dr and Mrs Mxenge.

⁷ "Truth Commission should probe Socio-Economic Violations" Cape Town: 18 March 1997 SAPA News Service. For further details see <<http://www.truth.org.za/media/sapaindex.htm>>.

⁸ Promotion of National Unity and Reconciliation Act 34 of 1995.

⁹ AZAPO (n 4 above) Editors Summary 1015 – 1018.

¹⁰ As above.

¹¹ As above.

Pending the decision of the Constitutional Court, the applicants sought an injunction from the Cape Provincial Division of the Supreme Court of Appeal to prevent the award of any amnesties in the interim. The Court declined however to impose the interdict.¹²

4.2.1 The Decision of the Constitutional Court

A unanimous Court found that the National Unity and Reconciliation Act 34 of 1995 was consistent with the IC for several reasons. The Court first noted that section 232(4) of the IC gave to the post-amble, the same status as any of its other provisions. It noted also that the post-amble not only authorised but mandated that the legislature enact a statute that provided for amnesties within the perimeters of listed criteria.

The Court then went on to set out the circumstances leading to the passage of the statute and the context within which the contemplated amnesties should be understood.¹³ Much of the abuses of the apartheid era, it said, remained shrouded in secrecy and so it had been necessary as a means of eliciting the truth and facilitating recognition of the past wrongs, to give incentives for public unburdening. This it held would create the climate necessary for healing the wounds of the past, and promoting reconciliation and reconstruction.¹⁴ It asserted that if there had been no amnesty provisions, the IC that paved the way for the emergence of a democratic political dispensation, might never have come into being at all.¹⁵

The Court then held that it did not have the competence to exercise for the legislature, choices that were within its exclusive authority. Its only mandate was to determine whether or not the choices exercised by the legislature were consistent with IC.¹⁶ The contemplated amnesties could be granted only after a disclosure of the full truth and a quasi-judicial appraisal of the relationship and proportionality between the offence committed and the political objective pursued. These requisites, the Court held, made the amnesties not inconsistent with the constitution.¹⁷

¹² *AZAPO v President of the Republic of South Africa* 1996 (4) SA 562.

¹³ *AZAPO* (n 4 above) 1019 – 1027 paras 1 – 15.

¹⁴ *AZAPO* (n 4 above) 1027 para 17.

¹⁵ *AZAPO* (n 4 above) 1028 para 19.

¹⁶ *AZAPO* (n 4 above) 1029 – 1030 para 21.

¹⁷ *AZAPO* (n 4 above) 1035 para 32.

With respect to the consistency of the amnesties with South Africa's international obligations, the Court held that the international instruments referred to – the Geneva Conventions – were inapplicable because South Africa was either not a party thereto or because they were applicable only to international conflict.¹⁸ Furthermore international law did not always mandate prosecutions for gross human rights abuses because it encouraged broad amnesties in cases of intra-state conflict.¹⁹ It reasoned also that although the IC encouraged the application of international legal standards, the IC would be the final authority on the amnesties even if the constitutional mandate violated *jus cogens*.²⁰

On the question of the constitutional legitimacy of the ouster of the civil liability of the perpetrators, the Court's view was that the concept of amnesty is not limited to remission for criminal culpability. It held that the constitution expressly sought to accommodate the ouster of civil liability by using the words "acts, omissions and offences",²¹ and that the objectives of the amnesties would be vitiated if they did not extend to civil liability.²² The Court said that to hold the government civilly liable for the acts and omissions of its servants could divert funds essential for the reconstruction of South Africa, and the creation of social equity.²³

4.2.2 The Decision of the Court Revisited

As the guardians and defenders of the South African Constitution, the Constitutional Court is undoubtedly the last word on what is consistent with the IC. This competence does not extend however to what is or is not violative of international law. The Court's judgment was regrettably lacking in a proper analysis of the consistency of amnesties with international obligations. This is a failing that arguably prejudiced the entire amnesty process by giving it flawed legal foundation.

¹⁸ AZAPO (n 4 above) 1031 – 1033 para 25 – 30.

¹⁹ AZAPO (n 4 above) 1033 para 30.

²⁰ AZAPO (n 4 above) 1031 – 1032 para 26 and 27.

²¹ AZAPO (n 4 above) 1037 para 37.

²² AZAPO (n 4 above) 1041 – 1042 para 50.

²³ As above.

