

2004

Reparations for Apartheid's Victims: The Path to Reconciliation?

Penelope Andrews

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters

 Part of the [Comparative and Foreign Law Commons](#), and the [Law and Race Commons](#)

REPARATIONS FOR APARTHEID'S VICTIMS: THE PATH TO RECONCILIATION?

*Penelope E. Andrews**

[A]s far as justice is concerned, the real test, in my view, is not so much who gets paid out what, or who goes to jail for how long. The real test is what we do in South Africa to change and transform our country, so that the massive injustices, institutionalized, systemic, which led to the violations, are corrected, that the people who suffered so much historically can now get on with their lives and feel full, free human beings.¹

INTRODUCTION

In situations of systemic and widespread racial subordination, dis-possession, and discrimination, how does a society "make reparations"² to its seemingly countless victims? How is the determination of victim made? How does a society establish a causal connection between the perpetrators and the victims, a precondition for legal liability? Who are the beneficiaries and should they be implicated in the reparations process? What counts as reparations? An apology? Monetary compensation? How does a society shift from one premised on apartheid and authoritarianism to one characterized by democratic notions?

These were some of the difficult questions confronting those individuals and groups who negotiated the transition to democracy and the architects of the new democratic legal and political order in South Africa.³ The newly elected government, under the stewardship of President Nelson Mandela, was left the task of fine-tuning the structure and processes that would begin to deal with some of the ques-

* Professor of Law, City University of New York School of Law. B.A. LL.B. (University of Natal), LL.M. (Columbia Law School). The author wishes to thank the *DePaul Law Review* for the invitation to participate in the Symposium, Race as Proxy in Law and Society: Emerging Issues in Race and the Law. The author also wishes to thank Gurmeet Singh, 2L (City University of New York School of Law), for research assistance.

1. Albie Sachs, *Truth and Reconciliation*, 52 SMU L. REV. 1563, 1577 (1999).

2. Black's Law Dictionary defines "reparation" as: "payment for an injury; redress for a wrong done." BLACK'S LAW DICTIONARY 1167 (5th ed. 1979).

3. For a thoughtful account of the transitional-negotiations in South Africa, see ALISTER SPARKS, TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA'S ROAD TO CHANGE (1995); see also THE SMALL MIRACLE: SOUTH AFRICA'S NEGOTIATED SETTLEMENT (Steven Friedman & Doreen Atkinson eds., 1994)

tions raised above. The aftermath of decades of apartheid and centuries of colonialism left a legacy of enormous social and economic inequalities,⁴ as well as a deep-seated national psychological trauma.⁵ It has been noted:

The ability of black families and communities to cope with the violence and to provide functionally nurturing ambience for child development was greatly impaired by the requirements of apartheid. Communities were uprooted and displaced (ethnic cleansing long before Bosnian Serbs adopted the technique), and their homes were bulldozed flat. Social norms were damaged by economic conditions enforcing migrant labor. . . . Unable to rebel effectively against the tyranny experienced, many frustrations inflamed internecine violence.⁶

Redress for apartheid's victims became one of the urgent tasks of governance facing the post-1994 South African government.

Nearly ten years after South Africa embarked on its journey toward democracy, it is patently obvious that the journey was always going to be difficult.⁷ South Africans imagined that the process of racial reconciliation and racial integration would be a linear or chronological one. But it has been a messy one, characterized by fits and starts, made more challenging by increasing poverty, rising levels of crime, and an AIDS epidemic.⁸

The future, at least symbolically, was optimistically encapsulated in one of the most generous constitutional frameworks negotiated.⁹ South Africa's impressive Bill of Rights represents both the vindication and the embodiment of late twentieth century human rights activ-

4. Dullah Omar, *Community Peace*, THIRD WORLD LEGAL STUD. 7, 14 (2003).

5. See Michael A. Simpson, *The Second Bullet: Transgenerational Impacts of the Trauma of Conflict Within a South African and World Context*, in INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA 487 (Yael Danieli ed., 1998).

6. *Id.* at 505.

7. FRED HENDRICKS, *FAULT-LINES IN SOUTH AFRICAN DEMOCRACY: CONTINUING CRISES OF INEQUALITY AND INJUSTICE* 9 (2003).

8. See Francis Wilson, *Addressing Poverty and Inequality*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 177 (Wilmot James & Linda Van De Vijver eds., 2000) [hereinafter AFTER THE TRC].

9. Parallels have sometimes been drawn between apartheid in South Africa and Jim Crow in the United States for purposes of analyzing questions of reconciliation and reparations. My own feeling is that even though the parallels are useful, they sometimes obscure more than they reveal. So it is arguable that the actual experience of racism in its various manifestations may be similar in both contexts and so too are the consequences. But several historical, cultural, political, legal, economic, and other factors have combined to generate a somewhat different context of race and racism in the two societies. Consequently, both societies have and continue to seek different solutions to the legacy of racism. See GEORGE M. FREDERICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981); see also BLACK AND WHITE IN SOUTHERN STATES: A STUDY OF THE RACE PROBLEM IN THE UNITED STATES FROM A SOUTH AFRICAN POINT OF VIEW (Maurice S. Evans ed., 2001).

ism.¹⁰ The list of proscribed grounds of discrimination was expansive;¹¹ so were the bodies mandated to enforce the rights encapsulated.¹² The inclusion of the classic so-called “first generation” civil and political rights was coupled with the embrace of a broad array of social and economic rights.¹³ Underpinning this arrangement was the paramount principle of equality, bolstered by the right to dignity¹⁴—a concept fueled by the African notion of “ubuntu,”¹⁵ as well as the variations provided by South Africa’s vast range of religious traditions.¹⁶

This coupling of equality and dignity underscored South Africa’s commitment to a substantive equality that eschewed the false dichotomy between civil and political rights on the one hand, and social and economic rights on the other.¹⁷ In an address in 2001, the President of South Africa’s Constitutional Court noted:

There is also a close link between dignity and equality. No society can promise equality of goods or wealth. Nor could it reasonably be thought that this is what our Constitution contemplates. It recognizes that at the basic level of basic needs such as housing, health

10. See S. AFR. CONST. (Constitution Act 108, 1996).

11. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. *Id.* § 9(3).

12. These include the Public Protector, the Human Rights Commission, the Gender Commission, and the Commission in the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. *Id.* ch. IX, §§ 181-194.

13. *Id.* ch. II, §§ 7-39.

14. “Everyone has inherent dignity and the right to have their dignity respected and protected.” *Id.* § 10.

15. The concept “ubuntu” was explained by the Constitutional Court in a 1995 judgement outlawing the death penalty. See *State v. Makwanyane*, 1995 (3) SALR (CC). The court noted:

The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

Id. at 225.

16. For a thoughtful analysis of “ubuntu,” see MICHAEL BATTLE, *RECONCILIATION: THE UBUNTU THEOLOGY OF DESMOND TUTU* (1997).

17. Mark S. Kende, *The South African Constitutional Court’s Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 *CHAP. L. REV.* 137, 139 (2003).

care, food, water and social security, profound inadequacies require state intervention¹⁸

This Article will address the South African context of reparations and reconciliation within the broader project of national reconstruction and nation building. This Article will also raise the concerns of truth and forgiveness and their place within the Truth and Reconciliation Commission (TRC) process with specific reference to the question of racial healing, racial harmony, and racial reconciliation.¹⁹ In addition, this Article will note the tensions inherent in individualizing racial harms by demarcating individual victims and perpetrators within a context of systemic and structural racial oppression and subordination. Particularly, it will highlight the complications in implicating the beneficiaries of racial privilege, and assess both the nature of the harm and causation for victims and beneficiaries. This Article will also discuss the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance by highlighting the difficulties of the global reparations project.

