

TRANSFORMATIVE JUSTICE: CHARTING A PATH TO RECONCILIATION

*Erin Daly**

INTRODUCTION: RECOGNIZING THE TRANSFORMATIVE AGENDA

When nations transition from oppressive and lawless regimes to democratic ones they face myriad challenges. As an anxious public and an impatient world look on, they must create new governing bodies, write new laws and repeal old ones, redefine the balance of private and public power, and organize elections, just to name a few of the daunting tasks. But perhaps the greatest challenge facing these nascent liberal governments is one that receives insufficient attention: if the values of the new government are to take root, the new leaders must also transform the culture in which they operate.

This aspect of transitional justice is implicit in the growing recognition of the role of the public at large in the commission of state oppression and atrocity. "The relatively recent Rwandan and Yugoslavian events, no less than apartheid before them, throw into question the inherited distinction between civilian and military spheres, combatants and non-combatants."¹ Thus, it has become abundantly clear that oppressive policies often emerge from cultures that tolerate

* Associate Professor of Law, Widener University. I would like to thank Andrew Strauss in the United States and Christopher Roederer, Jeremy Sarkin, and Francois du Bois in South Africa for their very helpful discussions and comments on drafts of this article. I would also like to thank Hugh Corder and the law faculty at the University of Cape Town for their generous support and assistance during my sabbatical, and Tyrone Savage at the Institute for Justice and Reconciliation in Cape Town for making materials relating to Rwanda available to me.

¹ Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *When The Assassin Cries Foul*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 94 (Charles Villavicencio and Wilhelm Verwoerd eds., UCT Press 2000).

or actively promote them. If the new democratic governments aim to secure their authority and their values, then it is necessary for them to transform their societies from ones that tolerated or fostered oppression to ones that respect human rights and democratic values. In other words, if the public was involved in some way in the original oppression, then the culture that allowed the oppression to take place or actively pursued it must be changed. Simply changing the governors won't cure a problem that resides as well in the governed.

This entails not just a transition, but rather a transformation. Transition suggests movement from one thing to another – from oppression to liberation, from oligarchy to democracy, from lawlessness to due process, from injustice to justice. Transformation, however, suggests that the thing that is moving from one place to another is itself changing as it proceeds through the transition; it can be thought of as radical change. A nation in transition is the same nation with a new government; a nation in the midst of a transformation is reinventing itself. Because transformation entails a recreation of the culture, it fulfills the promises of reconciliation and deterrence that transition alone can not achieve.

While much has been written about transitional justice and the process of democratization throughout the world, inadequate attention has been paid to the importance of transformation as an element of the transitional project. Indeed, in much of the literature, the terms “transition” and “transformation” tend to be used interchangeably. Yet, the distinction is critical: because transition happens at the top, it does not reach deep into the soil of the new society where the commitment to democratic values actually takes root.

One of the most important opportunities for promoting the transformation of the culture is in the new government's response to past abuses – the gross violations of human rights that were committed by the predecessor (and sometimes by the current) regime. This response has the potential to inculcate the values of the new government in the society at large because it has a far greater hold on the public's attention than most other aspects of the transition. Unlike an election or an inauguration, the government's response to past abuse is not a transitional moment, but can last over an extended pe-

riod of time and can therefore seep into the public consciousness and even evolve dialectically. Whereas a new constitution or a set of laws can codify new values, a tribunal comprises individuals who can articulate and even embody those values. By engaging in a dialogue with the public, the institutional actors can promote the values of the new government. This institutional response is often the earliest and most visible manifestation of the deepest values of the new order.² As such, it can begin the transformation of the society at large. The new government's choice of institutional mechanisms to deal with past abuses is therefore critical.

Since the second world war, the dominant paradigm for dealing with past abuses has been the Nuremberg trials.³ The emergence of

² In South Africa, the Truth and Reconciliation Commission was viewed as having the potential to "meaningfully contribute to establishing a new moral order that is required to underpin a human rights culture in South Africa." George Devenish, *Constitutional and Political Developments*, in 6 SOUTH AFRICAN HUMAN RIGHTS YEARBOOK 1995 (Centre for Socio-Legal Studies) 42. *See also* Dullah Omar's introduction of the TRC Act in Parliament, noting that "it was necessary...to deal with South Africa's past, including the question of amnesty, on a morally acceptable basis." Quoted in Alex Boraine, *A COUNTRY UNMASKED* (Oxford U. Press 2000) 68; *and see* Antjie Krog, *COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA* (Times Books 1998) 24-25, (quoting the Reverend Frank Chikane as saying that "The Truth Commission should bring a new morality to this country ... People demanding punitive justice are ignoring the greater justice a new morality could bring – a shared morality, freed from colonialism, oppression, and greed.").