The treaties that are said to impose a duty upon states to prosecute perpetrators of gross human rights abuses are the Genocide Convention,²⁴ the Torture Convention,²⁵ the Geneva Conventions on the laws of war,²⁶ the ICCPR and the Apartheid Convention.²⁷ Beyond treaty law, crimes against humanity under customary international law as subsequently codified by the statutes of the ICTY²⁸ and ICTR,²⁹ arguably impose an obligation upon states to prosecute and punish them.³⁰

Contrary to previous arguments, which originated from the international context of the Nuremberg definition,³¹ it has now been established conclusively that crimes against humanity may be perpetrated independently of an international conflict.³² Prohibitions against apartheid and genocide have now also arguably attained the status of customary international law.³³

During the apartheid era, South Africa was not party to the aforementioned treaties and so the international law principle of *pacta tertiis nec nocent nec prosunt* would avail and operate to absolve it from any responsibility thereunder.³⁴ This leaves the vexed question of South Africa's obligations under customary international law.

The Court should therefore have first considered the various models of transitional justice and the law that supports or proscribes their operation. It should then have proceeded to the reasons for South Africa's choice and the authority upon which such a choice was legitimate under international law. This would have held the amnesty

²⁴ Articles 4 and 5 of the Genocide Convention.

²⁵ Articles 4, 5 and 7 of the Torture Convention.

²⁶ Article 51 of Geneva Convention I; article 52 of Geneva Convention II; article 131 of Geneva Convention III and article 148 of Geneva Convention IV.

²⁷ International Convention on the Suppression and Punishment of the Crime of Apartheid (UN, 1973).

²⁸ Article 5 of the ICTY Statute UN Security Council Resolution 827 (1993).

²⁹ Article 3 of the ICTR Statute UN Security Council Resolution 955 (1994).

³⁰ Motala 'The Promotion of National Unity and Reconciliation Act, the Constitution and International Law' (1995) 28 *Comparative and International Law Journal of South Africa* 338. Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 45.

³¹ Nuremberg Charter.

³² *Prosecutor v Dusko Tadic* (1996) 35 *International Legal Materials* 32, 72.

³³ Dugard (n 3 above) 1009 – 1013.

³⁴ Dugard (2000) *International Law – A South African Perspective* 27.

process to an international standard and would have secured greater care in the decisions handed down.

By grounding the legitimacy of the amnesty provisions in the Constitution and nothing else however, the decision of the Court failed to recognise the concept of crimes *erga omnes* for which universal proscription exists. It set a bad precedent by first inadequately explaining international law and secondly by sending a message that at the end of internal conflicts with attendant gross abuses of human rights, states can do as they please so far as their actions are validated by their constitutions. This perception, which coloured the legal foundation and activities of the TRC, needlessly prejudiced its international relevance.

With the question of the international legitimacy of amnesties clearly ambiguous, and an alleged duty to prosecute honoured more in the breach,³⁵ the South African Court disregarded an ideal opportunity to canvass not only a novel concept of retributive justice,³⁶ but also an opportunity to contribute to the development of definitive international principles on amnesties.

4.3 The Objectivity of the TRC

Sarkin contends that in the quest for justice in transitional societies, unless the entire society has a claim to ownership of the chosen process, its objectives might never be achieved. He argues further that even a perception of bias – substantiated by however very little evidence – stands a chance of undermining the process.³⁷

In this regard, perhaps the most dangerous and subversive critique of the TRC was that which impugned its objectivity and credibility. Among the Afrikaners especially, it was widely perceived as a witch hunting exercise that sought to condemn everything about the “Afrikaner Nation”.³⁸ Right from the selection of the Commissioners in a

³⁵ Scharf 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41.

³⁶ Markel 'The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States' (1999) 49 *University of Toronto Law Journal* 389

³⁷ Sarkin “Transitional Justice” lecture to LLM students (Human Rights and Democratisation in Africa) University of Pretoria on 12 June 2001. Notes on file.

