

# The Truth and Reconciliation Commission (TRC): Human Rights and State Transitions--The South Africa Model

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**Abstract:** Post-authoritarian regimes have struggled with the most appropriate way to deal with the former regimes' human rights abuses. Several schools of thought have emerged as to how this should be accomplished. Into this framework the South Africa model, the Truth and Reconciliation Commission (TRC), is discussed. The TRC has completed its charge and the results vary according to one's perception of that charge. An assessment of South Africa's attempt at truth and reconciliation and the TRC's viability as a model for other transitioning societies are discussed.

"Injustice is like having an eye gouged out, but looking away is losing both eyes."--Russian Proverb<sup>1</sup>

## Introduction

In 20 October 1998, South Africa's Truth and Reconciliation Commission (TRC) published its final report. With the exception of a relatively small minority of supporters, the TRC and its subsequent report have been widely criticized. Many in both the former ruling white elite as well as the Zulu-based Inkatha Freedom Party (IFP) have called the TRC a witch hunt. Many of apartheid's victims believe the process failed them by both granting amnesties and failing to pay reparations. The minority of TRC supporters, led by Desmond Tutu, former Chairperson of the TRC, argue that the process has been both healing and necessary for the future of a South African society based on human rights. The idea of bringing to justice those within an authoritarian regime who committed human rights abuses during their tenure is not new. The evolution of a human rights paradigm and the development of mechanisms necessary for pursuing justice for the survivors of human rights abuses emerged at the end of World War II with both the Nuremberg and Tokyo tribunals. These tribunals have become the standard by which all others are measured. Duplications have been impossible, in large part due to the nature of the majority of transitions. As a result many varieties have emerged.

With roughly twenty commissions in more than fifteen countries over the past twenty-five years, it is evident that the "commission" has become an important transition tool. There are as

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many types of commissions as there are types of transitions. Each commission has its own limitations. The South African TRC is but one recent variation, albeit a variation that many viewed with high expectations. The TRC in its inception sought to alleviate the various problems and obstacles encountered by many of the recent commissions, particularly those in Latin America. Because South Africa's TRC has been seen as an improvement over other experiments, it is legitimate to assess whether or not the goals of the TRC have been met and if this hybrid model has anything to offer other transitioning societies. Thus, two questions are addressed here. Is South Africa's TRC a viable model for justice and reconciliation in a post-authoritarian society? What advantages and disadvantages does this model present?

## Background

The apartheid regime stepped aside in South Africa as part of a negotiated settlement. During the negotiations for the transition, it became clear that de Klerk's National Party (NP) was unwilling to compromise over the issue of amnesty. In fact, it had tried to tie the issue of amnesty to the release of political prisoners. The first step in the development of the TRC model was the Indemnity Act, passed in November 1990. It was seen as a necessary step before any type of talks could get underway. The Act allowed the return of some exiles and the release of some political prisoners.<sup>2</sup>

By October of 1992, the NP was trying to expand the amnesty to cover members of its government. Over ANC objections, the regime attempted to push through a special law that would have given the president the power of indemnity. Although it passed in the House of Assembly, the bill failed. Not satisfied, de Klerk took the measure to the president's council, a parliamentary body designed to resolve conflicts over legislative issues. The NP dominated here and, as a result, the Further Indemnity Act was passed.

After negotiations and an intense public relations campaign (see below), the ANC indicated that it understood the need for a general amnesty for some who may have been in a position to obstruct the transition process.<sup>3</sup> According to Keightley's analysis (1993) of the struggle during the negotiations to define political offenses, the resulting indemnity process was arbitrary and very confusing for the citizenry. This cast a pall over the negotiation process as many South Africans were left feeling suspicious and angry.

As calls for some kind of commission of inquiry to investigate government abuses mounted, the NP, along with other minority parties, began a public relations campaign designed to cast aspersions on the ANC and to force them into agreement over the Further Indemnity Act. The attacks on the ANC focused on alleged abuses within its camps and for abuses allegedly committed by some in high-ranking positions within the ANC.

To the ANC's credit, and led by Nelson Mandela, the ANC held two commissions of its own to investigate those allegations. While admitting some abuses took place, the ANC was careful to point out that the abuses were not part of an official policy, but rather isolated incidents. Additionally, the ANC refused to allow the equation of abuses perpetrated by it or its supporters with those of the apartheid regime. The ANC argued that because it operated as a resistance movement, or was engaged in a "just war" attempting to bring an end to the crime of

apartheid, abuses committed by its members could not be equated with those of the apartheid state.

Critics of the two ANC reports charged the first commission with bias because two of the three members were part of the ANC. The second, they argued, did not go far enough in unearthing abuses within ANC camps and further charged that abuses are abuses and, therefore, the ANC should not be able to skirt responsibility by hiding behind the “resistance” label. Independent observers praised the self evaluation of the ANC, noting that it was one of the few times in modern history when ruling powers allowed their organization and its actions to be so scrutinized.<sup>5</sup> Self evaluation, however was all the Commission was designed to do.

The initial response of both major players--the ANC and the NP--to protect their own, turned out to be a good indicator of the obstacles to come as South Africa began its journey to reconciliation.