It is the thesis of this Article that despite its limitations, the TRC and its institutional validity and widespread support were essential to the South African project of reconciliation and nation building for several reasons. First, the symbolism of the process of reconciliation enabled the TRC to steer the country from a culture of repression toward one of accountability. Second, it gave the victims of gross human rights violations the opportunity to be heard, and more importantly, to be compensated. The TRC, and particularly the hearings for victims and perpetrators, gave South Africans not immediately impacted by the excesses of apartheid the occasion to become witnesses to the testimony of these events. The country confronted the pain of those who were powerless in the face of an arbitrary abuse of power. Third, it allowed the stories of the victims, and the testimony of the perpetrators, to become part of official South African history.²⁰ Denial of this history was no longer an option. In short, it provided

18. Arthur Chaskalson, *Human Dignity as a Foundational Value of our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193, 202 (2000). The major United Nations human rights instrument references the concept of dignity as follows: "All human beings are born free and equal in dignity and rights." *Universal Declaration of Human Rights*, G.A. Res. 217A (111), U.N. GAOR, 3d Sess., art. 1, at 71, U.N. Doc. A/810 (1948). See also JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 17 (1989).

19. Bishop Tutu has highlighted the connection between reparations and reconciliation, noting that often reparations "receives too little attention but is quite crucial to the process of establishing reconciliation." See DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* 58 (1999).

20. For a most powerful account of the victims' testimonies, see ANTJIE KROG, *THE COUNTRY OF MY SKULL* (1999).

South Africans with a kind of cathartic vehicle to testify to the substance, context, and memory of a dark phase in South Africa's history and to record such history for posterity.²¹

II. REPARATIONS AND HISTORY

The Constitution . . . provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex²²

The South African case is compelling for pursuing issues of racial reconciliation and reparations for several reasons. Most significantly, it is frequently cited as a positive model for examining these questions in other contexts.²³ It has been noted:

South Africa's TRC is increasingly held up as a model of how to address past abuses and conflicts in countries changing from authoritarian to democratic rule. It is regarded as a key component of South Africa's miraculous political transition, and has many advocates and admirers, especially abroad. Visiting delegations from as far afield as Nigeria and Indonesia have come to South Africa to learn lessons for their own truth recovery processes.²⁴

21. I use the term "dark phase" to reflect the time period in which the TRC was mandated to investigate—1960 to 1994. No doubt, this rather abbreviated investigation pays short shrift to the excesses of the successive periods of colonialism, as well as the entire period of apartheid. For a thoughtful history of South Africa, see *THE OXFORD HISTORY OF SOUTH AFRICA* (Monica Hunter Wilson & Leonard Monteath Thompson eds., 1969).

22. *Preamble*, Promotion of National Unity and Reconciliation Act 34 of 1995, available at <http://www.doj.gov.za/trc/legal/act9534.htm> (last visited Mar. 8, 2004) [hereinafter TRC Act].

23. Marth Minow and Eric K. Yamamoto explore the TRC in their impressive contributions to the field. See *MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); *ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST CIVIL-RIGHTS AMERICA* (1999). The South African model is however regarded with relative skepticism in some quarters. Reed Brody of Human Rights Watch has noted that it

seems that because of South Africa, the international community has become blindly besotted with truth commissions, regardless of how they are established and whether they are seen as precursors or complements to justice, or very often now, as substitutes for justice.

Reed Brody, *Justice: The First Casualty of Truth?*, at www.hrw.org/editorials/2001/justice0430.htm (last visited Feb. 27, 2004).

24. Piers Pigou, *False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission*, in *COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* 37, 38 (Deborah Posel & Graeme Simpson eds., 2002) [hereinafter *COMMISSIONING THE PAST*]; see also Tama Koss, *South Africa's Truth and Reconciliation Commission: A Model for the Future*, 14 *FLA. J. INT'L L.* 517 (2002).

Indeed, it is arguable that in the growing jurisprudential fields of transitional justice and restorative justice, the South African experience looms large.²⁵

What was apartheid²⁶ and what were reparations for? In many ways the reference to the apartheid's past in the quotation at the beginning of this section does not fully capture the total repression, subordination, and discrimination that so typified apartheid. It does, however, capture the brutal imprint of apartheid, with its legacy of racially segregated communities, distressing levels of poverty, and disproportionate levels of economic inequalities.²⁷ Instituted in 1948, after an election victory by the Nationalist Party in South Africa, apartheid was no doubt one of the twentieth century's most brutal forms of social engineering, which is captured in the following description:

Every aspect of people's lives [is] regulated according to the population group to which they are officially assigned. For black groups there are separate and subordinate political structures, under white control and domination. Where people may live, or work, or own land, or trade, who they can go to school with, or have as a neighbour or friend, or marry—all these things, and many more, are determined by how they are classified in terms of the racial laws of apartheid.²⁸

25. For a more detailed exploration of the field, see RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); see also *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN DEMOCRACIES* (A. James McAdams ed., 1997); *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995). Stuart Wilson, *The Myth Of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty*, 17 S. AFR. J. HUM. RTS. 531 (2001). For bibliography of comparative debates around the TRC, see Tyrone Savage et al., *Truth Commissions and Transitional Justice: A Select Bibliography on the South African Truth and Reconciliation Commission Debate*, 16 J.L. & RELIGION 69 (2001).

26. The Afrikaans term literally means "separateness." Arthur Chaskalson, Chief Justice and President of South Africa's Constitutional Court described apartheid as follows:

Apartheid was defined by law and enforced by law. It is necessary therefore to acknowledge the role of the legal system in upholding and maintaining apartheid, and the injustices associated with it. There can be no half-measures about this. Apartheid caused poverty, degradation and suffering on a massive scale Apartheid, in itself, and in the way it was implemented, constituted a gross abuse of human rights.

Chaskalson, *Submission to the Truth and Reconciliation Commission*, cited in DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION, AND THE APARTHEID LEGAL ORDER* 59 (1998).

27. The wealthiest 10% of South Africa's population account for 60% of the country's wealth. KATHRYN STRACHAN, *HST'S EQUITY PROJECT, EQUITY UPDATE* (2000), available at <http://www.hst.org.za/update/49/policy.htm> (last visited Feb. 27, 2004); see also HENDRICKS, *supra* note 7. Hendricks cites the following statistics: 61% of all Africans and only 1% of Whites could be regarded as living in poverty. The mean annual income for African-headed households is R23,000, while it is R103,000 for whites. *Id.*

28. INT'L DEFENSE & AID FUND FOR S. AFR., *APARTHEID: THE FACTS*, 15 (1983).

These absurdly rigid laws of segregation were bolstered by a police and security apparatus, which was brutal in its determination to maintain a racially divided and racially hierarchical status quo and tolerated no dissent.²⁹ In addition, a vast Kafkaesque body of censorship laws ensured that dissemination of unfavorable ideas was sharply curtailed.³⁰

The ideology and system of apartheid embodied the most vicious combination of race, class, and gender subordination and discrimination.³¹ This was most pronounced in the system of migrant labor, or influx control, which had the most devastating impact on the lives of black South Africans, rendering a stable family life,³² freedom of movement, and economic security an impossibility.³³

Under this system, all black South Africans over the age of sixteen had to carry a reference book, a "pass," at all times. Failure to do so was a crime. The pass contained a photograph, fingerprints, and other information that identified the holder.³⁴ Without these passes, finding employment and housing was virtually impossible.³⁵ This system, in effect for decades, has left a legacy of destruction and deprivation that will haunt South Africa for generations.

In its annual development reports, South Africa is designated an upper-middle-income country by the United Nations Development Program. Despite this apparent relative wealth, the experience of most South African households continues to be one of outright pov-

29. See JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* (1978). See also A.S. Mathews, *The South African Judiciary and the Security System*, 1 S. AFR. J. HUM. RTS. 199 (1985); Julian Rickert, *The Silent Scream: Detention Without Trial, Solitary Confinement and Evidence in South African "Security Law" Trials*, 1 S. AFR. J. HUM. RTS. 245 (1985); NAT'L ASS'N OF DEMOCRATIC LAWYERS, *THE ROLE OF LAWYERS IN THE GROSS HUMAN VIOLATIONS OF APARTHEID* 6-7 (1998) (submission to the South African Truth and Reconciliation Commissions).