³⁸ Meiring (n 6 above) 95. See also “Tutu holds out hand of friendship to Afrikaners” 11 October 1996 SAPA News Service. For details see <<http://www.truth.org.za/media/sapaindex.htm>>.

process, which was generally transparent, their claim was that the “struggle types” appointed as Commissioners would seek vindication for their past efforts by condemning the regime they opposed.³⁹ This perception was not helped by Mandela who went outside the set down appointment process to appoint two Commissioners to the TRC,⁴⁰ or by the Amnesty Committee’s decision to give blanket amnesty to 37 ANC applicants.⁴¹ The inclusion of Tutu’s son in one of the earliest lists of amnesty recipients also created negative impressions.⁴²

Upon closer scrutiny, it is easy to say that these claims are of doubtful veracity. Although the TRC mainly comprised persons who had been involved in the struggle against apartheid, their appointments were transparent and reflected public opinion. Who better to understand the motivations and considerations of persons who had committed atrocities than persons who had actively participated on one side of the divide or the other? Indeed Mandela justified his selection of the two Commissioners who had not been short-listed on grounds of the need for the TRC to be as representative as possible of all hues of South Africans.⁴³

Further, the chairperson and the driving force of the TRC did show objectivity in spite of some unfortunate remarks that earned condemnation from the Afrikaner community.⁴⁴ In response for instance to the ANC’s decision not to apply for amnesty because it had been involved in a just war, Tutu threatened to resign.⁴⁵ Further testimony to his integrity was provided also by his objections to the blanket amnesties granted to the

³⁹ Sarkin ‘The Trials and Tribulations of South Africa’s Truth and Reconciliation Commission’ (1997) *South African Journal on Human Rights* 617.

⁴⁰ Sarkin (n 39 above) 621.

⁴¹ Meiring (n 6 above) 322 – 325. The 37 ANC amnesties caused division within the TRC and led to the resignation of an Afrikaner Commissioner. See Krog (2000) *Country of My Skull* 276.

⁴² Trevor Armstrong Tutu – Amnesty Application No. AM 7983/97, Decision No. AC/97/0072.

⁴³ Sarkin (n 40 above). Also “Mandela rejected outstanding candidates for truth body: Mbeki” 14 March 1996 SAPA News Service – <<http://www.truth.org.za/media/sapaindex.htm>>.

⁴⁴ Meiring (n 6 above) 206 In response to what they perceived as Afrikaner intransigence to acknowledge the “sins of apartheid” Tutu and Boraine made some disparaging remarks about the National Party. The NP instituted a civil suit against the TRC but the matter was resolved when Tutu and Boraine apologized.

⁴⁵ Chairperson’s Foreword to the *Report of Truth and Reconciliation Commission* Vol 1 Chapter 1 para 41.

ANC leadership and his insistence that the matter be referred to the courts.⁴⁶ It is to his credit that his own views of the inhumanity of apartheid did not operate to close his mind to the views of others. He contends for instance in his Foreword to the *Report of the Truth and Reconciliation Commission* that⁴⁷

I am even-handed in that I will let an apartheid supporter tell me what he or she sincerely believed moved him or her, and what his or her insights and perspectives were; and I will take these seriously into account in making my finding. I do believe that there were those who supported apartheid who genuinely believed that it offered the best solution to the complexities of a multiracial land with citizens at very different levels of economic, social and educational development. I do not doubt that many who supported apartheid believed that it was the best policy in the circumstances to preserve their identity, language and culture and those of other peoples as well. I do believe such people were not driven by malicious motives. Many believed God had given them a calling to help civilise benighted natives. I do not for a single moment question the sincerity of those who believed that they were defending their country and what they understood to be its Western Christian values against the atheistic Communist onslaught. No, I do not call their motives into question. I do, however, condemn the policy they applied.

In its bid to ensure that justice was not only done but was also *seen* to be done, the TRC in its hearings and consideration of applications for amnesty, employed mainly judicial processes and gave every opportunity to persons who had been compromised by the testimonies of others to rebut such testimony with the assistance of counsel.⁴⁸ It is true however that in some cases the intervention of the courts was needed for the TRC to ensure due process rights of all persons who had been prejudiced by testimonies⁴⁹ Antjie Krog responds to criticisms about the slowness that characterised the TRC by introspectively asserting that after the furore of politics has died, the letter of the law and the objectivity it provides is all that is left to justify the paths taken by a body such as the TRC.⁵⁰

⁴⁶ Krog (n 41 above) 275.

⁴⁷ Chairperson's Foreword (n 45 above) para 56. Emphasis in original.

⁴⁸ *Du Preez and Janse van Rensburg v TRC*, CPD Case No. 4443/96 (Unreported). See Sarkin (n 39 above) 632-633

⁴⁹ As above.

⁵⁰ Krog (n 41 above).