### **Lessons Learned**

Various points of view exist with regard to how best to handle abuses of the past. Broadly speaking, these can be divided into three camps--the minimalists, the pragmatics, and the maximalists. The minimalists are those who put forth a series of arguments delineating the need for a society to move forward and not dwell on its past. Focusing on the past will only dredge up unpleasant and painful memories and will not allow the society as a whole to focus its energy on building a new society in which abuses of the past will be just that. This line of argument suggests that amnesty provides the best solution for moving ahead. Prosecutions, it is argued, would only endanger budding democracies that have already undergone the pain of transition. Additionally, minimalists raise a variety of questions. If the prosecutions begin, where do they end? Should only the leadership be brought to justice? Should bureaucrats, judiciary personnel, members of police and security forces, members of the media, the medical profession, all of whom are often duplicitous in authoritarian regimes, be eligible for prosecution? Can a state finance such an endeavor? Will these various members of the elite allow themselves to be dragged through a criminal or civil proceeding? Will prosecutions ensure that future leaders do a better job covering up abuses so as not be subject to the same? How will these prosecutions help a society move forward when a system is consumed with the past? How does a society prevent witch hunts and the guarantee of due process for those under prosecution?

If it is the military which is the target of prosecutions, then there exists the threat of a coup in order for military leaders to protect themselves. Also, if only the top leaders, those who gave the orders, are prosecuted, then the junior officers, those who carried out the bloody orders, will move into top military positions. Thus, the future will be jeopardized by having such folks in power.

Typically, those who put this argument forward can be found within the framework of supporters of the former authoritarian regimes, the NP in South Africa, and the military in both Argentina and Chile, for example. One striking example of this line of thinking was expressed in Margaret Thatcher's recent, stirring defense of Augusto Pinochet. She argued that Britain should not allow him to be extradited because he had been a friend to Britain during the

Falklands/Malvinas war. But, more importantly, the former British Prime Minister argued, it is against common sense to hold a head of state responsible for the abuses committed under his/her rule. He was, she argued, a victim of his ideology and was being sought because he had defeated communism and not because of human rights abuses, although she did admit some abuses had taken place under his rule.<sup>6</sup>

The maximalists are those who think anything less than full prosecution of all involved is unacceptable.<sup>7</sup> They argue that authoritarian regimes are at their weakest during the transition, hence the transition. During this period, the values and ideals that will set the course for the new governing apparatuses are being set. Therefore, granting indemnities may prove, in the long run, more dangerous than dealing with the past. According to Parker:

“[i]ndemnities by definition involve the suspension of the rule of law. They demand acceptance of the paradox that lawlessness might be a necessary condition for lawfulness, and of the humbling admission that a state weakened by such a pact might be better than the alternative . . . victims are to respect the law their violators did not . . . .”<sup>8</sup>

The resentment among victims who watched perpetrators escape justice may result, and may foster, a notion of lawlessness, thus endangering the unconsolidated democracy.

In O’Donnell and Schmitter’s study of transitions from authoritarian rule, they address the question of how far to go in pursuit of justice while trying to consolidate democracy. In particular, they address the minimalist argument of an impending coup should a society try to move too far or too fast this way:

but how can those who want to push the transition avoid a coup without becoming so paralyzed by fear of it that they will disillusion their supporters and diminish their ability to press for further steps in the transition? Indeed, if they pursue this anticipated reaction too far, the promoters of the coup will have achieved their objectives without having acted: the transition will remain limited to a precarious liberalization, and the regime opponents will end up divided and deluded.<sup>9</sup>

The threat of a coup, they argue, is more of a bluff and further they suggest that when a country is going through a transition and has a recent history of gross violations of human rights, it is better to impose judgment on those charged and to do it through due process. Otherwise, burying the past simply buries with it the very values and ideals upon which you hope to build the new society.<sup>10</sup>

Asmal, also arguing from this stand point with regard to South Africa, outlines ten reasons why the past cannot be buried. The arguments can be condensed as follows. First, without thoroughly understanding the past, future problems will be unexplainable and thus roots of violence unexplored will perpetuate future violence, including the acceptance of structural violence. Second, supporters of the former regime can continue believing the unchallenged myths of the regime; thus their neglect of history will breed resentment and potential attempts at revenge. Third, there is a need for a society that emerges from such an authoritarian regime to have an outlet for its emotion. This outlet should be based on truth and justice, with justice

not taking a backseat to the consolidation of democracy because a stable democracy “is not built by granting concessions to the military on issues pertaining to its violent intrusion into civilian life.”<sup>11</sup>

Orentlicher takes the argument further when suggesting that not only may criminal punishment be “effective insurance against future repression . . . by demonstrating that no sector is above the law” and thereby fostering “respect for democratic institutions,” she also suggests where governments may be reluctant to forego prosecutions due to domestic concerns, international law and international pressure to comply with that law may be the effective way to go about securing justice.<sup>12</sup>

In addition to Orentlicher, there are others who suggest that international law requires the punishment of violators of various international human rights treaties. (For a discussion of this, please see Roht-Arriaza 1995, Weschler 1997 and Henkin 1989). Amnesty International and Human Rights Watch Follow in this line. Both human rights organizations have issued policy statements calling for complete justice in post-authoritarian societies.<sup>13</sup> Does amnesty at the expense of justice promote reconciliation? Or will prosecutions threaten democracy by bringing back the old guard? Both Neier and Hayner question the correlation either way.<sup>14</sup> Thus far, there is no convincing evidence to support either proposition.

Somewhere in between the minimalists and the maximalists are the pragmatists--those who argue that the pursuit of truth and justice must be tempered with recognition of the political reality of a given society. The vast majority of those writing on commissions of inquiry most comfortably find a home here, where the focus is often on the nature of the transition. If, as in the case of Nuremburg and Tokoyo, there is an unconditional surrender of one government, bringing them to justice presents far fewer problems than if the transition was one of negotiated settlement where one regime agrees to step aside, but often only with guarantees of impunity. Proponents of this school argue that the most one can hope for is truth and, even then, sometimes a limited version of it. Here the case of justice becomes problematic as the threat of a recidivist coup looms large. A leading advocate for this approach is Zalaquett who argues that “two considerations. . . must be balanced--the ethical principles that ought to be pursued, and actual political opportunities and constraints that ought to be taken into account.”<sup>15</sup> Additionally, he argues that “according to the rule of law the victims cannot hold a veto power or decide on the general rules of society.”<sup>16</sup> Thus, the overall stability of society prevails over the needs of the victims.