30. DUGARD, *supra* note 29.

31. See Penelope Andrews, *The Stepchild of National Liberation: Women and Rights in the New South Africa*, in *THE POST-APARTHEID CONSTITUTIONS: REFLECTIONS ON SOUTH AFRICA'S BASIC LAW* 326, 327 (Penelope E. Andrews & Stephen Ellmann eds., 2001).

32. See MAMPHELE RAMPHELE, *A BED CALLED HOME: LIFE IN THE MIGRANT LABOUR HOSTELS OF CAPE TOWN* (1993).

33. On the operation and mechanisms of influx control, see RICHARD L. ABEL, *POLITICS BY OTHER MEANS* 61-65 (1995).

34. For an exploration of influx control law and policy issues, see Geoff Budlender, *Incorporation and Exclusion: Recent Developments in Labour Law and Influx Control*, 1 S. AFR. J. HUM. RTS. 3 (1985).

35. Black Urban Areas Consolidation Act, § 10, No. 25 (1945) (S. Afr.) (required proof of residence since birth; continuous employment by the same employer for 10 years, or continuous residence for 15 years; being the wife or dependent child of one qualified due to continued residence or employment or permission from the local labour bureau).

erty or of a constant vulnerability to being poor.³⁶ In addition, the distribution of income and wealth in South Africa is among the most unequal in the world, and many households still have unsatisfactory access to education, health care, energy, and clean water.³⁷

But surely the most brutal aspect of apartheid, and one that ultimately came under the purview of the Truth and Reconciliation Commission, was the gross violations of human rights that were perpetrated to maintain and perpetuate the system of apartheid. These violations have been documented in poignant detail in volumes five and six of the final report of the TRC.³⁸ They include methods of torture, kidnappings, murders, and severe ill-treatment.³⁹

III. THE REPARATIONS PROCESS: THE TRC

On 2 April 1994 members of the Inkatha Freedom Party (IFP) attacked the Mzelemu family home at Port Shepstone. On that day, Ndukuzempi William Mzelemu lost almost his entire family: his 84 year old mother, Cekise, his first wife Doris and seven of his daughters, Gugu, Hlengiwe, Joyce, Khululekile, Lindiwe, Phelelisile and Phindile, aged between five months and 18 years. His second wife, Ntombifuthi Mildred Mzelemu, survived but was injured, shot and stabbed. The reason for the attack was simply his son's alleged involvement with the African National Congress (ANC).⁴⁰

The aim of the TRC was primarily to be victim-centered; the process designed to allow victims to tell their stories unencumbered by legal methods such as cross-examination.⁴¹ The process was tailored to eschew purposely technical legal rules such as, for example, the hearsay rule in evidence.⁴² In fact, the choice of TRC chair, Bishop Desmond Tutu, infused an especially Christian sentiment and injected a particular model of reconciliation into the TRC proceedings.⁴³ Noting the TRC hearings as resembling "a church service more than a

36. Wilson, *supra* note 8.

37. STRACHAN, *supra* note 27.

38. FINAL REPORT OF THE TRC, vol. 5 (1999); FINAL REPORT OF THE TRC, vol. 6 (2003).

39. FINAL REPORT OF THE TRC, vol. 6, § 2, ch. 2, at 98 (2003).

40. *Id.* ch. 4, at 120.

41. See TUTU, *supra* note 19.

42. Despite the laudable aims of its architects, the TRC victim and perpetrator hearings "[were] more often than not confrontational and accusatory, more like a trial than an inquiry." DYZENHAUS, *supra* note 26, at 29.

43. Lyn S. Graybill, *South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives*, 12 ETHICS & INT'L AFF. 43 (1998).

judiciary proceeding,"⁴⁴ the TRC has both been supported and criticized for its particularly Christian orientation.⁴⁵

The TRC Act defined "victim" as follows:

- (a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights-
 - (i) as a result of a gross violation of human rights; or
 - (ii) as a result of an act associated with a political objective for which amnesty has been granted;
- (b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and
- (c) such relatives or dependants of victims as may be prescribed.⁴⁶

In effect, this definition draws a distinction between "ordinary" victims of apartheid—those who were subjected, daily, to the degradations and humiliations of apartheid—and "extraordinary" victims—those who were subjected to a "substantial" impairment of their human rights.⁴⁷ The latter referred to a more limited group of individuals.

The issue of reparations in South Africa was part of the broader project of national reconstruction and nation building. The vehicle for reparations was the TRC. The TRC was seen as one of the foundational institutions in South Africa to bridge the apartheid past and the democratic future. The TRC was seen as central to racial healing, racial harmony, and racial reconciliation, as evidenced by its empowering statute, the Promotion of National Unity and Reconciliation Act (TRC Act).⁴⁸

44. *Id.* at 46.

45. In addition, Bishop Tutu's personal style during the hearings, including tearful outbursts, caused some critics of the TRC to label it the "Kleenex Commission." *Id.*

46. TRC Act, *supra* note 22, § 1(xix).

47. *Id.*

48. TRC Act, *supra* note 22. The Preamble to the Act calls for the Act

[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the

The TRC included, as part of its project, three committees: the Committee on Human Rights Violations,⁴⁹ which designated victim status to applicants;⁵⁰ and the Amnesty Committee,⁵¹ which granted amnesty to applicants who disclosed fully the details of their acts that must have been committed to further a political purpose.⁵² The third committee was the Reparations Committee,⁵³ which was mandated to

restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims

Id.

49. The Act provides as follows: "The Committee on Human Rights Violations . . . shall deal, among other things, with matters pertaining to investigations of gross violations of human rights." *Id.* at ch. 3(a).

50. The Act provides that the Human Rights Committee:

[f]acilitate, and initiate or coordinate, the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or the representatives of such victims, which establish the identity of victims of such violations, their fate or present whereabouts and the nature and extent of the harm suffered by such victims

Id. at ch. 4(b).

51. The Act provided that the Amnesty Committee would:

[f]acilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts relating to such acts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty

Id. at ch. 4(c).

52. As a result of the grant of amnesty, the perpetrator cannot be criminally or civilly liable in respect of that act. Equally, the state or any other body, organization or person that would ordinarily have been vicariously liable for such act, cannot be liable in law. *Id.* § 20(7).

The constitutionality of this section of the Act was challenged by a group of victims' families who alleged that this provision violated their rights under international law to have perpetrators of gross violations of human rights brought to justice, and it deprived them of their constitutional rights to have their disputes settled by a court of law. See *Azanian Peoples Org. (AZAPO) v. President of South Africa*, 1996 (4) SALR 671 (CC). The Court upheld both the constitutionality of the section and found no violations of South Africa's international legal obligations. The Court held that the epilogue to the South African Constitution provided for amnesty because it provided significant incentive for offenders to disclose the truth about their past atrocities. The truth might unfold with such an amnesty, assisting in the process of reconciliation and reconstruction. For a discussion about the TRC and international law, see Catherine Jenkins, *After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa*, 16 S. AFR. J. HUM. RTS. 415 (2000); see also Sherri L. Russel-Brown, *Out of the Crooked Timber of Humanity: The Conflict Between South Africa's Truth and Reconciliation Commission and International Human Rights Norms Regarding "Effective Remedies,"* 26 HAST. INT'L & COMP. L. REV. 227 (2003).

53. The Act provides that the Reparations Committee

[m]ake recommendations to the President with regard to: (i) the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; (ii) measures which should be taken to grant urgent interim reparation to victims

Id. at ch. 4(f).

explore methods and mechanisms for reparations and to advise the government as to appropriate steps to be taken to compensate victims.