The most ardent criticisms about the objectivity of the TRC originated from the Afrikaners. Given that a fair number of them had actively perpetrated or tacitly supported the crime of apartheid and therefore stood at risk of condemnation, it is easy to concur with Tutu when he says that the criticisms were a clever ruse to *a priori* compromise the findings of the Commission. He says it best:⁵¹

There were those who decided from the outset, long even before the Commission had begun its work, to discredit us by trying to paint the Commission as a witch-hunt of, especially, Afrikaners; by claiming that we were biased in favour of the ANC, and as having failed in the end to advance the course of reconciliation. This latter kind of criticism was a clever ploy to seek pre-emptively to discredit the Commission and hence its report.

Further testimony to the objectivity of the Commission can be found in its rejection of lustration as a tool of transitional justice.⁵² Unfettered by the considerations of potential anarchy that had influenced the choice of limited amnesty over general prosecutions in the IC, lustration could have been employed to achieve similar results as prosecution. The TRC's agenda was clearly not one of condemnation or exclusion of any group. By rejecting lustration, the TRC must have believed that all perpetrators were capable of reform and of contributing to the development of the country.

4.4 The TRC and Christian Philosophy

Another criticism that the Commission faced was that of its inordinate infusion of Christian ideology into its activities. The regular prayers at the commencement and conclusions of its hearings caused not insubstantial irritation in a country where freedom of thought and conscience is given pride of place.⁵³ So also the preoccupation with the "healing power of forgiveness", and by the refrain that "vengeance belongs to God". Wilson says of the TRC's activities that the "virtue of forgiveness and reconciliation were so loudly ... applauded that emotions of revenge, hatred and bitterness were rendered unacceptable, an ugly intrusion on a peaceful healing process".⁵⁴ Tutu was heard also to remark frequently that "I believe we all have the

⁵¹ Chairperson's Foreword (n 45 above) para 34.

⁵² Chairperson's Foreword (n 45 above) para 11.

⁵³ See for example *S v Lawrence* 1997 (4) SA 1176 (CC) at para 103.

⁵⁴ Wilson 'Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights' (1999) *Papers Presented at the TRC: Commissioning the Past Conference* 17.

ability to become saints".⁵⁵ This predominance of Christian ideology, while creating difficulties for advocates of equality and the constitutional rights of religious freedoms can be blamed for other shortcomings of the process.⁵⁶

From the opportunity that the TRC provided for victims' pain to be acknowledged. Some managed to forgive their abusers and to achieve closure. Others failed because the TRC did not acknowledge the need for, or the worth of retributive justice. As has been contended in this dissertation, retributive justice or a sense thereof is essential for restoring the dignity of the victim who has been treated as unequal by a perpetrator. It restores to equal status with his abuser. It has been long recognised therefore that the retributivist elements of justice are as important as the remissive and that a failure to consider both sides of the coin results in a skewed process. Shriver's view in this regard is that⁵⁷

[f]orgiveness thrives in the tension between justice as punishment and justice as restoration. To take both sides seriously is to ponder how due retribution can play a restorative role in the future relation of wrongdoers and wrong sufferers, and how forgiveness makes room for punishment while making wider room yet for the repair of damages and renewal of relations between enemies.

That a large number of victims felt the TRC process inadequate for their catharsis is borne out by Gabriel O'Malley's study of 560 victims.⁵⁸ These victims wanted retribution for they believed that beyond an opportunity for victims to tell their stories, the TRC should have held the perpetrators beholden to them.

The concerns raised by this study undoubtedly have merit. It is not being suggested from endorsement of this view that amnesties are inappropriate or that all perpetrators should be tried and incarcerated. Indeed amnesties *are* capable of satisfying retributivist inclinations within a dispensation that has penal connotations. Amnesties could for instance have been conditional upon apologies and pleas for forgiveness as

⁵⁵ Meiring (n 6 above) 87 – 88.

⁵⁶ O'Malley G 'Respecting Revenge: The Road to Reconciliation' (1999) 3 *Law Democracy and Development* 181, 189.

⁵⁷ Shriver (1990) *An Ethic for Enemies: Forgiveness in Politics*.

⁵⁸ O'Malley (n 56 above) 184.

well as upon a regime that required perpetrators to make contributions to a fund for the rehabilitation of victims, or to contribute time and resources in community service.