Also advocating such an approach as well is Huntington who offers guidelines for “democratizers . . . dealing with authoritarian regimes.”<sup>17</sup> He suggests that the nature of the transition is key and that if the transition was a transformation or a transplacement “do not attempt to prosecute” and, even when prosecuting, such as in a replacement situation, do not go after the middle and lower-ranking officials.

Huyse offers several alternatives for dealing with the past which all conform to this approach: criminal prosecution, but only when acceptable and not risky to society; lustration--the barring of former regime officials from future office positions; amnesty, and truth commissions. Which to choose is dependent upon the particularities of a given society and the nature of the transition.<sup>18</sup>

Since Nuremburg and Tokyo, the majority of commissions have opted for combinations of Huyse's alternatives with most pursuing limited truth, while generously granting amnesties.

### Previous Examples

In choosing its path, South Africa had several other examples to draw upon from other transitional societies.<sup>19</sup> Three are discussed here: Chile, Argentina, and El Salvador.

One possible variant for South Africa was the Chilean model. The Rettig Commission was set up only to investigate murders and disappearances. It, therefore, did not investigate cases of torture, exile, forced detention, or censorship. The final report found that 2,279 people died for "political reasons", and of those, 95 percent of the murders were carried out by official forces.<sup>20</sup> The Chilean Comision Nacional para la Verdad y Reconciliacion, led by Jose Zalaquett, strongly rejected the publishing of the names of the accused perpetrators in the report because the members of the Commission felt that publicizing names without giving them a chance to respond failed to provide them with due process.<sup>21</sup> Without being able to publish names and with only being able to investigate a very limited scope of abuses, the Commission operated under a very limited mandate. Despite this, the Commission was able to conduct quite thorough investigations. The report was praised by many in the human rights field.<sup>22</sup> Shortly after its release, however, several incidents of violence, including an assassination of the opposition leader, brought discussion of the report to a halt.

In Chile, there was the Pinochet factor. In stepping aside, Chile's former military dictator, Augusto Pinochet, ensured that he and his accomplices would never be brought to justice. The settlement which ushered Pinochet from power ensured that Pinochet would remain de facto commander of the armed forces, and he and his cronies would constitutionally retain enough power in the Senate, as life-senators, to veto any attempts at true justice for the crimes committed during his regime. As a result, in Chile a minimum of truth was recovered, but no justice.

Part of the continuing work in Chile revolving around its past is carried out by the National Corporation for Reparation and Reconciliation, whose job it is to promote the recommendations of the Rettig Report and to deal with the issue of financial reparations for the victims. Cases left unresolved by the Report were to be followed up on by the Corporation. While the Corporation has been heralded as an "excellent model for continuing the work of the truth commission and providing a mechanism for implementation of a commission's recommendations," the Chilean victims were left without justice.<sup>23</sup>

In contrast to Chile, Zalaquett has argued Argentina went too far in trying to secure justice for the abuses which occurred as part of its "dirty war." The military, after a humiliating defeat in the war against Britain in the Malvinas/Falklands islands, was forced out of office. The succeeding President, Alfonsin, attempted to both discover the truth and to bring several military leaders to justice by abolishing the military's self amnesty law. The Argentinian government set up the Comision Nacional para la Desaparicion de Personas, CONADEP (the National Commission on the Disappeared). As a result, several military leaders were imprisoned. Zalaquett argued that abolishing the law forced the military into a corner and, as a result, they felt vulnerable and less willing to come forward with the truth about what had

happened to the thousands of disappeared in Argentina.<sup>24</sup> Argentina's next president, Carlos Menem, pardoned those in prison and stopped any attempt to bring the military to justice, arguing that this was best, given Argentina's fragile democracy. Thus, getting the truth in Argentina has been almost impossible. The Mothers of the Plaza de Mayo continue to march in search of the truth about their loved ones, but thus far their efforts go unrewarded.

One military leader, General Seilingo, did come forward on his own accord and shed some light on the fate of the disappeared. He described the flights, several per week, which flew out over the ocean, from which drugged and naked detainees would be pushed to their death. Shortly after his admission, he was arrested on "business related" fraud charges.

The silence of the military and, as a result, the lack of thorough investigations, have allowed those so inclined in Argentinian society to be able to deny the allegations of the victims. Additionally, as illustrated by the Mothers of the Plaza de Mayo, the victims' families are left with little or no idea of the exact fate of their loved ones. Some of the women who were incarcerated had children while in custody before they were presumably killed. The fate of those "born in captivity" remains one of the most difficult issues for the families of the victims. As in Chile, reparations were to be paid to victims, but those applying in Argentina had to produce documents indicating the dates of detention of the victims. This has been almost impossible to secure for many of the victims because of the military's refusal to produce the necessary information. The majority of Mothers of the Plaza de Mayo have refused reparations and are demanding truth with some justice instead.

El Salvador's process of coming to terms with its past was quite different because the international community, in the form of the United Nations, sponsored, financed, and staffed the truth commission for that country. The El Salvadorian report included names of the alleged perpetrators and the Commission on the Truth for El Salvador was empowered to remove members of the military who were named in the report. Civilians however, were not so threatened and the government of El Salvador did not follow up by ensuring that those removed would not be reinstated.