The Reparations Committee evaluated various forms of reparations, which included monetary compensation, individual and group apologies, symbolic reparations in the form of monuments, reburials, headstones and tombstones, and expunging criminal records.⁵⁴ The Committee also considered affirmative programs in education, training, business incentives, and healthcare.⁵⁵ The Committee categorized reparations in this manner: urgent interim reparations, individual reparations grants, community rehabilitation, institutional reform, and symbolic reparation.⁵⁶

The architects of the TRC had surveyed other truth commissions in Central and South America.⁵⁷ Those commissions focused largely on gross violations of human rights that were almost always carried out by military regimes and their agents. South Africa's TRC was the first postcolonial experiment in assessing reparations in the aftermath of colonialism and apartheid. Of course this created tensions and contradictions, and raised difficult questions: Who are the victims for the purposes of reparations? Who are the perpetrators? Who are the beneficiaries and what responsibility do they have to the granting of reparations and the course of reconciliation? What will count as harm? How is causation to be established? What role should reparations play in the process of racial reconciliation? Who should be reconciled?

These were difficult questions raised amidst widespread violence and the need to reach compromise on the political transition and the new constitutional order.⁵⁸ In the final analysis, the compromise arrived at and embraced in the TRC Act was pursued by the TRC, amidst some criticism.⁵⁹ This compromise embodied certain features.

54. See FINAL REPORT OF THE TRC, vol. 5, at ch. 9 (1999).

55. *Id.* For an interesting discussion of the recommendations of the Reparations Committee, see Ciraj Rasool, *Buying and Memorializing the Body of Truth: The TRC and National Heritage*, in AFTER THE TRC, *supra* note 8, at 115.

56. FINAL REPORT OF THE TRC, vol. 5.

57. For a detailed discussion of truth commissions, see PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001); see also Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 HUM. RTS. Q. 1 (2001)

58. See SPARKS, *supra* note 3.

59. Richard Wilson, for example, has argued that the TRC's emphasis on restorative justice failed to appreciate the desire for retributive justice on the part of local communities. See RICHARD A. WILSON, POLITICS OF THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE (2001). Kader Asmal and his coauthors have criticized the TRC for allocating some moral parity between those who perpetuated apartheid and those who fought against apartheid. See KADER ASMAL ET AL., RECONCILIATION THROUGH

First, even though apartheid was deemed a crime against humanity under international law,⁶⁰ the TRC in its methodology and operation reduced apartheid's crimes to individual acts of gross violations of human rights. In other words, the systemic processes of subordination, racism, and oppression—an integral feature of apartheid—remained largely unexamined.⁶¹ In effect, those millions of victims, exposed daily to abusive bureaucrats, or suffering the daily humiliations of a system that consistently dehumanized them, were not treated as victims for the purposes of the TRC.⁶² In the end, the TRC acknowledged around 22,000 victims of apartheid, a number subjected to vigorous criticism.⁶³

Second, excavating the truth about South Africa's past was paramount, so no blanket amnesty would be granted to perpetrators of gross violators of human rights. Those accused of gross violations of human rights had to make individual applications for amnesty. The TRC Act specifically provided that amnesty would only be granted for "full disclosure of all the relevant facts relating to acts associated with a political objective and comply[ing] with the requirements of this Act"⁶⁴ The requirement of "full disclosure" was interpreted as an effective safeguard against incomplete or distorted versions of

TRUTH: A RECKONING OF APARTHEID'S CRIMINAL GOVERNANCE (1997). Mahmood Mamdani has also criticized the TRC for what he perceives as an artificial distinction between the ordinary and extraordinary victims of apartheid. See Mahmood Mamdani, *A Diminished Truth*, in *AFTER THE TRC*, *supra* note 8, at 58.

60. Ibrahim Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGO's and Apartheid*, 19 *FORDHAM INT'L L.J.* 1464, 1488 (1996). See also *A CRIME AGAINST HUMANITY: ANALYZING THE REPRESSION OF THE APARTHEID STATE* (Max Coleman ed., 1998).

61. Mamdani, *supra* note 59.

62. This compromise appears reasonable in the face of the methodological limitations of the TRC. The count of apartheid's victims truly was millions—and the chances of reaching closure would have been impossible if the TRC Act did not embrace a limited definition of "victim." This did not mean that those individuals, the "ordinary" victims of apartheid, were excluded from some form of reparations. The whole project of transformation in South Africa has been about improving the lives of millions of South Africans who for centuries of colonialism and decades of apartheid were denied access to resources. A perusal of several pieces of legislation in the past few years indicates the willingness on the part of the South African government to confront the legacy of dispossession and discrimination. See *The Land Administration Act*, No. 2 (1995) (S. Afr.), available at www.gov.za/gazette/acts/1995/a2-95.htm (last visited Apr. 21, 2004); *The Employment Equity Act*, No. 55 (1998) (S. Afr.), available at www.gov.za/acts/1998/a55-98.pdf (last visited Apr. 21, 2004); *The Promotion of Equality and Prevention of Unfair Discrimination Act*, No. 4 (2000) (S. Afr.), available at www.gov.za/gazette/acts/2000/a4-00.pdf (last visited Apr. 21, 2004).

63. See *AMNESTY INT'L & HUM. RTS. WATCH*, *Truth and Justice: Unfinished Business in South Africa* (2003), available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR530012003ENGLISH/\\$File/AFR5300103.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR530012003ENGLISH/$File/AFR5300103.pdf) (last visited Apr. 2, 2004). See also Mamdani, *supra* note 59, at 59.

64. TRC Act, *supra* note 22, § 3(1)(b).

events.⁶⁵ This is indicated by the number of individuals who did not obtain amnesty, despite their appearance before the TRC.⁶⁶

Third, the designation "victim" for the purposes of reparations was accorded to those individuals who were directly affected by the excesses of the members of the security establishment and the liberation movements. This question of moral parity, between those who perpetuated the system of apartheid and those who fought the system, was one of the most troublesome features of the TRC.⁶⁷

In an attempt to analyze the structural edifice of racism, the TRC was also mandated to interrogate the organizations and institutions of civil society that had advanced the cause of apartheid, or benefited from it in some way.⁶⁸ To this end, the TRC held hearings on the role of the media, the medical establishment, the legal profession, the business community, and the religious establishment.

IV. THE WORLD CONFERENCE AGAINST RACISM: THE GLOBAL PURSUIT OF REPARATIONS

With a view to closing those dark chapters in history and as a means of reconciliation and meaning, we invite the international community and its members to honour the memory of the victims of those tragedies. We further note that some have taken the initiative of regretting or expressing remorse or presenting apologies, and call on those who have not yet contributed to restoring the dignity of the victims to find appropriate ways to do so and, to this end, appreciate those countries that have done so.⁶⁹

The United Nations Fourth World Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance (the World Conference Against Racism), which took place in Durban, South Africa in September 2001, occurred at a propinquitous moment.⁷⁰ At that point, South Africa's TRC process had already been formally concluded and the TRC Final Report had been published.⁷¹

65. Omar, *supra* note 4, at 13. For a discussion of the pursuit of truth in furthering human rights, see Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977 (2002).

66. Final Report of the TRC, vol. 6, *supra* note 38, § 1, ch. 4 at 69, 74, 79.

67. See ASMAL, *supra* note 59.

68. TRC Act, *supra* note 22.

69. Final Declaration of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance [hereinafter Durban Declaration], § 101, at 9, at <http://www.unhcr.ch/pdf/Durban.pdf> (last visited Apr. 2, 2004).

70. See generally United Nations, Dep't of Pub. Info., *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (2001), at <http://www.un.org/WCAR> (last visited Mar. 8, 2004).