On the larger question of the overriding influence of Christian ideology in the TRC's activities, it must be acknowledged also that it did yield considerable benefit. Religion and its reference to an all-knowing deity who rewards right and punishes wrong, helps abused persons to achieve closure and to get on with their lives. It also averts the potential chaos that would result from a victim's need to avenge himself. It is true that the Christian orientation of the process excluded other religions that have the same capacity. This cannot be excused but can be explained by saying that the process took on the identity of its chairperson – a phenomenon that was not altogether undesirable in South Africa's case.⁵⁹

4.5 Downplay of Economic and Social Right Violations

Another criticism that bears mention is that the TRC process concentrated on violations of civil and political rights to the exclusion of economic and social rights.⁶⁰ This is evident in the very definition of "gross violations of human rights" in the TRC's governing statute. The definition limited gross violations of human rights to "killing, abduction, torture or severe ill treatment of any person",⁶¹ or "attempt conspiracy, incitement, instigation, command or procurement to commit"⁶² such offences. Although the crime of apartheid and the debilitating consequences it wrought on the psyche of black persons could have been fitted within the ambit of "severe ill treatment", the provision was not construed as such. Applications were not submitted for, and not one amnesty was given for implementing or perpetuating the crime of apartheid.

It is trite that the characterisation of civil and political rights as first generation, and economic and social rights as second generation rights is based on a distinction that does not stand up to close scrutiny⁶³ – and hence the criticism. Of the millions of South Africans who bore the brunt of apartheid and suffered forcible displacement from their

⁵⁹ Meiring and Krog say that it was Tutu's charisma, innate goodness and deep spirituality that kept the TRC united and focused on the task at hand. Meiring (n 6 above) 103. Krog (n 41 above) 278.

⁶⁰ (n 7 above).

⁶¹ Section 1(1)(ix)(a) of Act 34 of 1995.

⁶² Section 1(1)(ix)(b) of Act 34 of 1995.

⁶³ 1995 Vienna Declaration and Programme of Action for Enforcement of Human Rights.

properties among other abuses, less than 22,000 qualified for reparations under the TRC's reparation policy.⁶⁴ And this was because they also fell within the limited construction of "victims of gross human rights violations". The result has been that, for a large number of South Africans, there has been little or no recognition of their suffering beyond lip service. Although apartheid has been recognised to be the crime against humanity that it is,⁶⁵ it is little consolation for generations of black South Africans who only had access to defective education and health care and are now equipped with few marketable skills within a competitive employment environment.

The costs of any extensive reparation policy must however be taken into account in making any assessment. For the 22,000 victims of gross abuses of human rights, government grants pegged at the average earnings of South Africans for five years is estimated to cost the government three billion rands.⁶⁶ Government policies of accelerating social equity through affirmative action and rural development,⁶⁷ rather than through gratuitous payouts, are therefore arguably legitimate within such a dispensation. One cannot help but mention however that the achievement of social equity would have been hastened further if all persons who had actively supported or tacitly endorsed apartheid policies – to their undoubted benefit – had been made to pay an insubstantial levy. The logistics for such an enterprise would be potentially overwhelming but certainly not insurmountable.

4.6 Conclusion

I have sought to show within this chapter that although some of the criticisms directed at the TRC were legitimate, they were not fatal to its ultimate objective of facilitating reconciliation and avoiding impunity.

It was inevitable that a body such as the TRC was, would attract considerable criticism. It was engaged in a thankless enterprise – ensuring accountability for institutionalised bigotry and human rights abuses. It was also implementing a unique model with

⁶⁴ Fernandez 'Reparations Policy in South Africa for the Victims of Apartheid' (1999) 3 *Law Democracy and Development* 209.

⁶⁵ Chairperson's Foreword (n 44 above) paras 61 and 62.

⁶⁶ Fernandez (n 64 above).

⁶⁷ *South Africa: Transformation for Human Development UNDP Human Development Report – 2000* Pretoria: UNDP

parallels nowhere else in the world. While in hindsight, some of the TRC's mistakes could have been avoided, the paths it trod and the choices it made were in good faith. Without the benefit of precedents to guide it, its efforts were indeed laudable.

For the amnesty process and its elaborate criteria for qualification to have any meaning however, it is essential that all persons who contemptuously did not apply, or who applied and were denied amnesty, be prosecuted. Prosecution for such persons would be the only means to ensure their accountability for crimes they perpetrated and to ensure justice.