The government went even further, and within five days of the report's publication, the legislature passed a general amnesty. The report was also critical of the military, paramilitary, intelligence and security forces, and those who allowed the abuses or covered them up, including the judiciary. The commission also recommended the removal of supreme court justices because they were considered to be corrupt and inefficient. Strikingly, the report also criticized those that funded the military, including the United States and business leaders in Miami.<sup>25</sup>

Many have argued that El Salvador's Commission could have acted more boldly with its recommendations and publishing of names because it was an international commission. Conversely, since the Commission was not organic, this may have led to the El Salvadorian government's reluctance to carry those recommendations forward. Reparations were to be given to victims and their families with the bulk of the money coming from one percent of all foreign aid given to the country. Thus far very few victims have seen any money.

## South Africa

The South African model sought to put together a commission which would replicate the positive aspects of the earlier commissions while avoiding some of their pitfalls. Thus it would appear that South Africa had chosen the middle path, the pragmatic approach, utilizing the truth commission and amnesty approach.

The groundwork was laid during the transition negotiations which provided, in the post-amble to the interim constitution, for the establishment of the TRC. The following provisions were contained therein: 1) the establishment of the TRC; 2) a specific time limit for the TRC to consider cases from 1 March 1960 to 6 December 1993 (later extended to 11 May 1994); 3) an amnesty for those involved in abuses, provided the abuses were politically motivated, not personal in nature, proportional, and provided the perpetrator came forward and confessed the deed(s). Only gross violations of human rights were covered by the agreement; thus other human rights violations including detention without trial, jailing of people for pass law offences, and forcible removal were excluded.<sup>26</sup>

In addition to the TRC, three other committees were set up to carry out the mandate of the TRC. The first was the Human Rights Violations Committee (HRV) whose purpose was to investigate human rights abuses between 1960 and 1994. It was to use statements made to the TRC to find victims and then to refer the victims of gross human rights violations to the second committee, the Reparation and Rehabilitation (R&R) Committee, whose job it was to provide support for victims in an effort to restore the victim's dignity. This committee was also assigned the task of formulating policy proposals and recommendations on how to promote the rehabilitation and healing of the survivors, their families, and the community at large. The goal was to develop affective ways to prevent such abuses in the future. Finally, the Amnesty Committee's (AC) duty was to ensure that applications for amnesty would be carried out in accordance with the act which established the process. If granted an amnesty, the applicant would not be subject to future prosecution. Each amnesty application had to be granted final approval by the president, which was expected to be Nelson Mandela. Once granted amnesty, the recipient would no longer be eligible for future prosecution in either criminal or civil court. Those who did not come forward continued to be eligible for future criminal prosecution. Supporters of this approach have called it restorative rather than retributive justice.

More than 7,000 applied for amnesty, 3,031 were thrown out as their action(s) was/were determined to be of a personal rather than a political nature, with still others thrown out because the action did not fit within the time frame guidelines of the Commission, or because the applicant refused to admit guilt. More than 200 were granted amnesty. For eighteen months, hearings were held throughout South Africa and the Commission received more than 15,000 statements from victims.<sup>27</sup> Hundreds of witnesses came forth to testify.

How well has the pragmatist approach worked?

## Assessment

The set up of the TRC offered several advantages. First, many believed that the amnesty provision was the key negotiating plank of the NP without which a relatively peaceful



settlement would not have been possible. Thus, the end of apartheid may have prevented future human rights abuses.

Second, the TRC had asked for anyone involved in gross human rights violations which included “the killing, abduction, torture or severe ill-treatment of any person,” to step forward and confess.<sup>28</sup> Those included ranged from the NP leaders to Chief Buthelezi to the ANC leadership to local police authorities and minor players in township liberation organizations. This approach diminished arguments of opponents who sought to characterize the process as revenge by the new government and gave credence to supporters’ arguments that one key goal of the TRC process was the establishment of a human rights culture in South Africa.

Third, through the process, the truth and the true nature of South Africa’s apartheid system would become public knowledge, thus the creation of a national memory. No longer could anyone in South Africa pretend that the abuses perpetrated under apartheid did not happen or were not as bad as many of its victims had been alleging. The process ensured that those who refused to believe the full extent of South Africa’s crimes and who had dismissed the stories as ANC “communist” lies would be forced to hear the truth, and not from the ANC, but from the perpetrators themselves.

In almost all of the literature on truth commissions, the importance of allowing the truth to be heard is described as critical to the country’s ability to move forward. Reconciliation is impossible if a segment of society wants to remain conveniently ignorant about its past while another segment has never had its suffering acknowledged.<sup>29</sup> According to Hamber, “when countries are attempting to overcome a violent past, it is better to deal with the past through investigations, truth recovery, justice, and support for victims and survivors of violence than to ignore it.”<sup>30</sup> To ignore it breeds resentment and has the potential to engender revenge violence.

The importance of truth has another purpose. The power of truth to release the victims has been central to the TRC process. The power of the torturer over the victim is in part the psychological torment of the victim believing that no one will ever know the abuses that he or she has suffered. Thus the ability of victims to come forward is a central step toward healing. As Hamber notes, “past traumas do not simply pass or disappear with the passage of time. Psychological restoration and healing can only occur through providing the space for survivors to feel heard and for every detail of the traumatic event to be re-experienced in a safe environment.”<sup>31</sup>

Fourth, this truth allowed many families to finally discover what happened to their loved ones and in some cases find their remains and give them a proper burial. This closure, it is hoped, will enable reconciliation. Television coverage of perpetrators and victims hugging at the close of hearings is a testament to the power of truth for reconciliation. Desmond Tutu, Chairperson of the TRC, has noted that a 1998 opinion poll on public attitudes toward TRC hearings indicated that “80 percent of the victims of apartheid say they believe reconciliation is possible.” He went on to say “[n]ow these are the people who should be saying we want revenge, but they’re saying ‘we feel it [reconciliation] is possible.’”<sup>32</sup>

Fifth, the TRC forum allowed South Africa to present itself in the world arena as a nation of law and order where vigilante type justice would not prevail. The new government had to be cognizant of the need to prevent foreign investors, both current and future, from fearing a government bent on retribution. In addition, the government was cautious about “white flight”-

the fear that many white South Africans, in whose hands enormous economic power lay, would flee the country. With South Africa's reputation protected internationally, after a few rough years, its economy now appears to be growing and foreign investment is on the rise.