71. Indeed, the Declaration of the World Conference specifically mentioned the struggle against apartheid in South Africa:

The World Conference Against Racism was designed to be the pre-eminent international global human rights conference at the start of the new century under the auspices of the United Nations.⁷² It was only the third time in the history of the United Nations that the issue of racism and all its manifestations were to come under the global spotlight. Two previous conferences had been held in 1978 and 1983.⁷³ A confluence of factors suggested that this was to be no run-of-the-mill United Nations conference. These factors included: the victory over apartheid in South Africa;⁷⁴ the increasingly vocal voices of anti-racist activists around the globe; the proliferation of nongovernmental organizations dedicated to fighting racism locally and globally; a well organized reparations lobby in the United States and South Africa, and, to a lesser extent elsewhere; and the commitment by the then United Nations High Commissioner for Human Rights, Mary Robinson, to make this event the centerpiece of her tenure, deeming the event to be “a landmark in the struggle to eradicate all forms of racism.”⁷⁵

These multilayered modalities, generated by a “globalization from below,”⁷⁶ provided the organizational space to pursue the eradication of racism globally. Unfortunately, the aspirations for the conference

Drawing inspiration from the heroic struggle of the people of South Africa against the institutionalized system of apartheid, as well as for equality and justice under democracy, development, the rule of law and respect for human rights, recalling in this context the important contribution to that struggle of the international community and, in particular, the pivotal role of the people and Governments of Africa, and noting the important role that different actors of civil society, including non-governmental organizations, played in that struggle and in ongoing efforts to combat racism, racial discrimination, xenophobia and related intolerance.

Durban Declaration, *supra* note 69, at 1.

72. See Michelle E. Lyons, *World Conference Against Racism: New Avenue for Slavery Reparations*, 35 VAND. J. TRANSNAT'L L. 1235 (2002); see also J. A. Lindgren Alves, *The Durban Conference Against Racism and Everyone's Responsibilities*, 37 U.S.F. L. REV. 971 (2003).

73. Background paper for the third world conference prepared by Theodor van Boven, member of the Committee on the Elimination of Racial Discrimination, *United Nations Strategies to Combat Racism and Racial Discrimination: Past Experiences and Present Perspectives*, E/CN.4/1999/WG.1/BP.7, Feb. 26, 1999, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/f5361232f18f18a3802567a600353646?Opendocument> (last visited Apr. 25, 2004).

74. There appeared to be an interesting global symmetry to holding the third United Nations conference on racism in South Africa. Both prior conferences had been dominated by the global struggle to eradicate apartheid in South Africa. See Christopher N. Camponovo, *Disaster in Durban: The United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, 34 GEO. WASH. INT'L L. REV. 659, 663-66 (2003).

75. Mary Robinson, *The Spirit of the Century: One Human Family*, Address at the Preparatory Committee for the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (May 1, 2000), at <http://www.racism.org.za/background/Mary%20Robinson.doc>. (last visited Apr. 17, 2004).

76. Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 333, 339 (1997).

cluded those committed to its success. The gathering lost momentum because of the inability to reach consensus on a host of questions, most significantly, those around reparations for slavery, as well as the issues of Palestine, Zionism, Israel, and racism.⁷⁷ On September 11, 2001, one week after the conference ended, the attacks on the World Trade Center in New York and the Pentagon in Washington, D.C. occurred, and effectively eroded the significance of the event (even with its limitations).⁷⁸

The United Nation's General Assembly had directed that the conference be "action oriented." The conference announcement stated its aim as follows: "To focus on practical steps to eradicate racism by considering how to ensure that international standards and instruments are applied in efforts to combat it. [It] will also formulate recommendations for further action to combat bias and intolerance."⁷⁹

The International Convention on the Elimination of all Forms of Racial Discrimination,⁸⁰ the centerpiece of the United Nations' human rights armory to fight racism, was the main focus of the event, although the conference also aimed to "highlight global efforts to promote the rights of migrants."⁸¹ A pioneering dimension of the conference was the stated goal of analyzing the intersectionality of race, gender, disability, or age.⁸²

77. Lyons, *supra* note 72, at 1237-38; see also Rachel L. Swarns, *The Racism Walkout: The Overview; U.S. and Israelis Quit Racism Talks*, N.Y. TIMES, Sept. 4, 2001, at A1.

78. Peggy Maisel, *Lessons from the World Conference Against Racism: South Africa as a Case Study*, 81 OR. L. REV. 739 (2002). Rachel L. Swarns, *After the Race Conference: Relief, and Doubt over Whether It Will Matter*, N.Y. TIMES, Sept. 10, 2001, at A10.

79. In addition, the conference announcement outlined the following aims and objectives: To review progress made against racial discrimination; to reappraise obstacles to further progress and to devise ways to overcome them; to consider how to ensure the better application of existing standards to combat racial discrimination; to increase awareness about racism and its consequences; to make recommendations on how the activities and mechanisms of the United Nations can be more effective in fighting racism; to review the political, historical, economic, social, cultural and other factors which have contributed to racism; to make recommendations with regard to new national, regional and international measures that could be adopted to fight racism; and to make recommendations concerning how to ensure that the United Nations has sufficient resources to be able to carry out an effective program to combat racism and racial discrimination. See *Third Decade to Combat Racism and Racial Discrimination and the Convening of a World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, G.A. Res 52/111, U.N. GAOR, 52d. Sess., Supp. No. 49, U.N. Doc. A/RES/52/11 (1998) [hereinafter G.A. Res. 52].

80. Opened for signature Dec. 16, 1966 (adopted by the United Nations General Assembly in New York on Dec. 21, 1965, entered into force on Jan. 4, 1969).

81. See G.A. Res. 52, *supra* note 79.

82. Catherine Powell & Jennifer H. Lee, *Recognizing the Interdependence of Rights in the Antidiscrimination Context Through the World Conference Against Racism*, 34 COLUM. HUM. RTS. L. REV. 235, 236 (2002).

The World Conference was viewed by many as the legitimate site for pursuing reparations, and the venue in which the details of reparations could be discussed and negotiated. Nongovernmental organizations around the world, including a sizeable number from the United States, lobbied extensively to ensure that the conference agenda reflected their demands.⁸³ It was hoped that the Draft Declaration and Program of Action, at the conclusion of the conference, would provide some guidelines for the pursuit of reparations at the local, regional, and international levels.

During the series of preparatory regional meetings before the final event in Durban, conference themes were explored to pursue the goals of the conference.⁸⁴ Ultimately, five themes or issues were agreed upon to serve as the focus of the conference: to address the sources, cause, forms, and contemporary manifestations of racism, racial discrimination and related intolerance; to discuss the treatment of victims of racism; to consider and implement measures of prevention, education, and protection, thereby eradicating racism at the national, regional, and international levels; to create a provision for effective remedies, resources, redress, and other measures at the national, regional, and international level; and to explore strategies to achieve full and effective racial equality.⁸⁵

But reparations for the Atlantic slave trade and the question of Palestine became the most controversial questions and almost derailed the proceedings.⁸⁶ For example, the U.S. government threatened to withdraw if a mandate for reparations was implemented. In addition, African countries were largely divided over the substance and form of reparations. So too were the Europeans.⁸⁷ Zimbabwe spearheaded a campaign by some African countries and African Americans against Western countries that had engaged in the slave trade to demand an apology for slavery, which included reparations in cash payments to individuals.⁸⁸ The South African government and some of its counter-

83. See *The Campaigns of Human Rights Watch and Amnesty International, RACISM AND HUMAN RIGHTS*, available at <http://www.hrw.org/campaigns/race/background0727.htm> (last visited Mar. 28, 2004); AMNESTY INTERNATIONAL'S RECOMMENDATIONS TO GOVERNMENTS FOR THE WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE, 31 August–7 September 2001, Durban, South Africa at <http://web.amnesty.org/library/Index/ENGIOR410022001?open&of=ENG-393> (last visited Apr. 2, 2004).

84. Camponovo, *supra* note 74, at 667-70.

85. G.A. Res. 52, *supra* note 79.

86. See Rachel L. Swarns, *Race Talks Finally Reach Accord on Slavery and Palestinian Plight*, N.Y. TIMES, Sept. 9, 2001, at A1.