CHAPTER FIVE

OF BLUEPRINTS AND PRECEDENTS: *THY WILL BE DONE ON EARTH AS ...*

5.1 Introduction

This concluding chapter sets out the lessons that may be learnt from the South African experience and it does this by drawing to a close and drawing conclusions from the various strands of thought expressed in the preceding chapters. The objective is to secure a blueprint that may be added to, or taken from to suit various country circumstances. This is especially relevant in light of the fact that Ghana¹ among several other African countries, has in recent times embarked upon a reconciliation process. It would be prudent for such an enterprise to draw from the experiences of countries that have achieved a measure of success in transitional justice.

Beyond the conclusions of this dissertation, recommendations are made but these are, notwithstanding the demise of the truth commission, not sterile. They are undertaken with the efforts of other states in mind and with a view to facilitating the achievement of justice within other transitional societies.

5.2 Conclusions

In the quest for justice in transitional societies, it must first be acknowledged that there exists no single definitive model of transitional justice. The civil conflicts that necessitate reparation and victim healing under the rubric of transitional justice are *sui generis* and are therefore incapable of eliciting uniform models. It is essential therefore for societies in transition to recognise that what is deemed just in any society is contingent upon, and informed by prior injustice. Its content should be informed by the society's self-understanding of the nature and sources of the human rights abuses in its past.

Although international law is ambiguous as to whether or not the prosecution of prior gross human rights abuses is a duty upon states in transition, it must be acknowledged

¹ Commission for National Reconciliation Bill (2001).

that transitional societies *need* to deal with the abuses of the past and endeavour to give succour to victims.² Human psychology craves a degree of vindication and recognition for pain suffered. Victims crave some punishment for their abusers as an avenue for expression of the justifiable hatred, which is created by the erosion of their dignity. The use of the law in this enterprise would avoid impunity and serve to entrench a humanitarian moral code within the rule of law. It would also set the new terms of a social contract between victims, perpetrators, onlookers, and the state – a social contract that affirms equality of all persons and eschews impunity.³

It must be acknowledged also that the currently popular notions that justice is necessarily retributive and further, that prosecution represents a necessary element of retributivist justice are inaccurate. The alternative philosophy is best expressed in the words of Tutu, whose sentiments on the retributivist potential for amnesties accord with acknowledged criminal jurisprudence and political philosophy:⁴

The amnesty applicant has to admit responsibility for the act for which amnesty is being sought, thus dealing with the matter of impunity ... [T]he application is dealt with in a public hearing [where] the applicant must make his admissions in the full glare of publicity ... Often this is the first time that an applicant's family and community learn that an apparently decent man was, for instance, a callous torturer or a member of a ruthless death squad that assassinated many opponents of the previous regime. There is, therefore, a price to be paid. Public disclosure results in public shaming ...

Ultimately the ends that prosecutions are intended to serve are to disabuse the mind of a perpetrator who acted as, and believed himself to be superior to others in society. They are also a means for affirming that no one is above the law. Depending on how granted, amnesties are also able to serve this function but with the added advantage of reintegrating offenders into society.

By the same token, it may be concluded that amnesties that are applied in the absence of a principled and positive social objective, and that fail to achieve the objectives of re-

² Kumado 'Forgive us our Trespasses' (1993 – 1995) 19 *University of Ghana Law Journal* 83

³ Viljoen F 'The Role of the Law in Post-Traumatized Societies: Addressing Gross Human Rights Violations in Rwanda' (1997) 30 *De Jure* 18

⁴ Chapter 1 of Volume I of the *Report of the Truth and Reconciliation Commission* para 35. See Markel D 'The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States' (1999) 49 *University of Toronto Law Journal* 389.

uniting society or entrenching the rule of law and achieving justice should not be permissible. This is because they would validate impunity for human rights abuses and represent a slap in the face of victims. Within this category would fall amnesties that are self-granted by previous regimes before they relinquish power or amnesties that are the product of coercion or intimidation. Such amnesties send a message into society that perpetrators of abuses are above the law and that might is right. Recent developments in international human rights law suggest that this is unlikely to be countenanced by the international community.⁵

To the extent that the South African experience with amnesties reflected the circumstances of its history and to the extent that it eschewed both impunity and amnesia, it was a salutary example. This process has not however been impervious to justifiable criticism of which there are a few.