Sixth, as in many post-authoritarian societies, the TRC was seen as a way to find out about the past without too vigorously pursuing those who were responsible for the abuses, thus not jeopardizing the fragile new democracy. This way South Africans could learn about the past while continuing to move forward--the essence of Tutu's restorative justice. The danger of a violent civil war, or the break down of the South African state, has been a long-standing fear both inside and out of the country. One visit to the U.S embassy in South Africa and it is easy to see that the design of this fortress was meant to withstand what many anticipated would end apartheid--mass violence. Instead, South Africa has seen two relatively peaceful elections.

Finally, it must be said that the example and the stature of both Nelson Mandela and Desmond Tutu made the transition possible and the TRC palatable for many South Africans. Without Mandela's example of forgiving his perpetrators after twenty-seven years at the hands of the apartheid state, many would have found reconciliation a hollow notion. The hearings, too, could have proven a spectacle had it not been for Tutu's moral leadership. He made the process very much about human beings. With religious zealotry he demanded truth, absolution, and reconciliation.

No process is without its imperfections and such is the case of the TRC. Criticism of the TRC procedures and of the final report has come from many quarters.

Was a promise of amnesty necessary in order to dismantle apartheid? This is debatable. According to de Klerk, in his submission to the TRC, the South African government was on a course for change brought about by the fall of the Soviet Union and the worsening economic situation of the country. De Klerk also argued in that same submission that sanctions had nothing to do with the changes that took place in South Africa. While this too is debatable, given the country's worsening economic situation as sanctions tightened, what is clear is that some type of change was inevitable. The degree to which it would have been peaceful, however, is open to debate.

From the beginning, both the NP and the IFP have argued that the commission was ANC biased and as a result both participated in the process reluctantly, and defiantly, providing as little information as possible. The Commission was made up of members of the human rights community from all races. The Chairman, a Nobel laureate, Desmond Tutu, was widely regarded as a man of integrity and honesty. However, it may be argued that neither the IFP nor the National Party would have been happy with any commission that was not dominated by those who shared their version of the past. The Commission, however, did face charges that its make-up favored the ANC and came in for criticism both domestically and internationally.

Both the NP and IFP argued that their suspicions were well-founded when a blanket amnesty was offered to the ANC leadership even though amnesty applications were supposed to be done on an individual basis. Criticism of the blanket amnesty also came from victims' families. Critics charged various ANC members with kidnaping, torture, and with either using or encouraging the use of necklacing. These acts, they argued, many of which took place within ANC camps, were only given a passing glance by the TRC. One victim's brother, the current Chief Land Claims Commissioner, Wetsho-Otsile "Joe" Seremane, to say: "I cannot help feeling

that our TRC has betrayed a partisan inclination, accommodating so-called high-profile people or adherents to the 'popular party', relegating the relative unknowns to the periphery of TRC experiences and services."<sup>33</sup> *The Economist* opined what many others had suggested, that evidence of preferential treatment could also be found if the treatment of Botha and Winnie Madikizela-Mandela was compared. Additionally, it queried why Mangosuthu Buthelezi and the IFP were not forced to come forward, given the connection between the IFP and the apartheid regime in fermenting township violence.<sup>34</sup> Implicit in *The Economist's* editorials is that the TRC was designed to only go after whites from the former regime.

Truth, of a kind, did emerge. But there were several areas beyond the TRC's reach which limited the amount and extent of truth revealed about South Africa's past. Since the Commission was limited to "gross violations of human rights," it was unable to take into consideration other abuses, such as forced removals, pass laws, or atrocities in neighboring states.

More than 3.5 million people were forcibly relocated between 1960 and 1982.<sup>35</sup> One goal of the pass laws and the homeland systems was to provide cheap labor for mines. The treatment of workers in the mines was reprehensible. The living conditions in single-sexed hostels bred diseases, such as AIDS, and dysfunction, both for the individual miners and for their families. Specific laws impacting this situation included the use of hut and poll taxes which had to be paid in cash, thus forcing previously agricultural peasants to the mining industry in search of currency, the Masters and Servants Act which allowed for strict penalties for miners breaking their "contract" and "deserting" mines, and the 1913 Native Lands Act which allocated 8.8 percent of the country's land to 87 percent of the population.<sup>36</sup> The economic benefits of the mines and the cheap pools of labor trickled through South African society, benefitting many whites. As Mamdani has argued, using the Latin American analogy for South Africa does not work because it misses "the link between conquest and dispossession, between racialised power and racialised privilege, between perpetrator and beneficiary."<sup>37</sup>

Since the South African government had no respect for the sovereignty of its neighboring nations, its destabilization policies were particularly harsh on them. Damage done beyond South Africa's borders was also not part of the TRC mandate. This also, then, excludes abuses committed in ANC camps.