87. Camponovo, *supra* note 74, at 670.

88. Lyons, *supra* note 72, at 1239.

parts on the African continent preferred reparations in the shape of developmental assistance.⁸⁹

The conference Declaration stopped short of calling for reparations and an explicit apology from the nations that benefited from the slave trade and colonialism. The Declaration noted:

We acknowledge and profoundly regret the massive human suffering and the tragic plight of millions of men, women and children caused by slavery, the slave trade, the transatlantic slave trade, apartheid, colonialism and genocide, and call upon the States concerned to honor the memory of the victims of past tragedies and affirm that, wherever and whenever these occurred, they must be condemned and their recurrence prevented. We regret that these practices and structures, political, socio-economic and cultural, have led to racism, racial discrimination, xenophobia and related intolerance.⁹⁰

In the Programme of Action, only two short paragraphs focus on reparations. They essentially exhort states to adopt national strategies and measures to ensure that individuals have access to remedies for past acts of racism.⁹¹ The rest of the Programme of Action contains broad and general statements about steps to eradicate racism on the national and global levels.⁹²

V. PURSUING REPARATIONS AND RECONCILIATION: LESSONS FROM SOUTH AFRICA

Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of strong commit-

89. *Id.*

90. The Durban Declaration, *supra* note 69, § 99, at 37-38.

91. *Id.* at 26. Section 165 urges states

to reinforce protection against racism, racial discrimination, xenophobia and related intolerance by ensuring that all persons have access to effective and adequate remedies and enjoy the right to seek from competent national tribunals and other national institutions just and adequate reparation and satisfaction for any damage as a result of such discrimination.

Id. § 165, at 108. It further underlines the importance of "access to the law and to the courts for complainants of racism and racial discrimination and draws attention to the need for judicial and other remedies to be made widely known, easily accessible, expeditious and not unduly complicated." *Id.* Section 166 urges states "to adopt the necessary measures, as provided by national law, to ensure the right of victims to seek just and adequate reparation and satisfaction to redress acts of racism, racial discrimination, xenophobia and related intolerance, and to design effective measures to prevent the repetition of such acts." *Id.* § 166, at 108-09.

92. *Id.* §§ 168-219, at 110-27.

ment, sensitivity and labour to “reconstruct our society” so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations⁹³

What can we learn from the South African process? To answer the question we have to look at what the TRC achieved with respect to reparations. The first is the symbolic achievement represented in the compromise: reparations for the victims and amnesty for the perpetrator. The symbolism was portrayed in the public forums of the victim and perpetrator hearings. The open display of pain and trauma on the part of the victims and victims’ families was synthesized alongside repentant perpetrators detailing the specific acts they visited on the victims.⁹⁴ This ritual of pain and penance became the metaphor for the society moving toward healing and reconciliation, which played to an international as well as a local audience.⁹⁵

My premise in this Article is that the TRC was an essential part of the transformation agenda. South Africans might have found it extremely difficult to move ahead without this process—the past would inevitably haunt the present and the future. But the TRC arguably fell short of its goal of reconciliation; victims who testified before it may have felt that their suffering was not adequately redressed. Contributing to this sense was the mandate of the TRC itself, which insisted on a narrative of individual perpetrators and victims, thereby excluding the accountability and responsibility of the beneficiaries of apartheid.⁹⁶ Moreover, huge numbers of victims of apartheid were left outside of the process.⁹⁷

Despite these limitations, the TRC has generated a veritable cottage industry. Even before the process itself ended, and before distance allowed some objective evaluation, huge numbers of books and articles have been written,⁹⁸ several by the protagonists in the pro-

93. See *AZAPO v. President of South Africa*, 1996 (4) SALR 671 (CC), ¶ 43.

94. See generally KROG, *supra* note 20.

95. See *supra* notes 24-26 and accompanying text.

96. Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Façade?*, 2001 AM. J. INT’L L. 32. It has been noted:

[N]o serious examination was made of the system that gave rise to some of the most horrific racist social engineering of modern times. Instead, there was a concentration on a proportion of the individual victims who came forward and on their immediate torturers, killers and persecutors. This narrowly focused litany of bloodshed and brutality often obscured more than it revealed. Apartheid was presented as a caricature

. . . .

TERRY BELL, *UNFINISHED BUSINESS: SOUTH AFRICA, APARTHEID AND TRUTH 2* (2003).

97. See *supra* notes 47-48 and accompanying text.

98. See, e.g., PIET MEIRING, *CHRONICLE OF THE TRUTH COMMISSION* (1998); GILLIAM SLOVO, *RED DUST* (2002); LYN S. GRAYBIL, *TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE*

cess.⁹⁹ At least two films have been produced, one nominated for an Academy Award in 2000 in the category of "Best Foreign Language Film."¹⁰⁰ These developments are a good thing. They illustrate the importance of the TRC as a lesson in forgiveness.¹⁰¹ They also provide a challenge to those who insist that a sanitized version does the victims a disservice. At the risk of sounding cavalier, it is, after all, a temptation to sanitize trauma to render it marketable.¹⁰²

Clearly not the framers' intent, the TRC nonetheless became a powerful global symbol of reconciliation and forgiveness. This is no mean feat at last century's end within an international environment littered with countless internal conflicts, some of them bordering on the horrific and generating huge numbers of victims and perpetrators.¹⁰³ In particular, under Bishop Tutu's tutelage, and his extroverted and venerated public approach to forgiveness, the TRC was bound to provide some succor to an international community made weary by a steady diet of images of human brutality and a sense of anarchy in some parts of the globe.¹⁰⁴ If nothing else, the mechanisms of the TRC were a refreshing antidote to the insidious cynicism that results from witnessing widespread and systemic human rights abuses.¹⁰⁵

The substantive achievement was to be found in the TRC Final Report, in which it called for monetary reparations to the victims in the form of an individual reparation grant, an official apology, institu-

OR MODEL (2002); Stuart Wilson, *The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty*, 17 S. AFR. J. HUM. RTS. 531 (2001).

99. See e.g., Tutu, *supra* note 19; Bell, *supra* note 96; PUMLA GOBODO-MADIKIZELA, A HUMAN BEING DIED THAT NIGHT: A SOUTH AFRICAN STORY OF FORGIVENESS (2002); ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2000); LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (Charles Villa-Vilencio & Wilhelm Verwoerd eds., 2000); WENDY ORR, FROM BIKO TO BASSON: WENDY ORR'S SEARCH FOR THE SOUL OF SOUTH AFRICA AS A COMMISSIONER OF THE TRC (2000).

100. One was a PBS documentary produced by Bill Moyers entitled, *Facing the Truth*. See www.pbs.org/pov/tv/race/initiative/facingthetruth (last visited Mar. 8, 2004). The Academy-Award nominated film is *Long Night's Journey into Day*. See <http://www.newsreel.org/films/longnight.htm> (last visited Apr. 2, 2004).

101. TOM LODGE, POLITICS IN SOUTH AFRICA 176 (2003).

102. Mtutuzeli Matshoba, *Nothing but the Truth: The Ordeal of Duma Khumalo*, in COMMISSIONING THE PAST, *supra* note 24, at 131.

103. See BENJAMIN A. VALENTINO, FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE 20TH CENTURY (2003); see also PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998).

104. See MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM AND THE GENOCIDE IN RWANDA (2002); see also CENTURY OF GENOCIDE: EYEWITNESS ACCOUNTS AND CRITICAL VIEWS (Samuel Totten ed., 1997).

105. This cynicism, particularly on the part of government, has been noted. See SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002).

tional symbols such as monuments, affirmative action programs in education and health, and the expunging of victims' criminal records.¹⁰⁶ In July 1998, the President's Fund provided some funds for "urgent interim reparations," as recommended by the Reparations Committee.¹⁰⁷

To date, some interim payments have been made, although the government has been stalling.¹⁰⁸ This reticence has been strongly criticized by former officers of the TRC¹⁰⁹ and other observers.¹¹⁰ John Daniel, a former researcher with the TRC, accused the government of "extraordinary meanness" to the victims.¹¹¹ After the release of the Final Report of the TRC, the South African government agreed to pay reparations totaling \$85 million to the 20,000 or so victims who testified before the TRC. Each victim would receive a one-time payment of \$3,900 (the average salary in South Africa is around \$3,000).¹¹²

So to ask a simplistic question: Are South Africans reconciled? This is a difficult and complex question to answer, almost not measurable. How does one evaluate the state of reconciliation? What does it mean to be reconciled?