The TRC should have incorporated a retributive philosophy into its work and it should have avoided an exclusively Christian orientation. Also in determining what human rights abuses of the past should attract societal sanction or forgiveness, as much emphasis should have been given to the deprivation of social and economic rights as to civil and political rights. The failure to do this gave unwitting justification to the now redundant and regressive view that the latter have superiority over the former. Deprivation of land and access only to sub-standard education for instance should have been recognised to be as much crimes as unjustified deprivation of liberty or physical abuse. The former has as much potential to destroy lives as the latter.

5.3 Recommendations

Amnesties should be granted within a model of transitional justice only where the objective to be served is rationally recognisable as one of social reconciliation and entrenchment of a moral code of humaneness within the rule of law. As earlier noted, this automatically excludes amnesties that are self-granted or amnesties that are a result of threats of violence or other type of coercion. It should also exclude general amnesties or amnesties that disregard individual responsibility and accountability for crimes perpetrated.

⁵ *R v Bow Street Metropolitan Stipendiary Magistrate. Ex Parte Pinochet* [1998] 4 AllER 897 (HL).

By necessary implication therefore amnesties must be awarded by an institution that is set up by a democratic process and that invokes the confidence, if not the support of the civil society that suffered from the atrocities of the past. The ideal institution would be one, in the crafting of whose mandate and composition, civil society plays a significant role.

To attract any measure of confidence, the institution that is empowered to grant amnesties must be operationally and politically independent. Its operation until the end of its stated mandate must not for instance be capable of being subjected to financial blackmail. It must also have absolute power to determine who gets amnesties and the award of such amnesties must be immune from political manipulation.

In order to deliver on its mandate effectively, the amnesty-granting institution's term must be long enough to permit it to delve adequately into the past. The determination of what is long enough would invariably be dictated by the peculiarities of a country's history.⁶

Amnesties should be granted only within a carefully circumscribed regime that bears out a rational connection between the process and the objective of affirming the rule of law and facilitating the healing of victims. Amnesties in exchange for the full disclosure of the truth would be such an instance. So also amnesties in exchange for expressions of remorse and community service or contribution to a fund for victim rehabilitation.

To this end, amnesty-granting institutions should have the resources and the means to independently and objectively ascertain details and evidence by which applicants' truth shall be measured. Victims should also be given every opportunity to participate in the processes that have the ultimate objective of giving them relief.

As a corollary thereto, the public should have full access to the reports of amnesty proceedings. This is the only means by which the institution can be held accountable by the people for whose benefit they come into being. The wonders of technology notwithstanding, dissemination of such information through websites and other electronic media is inadequate. Outreach programmes that affirm the importance of all persons should be employed.

⁶ Teitel (2000) *Transitional Justice*.

Processes of transitional justice should always accommodate some reparation for victims. Where amnesty is granted to perpetrators, such amnesty should not completely preclude the victims' rights to secure compensation. In instances like the South African case where civil liability was held by the Constitutional Court to be capable of subverting the entire process of reconciliation and social development,⁷ there should exist other means by which the victims receive substantial compensation for their pain. Such a measure could be the creation of a fund to which amnesty beneficiaries are required to contribute.

5.4 A Final Word

Professor Kumado contends that amnesty provisions or other clauses that seek to oust the jurisdictions of courts with respect to human rights abuses of the past, represent pleas for forgiveness.⁸ This is a believable proposition. For forgiveness to count as such however, it must be sought from the entire society or through their duly appointed representatives. It cannot be demanded as of right. Transitional justice models must always leave an option open to society to demand retribution or to grant remission. Amnesties, it is hoped from the analysis that has been the burden of this dissertation, can satisfy both the retributive and the remissive objects of transitional justice but the key lies in how they are granted.

The use of amnesties to access the truth has definitely achieved its objective in South Africa – a general if not full picture of the atrocities committed. While the jury is still out as to whether or not such truth will effect reconciliation it must be acknowledged that the task the TRC was set could not have been discharged much better

From an even handed process that seeks to repair injury to victims and to restore their dignity; to punish perpetrators who contemptuously uphold their wrongdoings and to offer remission to perpetrators whose actions were motivated by the circumstances of their commission; justice can indeed be done in transitional societies. It is possible from such a process for *kindness and truth to meet and justice and peace to kiss*.

(Word count: 18,867 minus bibliography and preliminary pages)

⁷ *AZAPO v President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC).

⁸ Kumado (n 2 above). He closes his discussion with a most appropriate bible passage that is repeated here.

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