The results of several studies conducted by the South African Centre for the Study of Violence and Reconciliation reveal that the victims of apartheid, who risked much and demonstrated enormous courage to come forth and testify, (in fact, many of the victims have expressed fear of repercussions for having given testimony to the Commission) have also been critical of it. Those who testified have complained that after giving their testimony, the Commission did nothing to follow up with them. Once the hearings were over, the TRC left town and the victims never heard from it again. The victims have expressed a desire to see follow up by the Commission, including providing the victims with accessible medical and psychological services. Many feel that there has been no attempt by the TRC to deal with the process of reliving the past which the Commission has brought up. According to Hamber, one of the authors of the Centre for the Study of Violence and Reconciliation's study, the TRC should not unearth these feelings and events without providing support for the victims after they come forward, otherwise "[i]t is far more likely that the TRC will lead to feelings of

revenge, bitterness and anger if peoples who come into contact with it do not receive appropriate counseling and adequate support and service."<sup>38 40</sup> Most victims feel that they should have been permanently removed from office. According to Gibson and Gouws, only those who received amnesty were happy with the process.<sup>41</sup> The victims were not happy with the process because they wanted retributive justice. Truth, many of the victims argued, was a precondition for reconciliation. But that was only the beginning. Justice equals reconciliation and justice with punishment was favored over amnesties. Many of the victims stated that reparations were a necessary component of reconciliation.

Finally, most in the Centre for the Study of Violence and Reconciliation's study believed that the whites benefitted from the system and yet were largely absent from the TRC process. And whites continue to benefit from the system, they argue, via amnesties and economic advantages such as pensions. The result has been a false reconciliation with many of the victims feeling that they were *expected* to forgive and reconcile.<sup>42</sup> Mamdani warns that if, in the TRC process, the beneficiaries of the system are not perceived as taking the process seriously and seem uninterested in being forgiven, the victims are more likely to demand exactly what the TRC seeks to prevent: justice.<sup>43</sup> Very few members of the security forces came forward to request amnesty and the behavior of former president PW Botha toward the Commission suggests there were many perpetrators of apartheid who refused to take the Commission seriously. Even though de Klerk submitted a series of statements to the TRC on behalf of the NP, he never accepted full responsibility for the abuses committed under both the party and his rule.

If one was seeking evidence to support victims' perceptions regarding the lack of true remorse by the perpetrators of apartheid's violence, one need look no further than de Klerk's submission to the TRC on behalf of the NP. In the document he refers to apartheid and the escalation of violence in the 1980s as "the conflict" or "our conflict," he suggests that not one side alone was responsible for the violence in South Africa, and that not one side alone brought about the transformation. He, like many other former apartheid supporters, seems to suggest that apartheid, as a policy, simply proved unworkable. De Klerk has stated that it was not the policy of the government to rape or kill. Yet there were no investigations when murder, rape and other human rights violations occurred. There has been no attempt by the NP to take responsibility for the structural and long-lasting impact of its apartheid policies.

The role of the media in helping prop up and disseminate apartheid propaganda has not been fully explored. In Bird and Garda's study regarding the role of the media in the reconciliation process, the authors found that the media have been playing a positive role in informing people about the TRC process both through newspapers, although literacy levels are low with only 15-20 percent of the population reached this way, and through radio, where hearings were played until the funding ran out. Special bulletins and Sunday broadcasts regarding TRC hearings followed. The authors, however, were quite critical of the ways in which the victims were described. Rarely were they called survivors, and instead their suffering was covered in graphic detail. Thus they concluded that, "what [was] evident from media reports is a failure to explain the meaning of many of the horrific events . . . [thus] the moral distinctions between those who fought against apartheid and those who enforced it were often blurred by the lack of context and depth in media reporting."<sup>44</sup> This may be a contributing

factor to the results of Gibson and Gouws' study regarding attitudes toward the TRC.<sup>45</sup> They found that whites were much more willing to forgive whites, for example the security forces, and less likely to forgive ANC activists, and that blacks were more willing to forgive blacks, and the ANC, and less willing to forgive whites.

Women were disproportionately affected by laws regarding pass arrests, forced removals, and loss of jobs when associated with a male member of the resistance, and yet none of this, nor the economic effects of apartheid, which disproportionately affected women are considered "gross violations of human rights." Women, when arrested, and twelve percent of the state of emergency detainees in 1986-87 were women, suffered torture and other human rights abuses, but also suffered from gender specific abuses such as rapes, sexual assaults, and torture techniques such as flooding their fallopian tubes with water to make them unable to conceive.

Violence against women happened at the hands of the government within both the ANC camps and within townships. Women were forced to act as sex slaves in hostels and were the subject of attacks by such groups as the South African Rapist Association (SARA). This group sought to punish women for not acting appropriately, including, for example, not observing a boycott of a white owned shop. Women also suffered sexual harassment in ANC camps. While there was a special "women's hearing in 1997 in Johannesburg, many brushed aside women's concerns as "special circumstances." Yet pressing questions remain. Should rapists qualify for amnesty? Is rape a political act?<sup>46</sup> Can the failure of the process to acknowledge and take seriously the abuses women suffered be tied to the current epidemic of violence against women in South Africa?

Finally, victims have complained that they have not had input regarding the amnesties. One prominent human rights activist in South Africa, Rhoda Kadalie, draws the correlation between amnesties and future crime. She suggests that there has been an indiscriminate granting of amnesties and that this has had a negative effect on the country's crime rate.<sup>47</sup> The crime rate has exploded in South Africa and of particular concern is the escalating violence against women. South Africa now holds the dubious title "rape capital of the world." Estimates are that one of every three women in South Africa has been the victim of violent sexual assault. Further study needs to be done with regard to this correlation, if in fact there is one. However, it is not a far intellectual leap to raise the question of immunity here. If, as Valdez suggests, "the best way of ensuring that an emerging democracy breaks fully with an atrocious past is to accord complete respect to national and international human rights law," then perhaps the knowledge that the perpetrators of apartheid have gone unpunished has prompted others not to take the law seriously.<sup>48</sup>