In venturing a response to the question, it is probably worth considering what South Africa may have become *without* the TRC. In other words, did the actual mechanisms and processes of the TRC, with its public renditions of victim and perpetrator hearings, provide a cathartic, indeed therapeutic, vehicle through which the nation could exorcise its horrific past? Raising counter-factuals that cannot realistically be proven is always a tricky proposition. But it can plausibly be argued that had the TRC not performed its public function, even with significant limitations, South Africa may have faced bitterness, rancor,

106. FINAL REPORT OF THE TRC, vol. 5 (1999).

107. *Id.*

108. Truth and Justice: Unfinished Business in South Africa, *supra* note 63, at 9.

109. James L. Gibson, Truth, Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa 7 (Apr. 19-21, 2001) (Paper presented to the Annual Meeting of the Midwest Political Science Association, on file with the author) (citing John Daniel a former researcher with the TRC).

110. See Marianne Merten, *Apartheid Victims' Families Still Wait for Reparations*, WKLY MAIL & GUARDIAN, Apr. 26, 2001, at www.mg.co.za (last visited Mar. 8, 2004); see also Piers Pigou, *Where Is the State's Policy on Reparations?*, WKLY. MAIL & GUARDIAN, Mar. 28, 2002, at www.mg.co.za (last visited Mar. 8, 2004).

111. Gibson, *supra* note 109, at 7.

112. Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES, Apr. 16, 2003, available at 2003 WL 19154697.

and rage that could have threatened to derail the transformation agenda.¹¹³

One may see some clues of reconciliation in the nature of discourse itself in South Africa, where there is a vibrant and vigilant civic culture.¹¹⁴ The universal expectations of what the TRC could accomplish toward reconstruction were immense.¹¹⁵ This ranged from its projected beneficent impact on the legal system, to its ability to cement a new set of national values that would further the democratic and justice agenda, to the ambition that it would create the discursive space for a multiplicity of voices to be heard and accommodated.¹¹⁶

As the TRC process unfolded, though, the tensions between reconciliation and recrimination, and between forgiveness and revenge, were severely strained. At times it appeared that the whole process would degenerate into a quagmire of skepticism and cynicism. In time, what the TRC demonstrated was that reconciliation requires the interaction of several processes. The TRC was just one. Even though tremendous expectations had been created around the TRC, reconciliation was "something to be earned by South Africans" which would require "navigation through a great deal of human turbulence."¹¹⁷

The TRC process played out in a post-apartheid South Africa, inextricably tied to a legacy of gross economic inequalities, where the first and third worlds exist extremely uncomfortably together, "two nations, the one black and the other white."¹¹⁸ These harsh realities will considerably obstruct the reparations, reconstructionist, and reconciliation project. The severe poverty and huge economic disparities are still highly racialized, with a backlog of educational skills and resource

113. LODGE, *supra* note 101, at 131.

114. This vigilance is evidenced, for example, by the very successful campaign of AIDS activists in South Africa. The Treatment Action Campaign (TAC) has engaged in all kinds of lobbying and education campaigns in South Africa. See www.tac.org.za (last visited Apr. 2, 2004). In 2002, the TAC successfully sued the South African government to mandate the government to provide antiretroviral drugs to all HIV-positive pregnant women who are treated in public hospitals throughout the country. See *Minister of Health v. Treatment Action Campaign*, 2002 (5) SALR 721 (CC). The umbrella organization for nongovernmental organization involved in social justice issues in South Africa is the National NGO Coalition. See www.sangoco.org.za (last visited Apr. 2, 2004).

115. Graeme Simpson, "Tell No Lies, Claim No Easy Victories:" *A Brief Evaluation of South Africa's Truth and Reconciliation Commission*, in COMMISSIONING THE PAST, *supra* note 24, at 220, 225.

116. *Id.* at 224. See also John de Gruchy, *The TRC and the Building of a Moral Culture*, in AFTER THE TRC, *supra* note 8, at 167.

117. Njabulo Ndebele, *Of Lions and Rabbits: Thoughts on Democracy and Reconciliation*, in AFTER THE TRC, *supra* note 8, at 143, 152.

118. Nicoli Natrass & Jeremy Seekings, *Two Nations: Race and Economic Inequality in South African Today*, 130 DAEDALUS 45 (2001) (quoting then-deputy president Thabo Mbeki) (internal quotations marks omitted).

deficits.¹¹⁹ Moreover, the alarming AIDS epidemic has and will continue to wreak havoc on communities through the country and on the economy.¹²⁰

One notable critique of the TRC was the dilemma created by its status as both a quasi-legal enterprise (in its engagement of factfinding and other evidentiary explorations typical of the legal process) and its endeavors to engage in an alternative approach capable of accommodating storytelling and healing.¹²¹ In other words, the TRC provided a creative space, but one situated within a peculiar legal paradigm, whereby victims could relate narratives of struggle and suffering unencumbered by formalist legal conventions. A commentator on the TRC process has noted: "The TRC served the ideal of recognizing individual citizens as possessing equal dignity, since it provided a forum in which the victims of injustice could tell the stories of oppression in a way that the forensic constraints of a courtroom would not permit."¹²²

Although this institutional hybridity may have resulted in some tension between the TRC, as a quasi-legal institution on the one hand, and a victim-centred body on the other, it arguably "introduced into the public culture of South Africa an educational element"¹²³ vital to a successful transition to democracy.

The TRC defined four kinds of truth: a factual or forensic truth, a personal or narrative truth, a social or dialogue truth, and a healing or restorative truth.¹²⁴ But only factual or forensic truth, capable of corroboration through evidentiary mechanisms, is workable within a legal framework. This tension corroded some of the victim-centred therapeutic value of the forum. In other words, the specter of legal challenges loomed large in the victims' testimonies. Alleged perpetrators of gross human rights violations exploited these tensions to their advantage.¹²⁵

Another critique of the TRC was the decision to limit the period of analysis of gross human rights violations to the period from 1960

119. Wilmot James & Lind Van de Vijver, *Introduction to AFTER THE TRC*, *supra* note 8, at 4.

120. Virginia van der Vliet, *AIDS: "Losing the New Struggle?"*, 130 *DAEDALUS* 151 (2001).

121. See DYZENHAUS, *supra* note 42, at 29.

122. David Dyzenhaus, *Debating South Africa's Truth and Reconciliation Commission*, 49 *U. TOR. L.J.* 311, 313 (1999).

123. *Id.*

124. Colin Bundy, *The Beast of the Past: History and the TRC*, in *AFTER THE TRC*, *supra* note 8, at 9, 14.

125. See *supra* note 22 and accompanying text. See also Frederik Van Zyl Slabbert, *Truth Without Reconciliation, Reconciliation Without Truth*, in *AFTER THE TRC*, *supra* note 8, at 62, 69; COMMISSIONING THE PAST, *supra* note 24, at 227, 237-238.

through 1994.¹²⁶ This arguably occasioned a distorted version of South Africa's history of colonial dispossession and apartheid.¹²⁷ In other words, this brief historical précis excluded successive periods of colonialism and apartheid. It treated apartheid as having reached an epoch during the period from 1960 through 1994 and failed to articulate clearly the link between conquest and dispossession, and between the nature of racialized power and privilege and its converse dispossession and disadvantage.¹²⁸ This surely limits the scope for reparations to victims.