Several issues are still left unresolved at this point. One is that of those who perpetrated abuses, but never came forward to tell the truth. According to the process, these folks are eligible for prosecution. Will they be? To highlight the problem let us look at the case of de Kock. He worked as an assassin for the South Africa government. His trial cost the state more than five million rand and prosecutors were tied up for more than two years preparing his defense. De Kock was a low level complicitor of the regime. It is safe to assume that going after bigger fish would prove even more costly. As judge Goldstone stated in a speech before the 1994 elections:

[t]here would be too many accused and adequate punishment would be too costly in human, political, as well as financial terms. Even if we had the human and financial resources, it would not be a sensible or practical route to follow. Criminal trials are unpleasant both for the accused and accusers. The technicalities and time necessary to ensure a fair trial are themselves a source of tremendous frustration. To compel the victims to be subjected to long and difficult cross-examination in many cases would be an additional punishment.<sup>49</sup>

This type of argument leaves many victims of apartheid cold. To suggest that trials would be costly is correct but how relevant? The TRC process itself was very expensive. No one would make such an argument about a thief or a murderer, so why is it acceptable when the thief or the murderer worked for a state? One should hope a trial would be unpleasant for the accused. For the accuser, perhaps they should be consulted before they are dismissed as not needing to face unpleasantness or “additional punishment.” What of the relief of knowing justice has been done, or of knowing that criminals are behind bars? The Centre for the Study of Violence and Reconciliation’s study indicates that apartheid victims do not share Goldstone’s views regarding this.

Another issue still to be worked out is how reparations will be made. Where will the money come from? The issue of implementing reparations is left to the government, not the TRC, although it is likely that victims who do not receive anything for their troubles in appearing before the TRC will likely blame it for the lack of follow up. The TRC also may take the brunt of criticism when reparations are not forthcoming.

## Conclusion

“It would be impossible for the world to be happy . . . [if] the innocent were not allowed to teach the guilty a lesson.”<sup>50</sup>

If Vitoria was right, what has been South Africa’s lesson and does it offer promise as a model for other societies? Like so many other questions, the answer seems to depend upon where you sit. If one takes a minimalist position, while entirely unsatisfactory, the process is not without its redeeming qualities. Tell the truth and be granted absolution. Likewise, a pragmatist may also find the TRC process acceptable because it sought to find the middle road between amnesia and justice. For the maximalist, however, the TRC is probably little more than a “get out of jail free card.”

The history of dealing with post-authoritarian regimes demonstrates that a variety of mechanisms have been used to varying degrees of success. Of course the central question must be: what is success?

The standard has been the tribunals of both Nuremberg and Tokyo which provided examples of some types of justice, albeit a victor’s justice. These were unique because they were an international effort. Currently there are two such efforts underway to deal with the former Yugoslavia and with Rwanda. Both are ongoing and, as a result, it is too early to fully assess their impact, but several themes have emerged which are relevant to our discussion. Since the vast majority of authoritarian regimes of late have negotiated their own departure, bringing the leaders to justice is much more difficult than it was in the post World War II setting where unconditional surrender made indictment of the former leaders much easier. Additionally, the

legacy of Nuremburg, which tried leaders using their own government documents has ensured that future authoritarian leaders won't make the same mistake. The apartheid state destroyed thousands of documents upon realizing Mandela's ascent to office was imminent. Thus, given the nature of transitions today, it is unlikely that we will see the duplication of Nuremburg.

Even with the first two international attempts, we must question how successful they have been. Their success should be measured, in part, on what the victims had hoped to gain from the process. Certainly, the demand from the Holocaust was "Never Again" and yet, while not in either Germany or Japan, genocide has been repeated many times since. Germany has apologized for its actions in WWII, while Japan has not. And, while Germany and Japan have been peaceful, democratic societies since the end of WWII, we have not yet seen the end of history.

So, if the question we seek to address with regard to the first set of international tribunals is "success at prevention of such abuses," the answer is clear. While genocide of the Jews has not again happened, genocide has indeed happened. While totalitarian regimes have not re-emerged in Germany or Japan, they have indeed wrought their terror upon other societies. Perhaps instead all we can hope for is that the types of abuses perpetrated in one society will not reappear within that society. In evaluating South Africa's transition and its attempt to deal with its past, perhaps the only acceptable measurement is whether or not an "apartheid-like" regime re-emerges. Reconciliation may not be possible there or anywhere.

What is insidious about state oppression and repression is the ease with which citizens in whose names these abuses are carried out can walk away from the past without accepting responsibility for it. We have in the U.S. "Daughters" of the American Republic, for example, which seek to demonstrate familial pride at helping found this country. Yet there is no "daughters of slave holders" or "sons of Native American slaughterers" simply because we accept no responsibility for those actions the state carries out in our name. We seek only credit for that which is perceived as a societal good.

As a collective society we were unable to apologize to the Japanese for interment camps until the 1980s and we still have not apologized for slavery or the treatment of Native Americans. South Africa will likely be no different. Those who were abused will continue to feel so and those who did it or in whose name it was done will continue to seek to distance themselves from their responsibility. The recipe that South Africa has formulated for dealing with its past may in fact produce more ghosts than it hoped to lay to rest. As Simpson warns:

Apartheid rendered it noble for most South Africans to be on the wrong side of the law and it must be acknowledged that there is a grave risk that a sense of impunity based on the granting of amnesty to confessed killers, may actually compound the problems of non-existent popular confidence in the rule of law or in 'politically polluted' institutions of criminal justice in South Africa. The result is sustained or growing levels of violent crime - or anti-social violence - which presents as if it is a new phenomenon associated with the transition to democracy, but which is in fact rooted in the very same experiences of social marginalisation, political exclusion and economic exploitation which are slow to change in the transition to democracy and which previously gave rise

to the more socially functional violence of resistance politics. The criminalisation of politics and the politicalisation of crime are really flip sides of the same coin.<sup>51</sup>

Simpson also warns that one must beware of show trials which, while accommodating the principles of international law, do little to restore faith in domestic criminal justice institutions. Motala shores up this point in his 1995 study of the constitution, which set up the Promotion of National Unity and Reconciliation Act. His conclusion suggests that the act is constitutionally suspect. In addition, Motala argues that by giving “amnesty for individuals engaged in crimes against war, crimes against humanity, and crimes against peace, violates peremptory norms of international law, which call for mandatory prosecution for these offences.”<sup>52</sup>

So restoring law and order requires extra-legal measures. This may be acceptable in societies, such as those of O’Donnell and Schmitter’s study, where people have felt comforted by being outside the realm of politics,<sup>53</sup> but in South African society, where every act of daily living has had political consequences, the reverse is proving to be the problem. South African society is far from apathetic and is in fact incredibly political.

South Africa is a model, like the Chilean, Argentinian and El Salvadorian examples before it, from which other transitioning societies may draw in dealing with a post-authoritarian regime. It should be used as a format from which to garner that which seemed to work. What is clear from the South African case, and certainly is also true of the other cases discussed here, is that reconciliation is a personal endeavor that no state alone can deliver. No state mechanism will satisfy the victims or the perpetrators. The best interests of the victims will never be the top priority, because they will remain objects in the process where elites secure their own egress and protect their own, all in the name of furthering the transition or some polluted sense of democracy. Because without justice, democracy is shallowed and attempts at consolidation may prove fruitless. The epidemic of violence in South Africa suggests that many refuse to accept the parameters of the transition and instead are taking it upon themselves to continue to operate outside the law to further their selfish aims. That is one of the legacies of the TRC.

Valdez suggests that a state which wishes to deal with its authoritarian past must include four components in its efforts: “to investigate and make the facts known (truth); to put on trial and punish the guilty (justice); to redress the moral and physical damage caused (reparation); and to eradicate from the security forces those known to have committed, ordered or tolerated the commission of abuses.”<sup>54</sup> South Africa was somewhat successful at achieving truth, but much less successful at the other three components. At this point, the main goal of the TRC--to promote reconciliation--appears to be faltering.

## Notes

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5. For further discussion regarding the maximalist position, please see Nino 1995.
6. National Public Radio, 7 October 1999.
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8. Parker, "The Politics of Indemnities," p.12.
9. O'Donnell, Guillermo and Philippe C. Schmitter. *Transitions from Authoritarian Rule: Tentative Conclusions*. Baltimore, MD: Johns Hopkins University Press, 1986, p. 24.
10. Ibid, *Transitions from Authoritarian Rule*, p. 30.
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14. Neier, Aryeh. in *Dealing with the Past Truth and Reconciliation in South Africa 2nd Edition*. Alex Boraine, Janey Levy and Ronel Scheffer, eds. Cape Town: Institute for Democracy in South Africa, 1997. Hayner, Priscilla B. "Fifteen Truth Commissions-1974-1993.
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16. Ibid, in *Dealing with the Past Truth and Reconciliation in South Africa, 2nd ed.* Alex Boraine, Janet Levy and Ronel Scheffer, ed. Cape Town: Institute for Democracy in South Africa.1997, p. 103.
17. Huntington, Samuel. "The Third Wave: Democratization in the Late Twentieth Century" in *Transitional Justice How Emerging Democracies Reckon with Former Regimes, Vol. I General*

- Considerations*, Neil J. Kritz, ed. Washington, D.C.: United States Institute of Peace Press, 1995, p. 81.
18. Huyse, Luc. "Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past" in *Transitional Justice How Emerging Democracies Reckon with Former Regimes, Vol. I General Considerations*, Neil J. Kritz, ed. Washington, D.C.: United States Institute of Peace Press, 1995, pp. 337-349.
  19. In addition to those discussed below, commissions of inquiry have also occurred in The Philippines, Chad, Uruguay, Uganda, Bolivia, Germany, Rwanda, Honduras, and Guatemala.
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  21. Kaye, Michael. "The Role of Truth Commissions in the Search for Justice Reconciliation and Democratisation: The Salvadorean and Honduran Cases." *Journal of Latin American Studies*, Vol. 29, #3, 1997, pp.693-716.
  22. Hayner, Priscilla B. "Fifteen Truth Commissions-1974-1993," p. 236.
  23. Ibid., "Fifteen Truth Commissions-1974-1993," p. 237. Pinochet has found himself subject to a different kind of justice, that of the international community. At this writing, Pinochet's return from Britain without having to face charges appears immanent, but precedent set in his case offers yet another possible route for dealing with authoritarian leaders.
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  25. Kaye, Michael. "The Role of Truth Commissions," p. 709.
  26. Sarkin, Jeremy. "The Trials and Tribulations of South Africa's Truth and Reconciliation Commission." *South African Journal on Human Rights*, Vol. 12, #4, 1996, p. 622.
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  29. For the importance of truth as critical to a nations' healing, please see Asmal 1992; Boraine, Levy, and Scheffer 1994; Hamber 1995 and Zalaquett 1993.
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  31. Ibid., "Dealing with the Past and the Psychology of Reconciliation" Public address presented at the 4th International Symposium on the Contributions of Psychology of Peace, Cape Town, 27 June, found at .,1995
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  34. *The Economist*. "International: How Impartial?" 346, 8052, 24 January 1998, p. 44.

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38. Hamber, "Dealing with the Past and the Psychology of Reconciliation at <http://sunsite.wits.ac.za/csvr/papdlpst.htm> ,1995.
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41. Gibson and Gouws, "Truth and Reconciliation in South Africa."
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