Recent developments may further compromise the project of reparations and the process of reconciliation for the victims. In 2002, a lawsuit was filed in federal court in New York by Khulumani, a South African nongovernmental organization that advances the rights of victims.¹²⁹ The lawsuit was filed against several corporations and banks, including Citicorp, IBM, Daimler Chrysler, and Credit Suisse, for investing in South Africa during the apartheid years, in effect aiding and abetting the apartheid government.¹³⁰ In its suit, Khulumani is seeking compensatory and punitive damages, arguing that the multinational corporations played a crucial role in sustaining the apartheid economy, and therefore, the apartheid state.¹³¹ The lawsuit makes specific claims with respect to the particular activities of the various corporations. It is alleged, for example, that certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies, while other businesses derived benefits from their cooperation with the security establishment of the apartheid state.¹³²

126. Dumisa B. Ntsebeza, *The Uses of Truth Commissions: Lessons for the World*, in TRUTH v. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 159 (Robert I. Rotberg & Dennis Thompson eds., 2000).

127. See Colin Bundy, *Truth or Reconciliation*, 14 S. AFR. REP. 8, 10 (1999).

128. Mahmood Mamdani, *A Diminished Truth*, in AFTER THE TRC, *supra* note 8, at 58.

129. In addition, a group called the Apartheid Claims Task Force announced plans to file a lawsuit against some South African gold mining companies for forcing miners to work under "sub-human" conditions during the apartheid regime. Information about the lawsuits can be obtained at <http://www.africaaction.org/docs03/rep0302.htm> (last visited Jan. 25, 2004).

130. *Apartheid Lawyer Launches a New Case*, BBC NEWS, Oct. 7, 2003, at <http://news.bbc.co.uk/1/hi/business/3171894.stm> (last visited Jan. 25, 2004); see also David Osborne, COMMON DREAMS NEWS CNTR., *Household Names Face Apartheid Profiteering Charges*, May 21, 2003, at <http://www.commondreams.org/headlines03/0520-11.htm> (last visited Jan. 25, 2004).

131. *Apartheid Victims Sue SA Government*, BBC NEWS, June 27, 2002, at <http://news.bbc.co.uk/1/hi/world/africa/2070243.stm> (last visited Jan. 25, 2004).

132. *Khulumani v. Barclays Bank*, at <http://www.cmht.com/casewatch/cases/apartheid-def.pdf> (last visited Jan. 25, 2004). "Without oil the police and military could not have functioned and the economy of South Africa would have come to a standstill." *Id.*

They claim further that corporations such as IBM and ICL provided the computers that enabled South Africa to create the hated “pass book” system used to control the black South African population.¹³³ The lawsuit also alleges that car manufacturers provided the armoured vehicles that were used to terrorize black South Africans in townships and that arms manufacturers violated the embargo on sales to South Africa. These arms were used to brutalize the black population.¹³⁴

The irony about the lawsuit is that Dumisa Ntzebeza, a member of the TRC, is one of the lead counsels in the case.¹³⁵ Bishop Tutu is quoted routinely as supporting the reparations lawsuits.¹³⁶ The South African government has opposed the lawsuits, and Justice Minister Penuell Maduna filed an affidavit in July 2003, in the United States District Court for the Eastern District of New York, asking the court to dismiss the case and reiterating the South African government’s opposition to the Khulumani lawsuits.¹³⁷

Among the South African public there is some wariness about the lawsuit. A journalist in Johannesburg commenting on the lawsuit noted: “We had deliberately designed a process that would be so different to the manner in which the Jews dealt with the Holocaust. We don’t want to be hauling apartheid soldiers into court in 50 years time.”¹³⁸

Even those who support the lawsuit recognize the protracted nature of litigation and that it may drag on for several years, arguably of significant advantage to the lawyers involved and without benefit to the purported beneficiaries.¹³⁹

The South African government has lately reiterated that it is indifferent toward the lawsuits, neither favoring nor opposing them.¹⁴⁰ Its

133. *Id.*

134. *Id.*

135. Lynne Duke, *The Price of Apartheid in Human Terms, South Africa’s Repressive System Cost Dearly. Some Victims Want U.S. Corporations To Pay*, WASH. TIMES., Dec. 3, 2002, at C1.

136. *Id.*

137. Declaration by Justice Minister Penuell Maduna on Apartheid Litigation in the United States, at <http://www.gov.za/reports/2003/apartheid.pdf> (last visited Apr. 2, 2004).

138. Phylcia Oppelt, *Reparations Promised to Apartheid Victims Are Way Overdue*, SUNDAY TIMES, Nov. 24, 2002, at <http://www.suntimes.co.za/2002/11/24/insight/in11.asp>. (last visited Apr. 2, 2004).

139. Osborne, *supra* note 130.

140. *Apartheid Claims Mount*, WKLY. MAIL & GUARDIAN, Feb. 21, 2003, at http://archive.mg.co.za/MGArchive/FrameSet.asp?xhitlist_q=%22Apartheid+Claims+Mount%22&f=xhitlist&xhitlist_x=advanced&xhitlist_s=contents&xhitlist_d=&xhitlist_hc=&xhitlist_xsl=xhitlist.xsl&xhitlist_vpc=first&xhitlist_sel=title%3Bpath%3Brelevance-weight%3Bcontent-type%3Bhome-path%3Bhome-title%3Btitle-path&vid=MailGuard:MailGuardView&npusername=MailGuard&npword=MailGuard. (last visited Apr. 2, 2004).

preference was that solutions would not be sought in U.S. courts, but through negotiations in South Africa.¹⁴¹ The government in particular feared the consequences for foreign investment in South Africa.¹⁴²

VI. CONCLUSION

I am not going back there. Pray to God that I am not asked to appear before the TRC again.¹⁴³

Yes, going to the TRC was a victory. It was a victory in that I found the courage to confront my rape. It gave me a platform to share my grief. It made me talk. Hopefully, I will heal in time.¹⁴⁴

The South African process reveals the difficulty of tailoring reparations to divergent constituencies with varying needs. Because the TRC was a compromise, it was bound to exclude huge numbers of people from the process and consequently leave many dissatisfied.¹⁴⁵

The South African process raises complex questions about the tensions inherent in individualizing racial harms by targeting individual victims and perpetrators within a context of systemic and structural racial oppression and subordination. It also raises questions about how the beneficiaries of apartheid ought to be implicated and what their contribution should be to the new democracy. White South Africans, as beneficiaries, were largely left out of the TRC process. By separating the perpetrators from the beneficiaries, white South Africans were immunized from the moral responsibility of the ravages of apartheid.¹⁴⁶

All the research shows that, while black people were intensely interested in the workings of the TRC, white South Africans were largely disinterested in the process.¹⁴⁷ So one could argue that the South African debate on reparations and reconciliation is far from over. Moreover, reconciliation is elusive if those who were oppressed under apartheid have not had their economic conditions altered. The bar-

141. President Thabo has publicly stated his opposition to the lawsuits:

We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.

Thurgood Marshall Jr., *Let South Africa Decide*, *LEGAL TIMES*, Sept. 15, 2003, at 82, 83. See also *South Africa Opposes Apartheid Case*, *BBC NEWS*, Nov. 25, 2002, at <http://news.bbc.co.uk/1/hi/business/2510973.stm> (last visited Feb. 24, 2004).

142. Osborne, *supra* note 130.

143. Pamela Sethynya Dube, *The Story of Thandi Shezi*, in *COMMISSIONING THE PAST*, *supra* note 24, at 117, 128.

144. *Id.*

145. Simpson, *supra* note 115, at 226.

146. Mahmood Mamdani, *A Diminished Truth*, in *AFTER THE TRC*, *supra* note 9.

147. LODGE, *supra* note 101, at 199.

gain—amnesty for truth telling—has resulted in perpetrators being able to walk away from the process, their economic lives largely intact. Victims are forced to go back to the appalling economic conditions that typified their lives under apartheid.¹⁴⁸ For them it may not have been such a good bargain.

148. Dube, *supra* note 143, at 128-29.