³ "The paradigm of justice established at Nuremberg and its vocabulary of international law, despite its shortcomings, continue to frame the successor justice debate." Ruti Teitel, *TRANSITIONAL JUSTICE* (Oxford U. Press 2001) at 33, *see generally* 31-39. *See also* Richard J. Goldstone, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 75 (noting that the Nuremberg trials "ushered in a completely new era in international law."). As a result, "Nuremberg" has become the shorthand term for reliance on criminal prosecution as a primary mechanism for dealing with those responsible for wrongs committed during a prior dispensation. Although the Nuremberg trials were conducted internationally, the term is equally applied to *intranational* situations. *See e.g.* David Dyzenhaus, *TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* 2 (Juta & Co. 1998): "Since the handover of power was negotiated, it was not considered a realistic option to have Nuremberg-type criminal trials where perpetrators, or at least the main per-

the principle of universal jurisdiction for crimes against humanity⁴ as well as the international criminal tribunals for Yugoslavia and Rwanda and the incipient International Criminal Court have reinforced the view that the primary route to transitional justice is through criminal prosecution.⁵ Further underscoring the value of this approach are the perceived failures of its presumed alternative, namely amnesty, as has been tried in parts of Latin America and elsewhere.⁶ Thus, “in the contemporary debates over transitional justice, the issue is often framed as ‘punishment versus amnesty.’”⁷

In recent years, however, a third course has emerged as a normatively appealing and pragmatically sound response to the problem of predecessor abuses. By most accounts, the most successful of these efforts is South Africa’s Truth and Reconciliation Commission (TRC). Because truth commissions eschew both criminal prosecution

petrators, of human rights abuses would be punished for their crimes.”

⁴ For instance, Belgium has tried people accused of participating in the Rwandan genocide for crimes against humanity. *Rwandan Nuns on Trial for Genocide*, CAPE TIMES, April 18, 2001 at 4 (noting that “Belgium’s eagerness to stage the £1.4 million trial reflects its failure to prevent the genocide in its former colony”). See also N.Y. TIMES, June 22, 2001 (noting that United States courts are increasingly taking jurisdiction over cases involving overseas crimes of state).

⁵ Pressure has been mounting to establish either domestic or international (or both types of) tribunals to try war crimes in East Timor, Cambodia, and elsewhere. Cambodia has enacted a bill (undergoing technical revisions in mid-2001) to enact a war crimes tribunal to try members of the Khmer Rouge for the 1975 - 1979 genocide in which 1.7 million are estimated to have died. For information on the Cambodia efforts, substantially sponsored by members of the United States Congress, see Yale University, *Cambodia Genocide Program*, available at <<http://www.yale.edu/cgp/>>.

⁶ See Tina Rosenberg, *Foreword*, in Martin Meredith, *COMING TO TERMS: SOUTH AFRICA’S SEARCH FOR TRUTH* (Public Affairs 1999). For a useful survey of both of these approaches, see e.g. A. James McAdams, *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* (Notre Dame 1997). See also Teitel, *supra* n. 3, and Martha Minow, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (Beacon Press 1998); Neil J. Kritz (ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: United States Institute of Peace Press, 1995) (3 volumes).

⁷ Teitel, *supra* note 3, at 72.

on the one hand and blanket amnesty on the other, they are often referred to as a “middle path” or “third course” or “golden mean.”

While there have been truth commissions in the past, none has been as successful or has garnered as much international attention as South Africa’s. This article posits that the key to the TRC’s success lies in its responsiveness to what can be called South Africa’s “social geography”⁸ – that is, the TRC was carefully designed to attend to the particular ills that characterized South Africa at the end of the apartheid era.

This contextuality creates a bit of a paradox, as evidenced by the international praises garnered by the TRC. The TRC was so successful that countries around the world want to copy it.⁹ But if its success lies in its particularity, then how can it be copied? This paradox makes it important to carefully identify what lessons should be learned from the TRC. The TRC’s success does not demonstrate that TRC clones are the panacea to the world’s transitional ills. Rather, it demonstrates that contextuality itself is critical. Each country’s transitional path consists of a unique constellation of social, historical, political, economic, ethnic, racial, religious, military, and other factors; these factors distinguish each transition from the others; and it is these differences in transitions that compel different institutional responses to past wrongs. What works in one place will not necessarily work in another.

This contextuality is critical to the transformational project.

⁸ The term is from Mark Drumbl, *Punishment, Postgenocide: From Guilt To Shame To Civis In Rwanda*, 75 N.Y.U.L. REV. 1221 (2000).

⁹ Priscilla Hayner, *Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide*, in LOOKING BACK, REACHING FORWARD 32, *supra* note 1. See also Comments of Yasmin Sooka, *Report on Khulumani Reparations Indaba* (April 25 and 26, 2001) (Compiled by Shirley Gunn) (on file with author). By this I do not mean to suggest that the TRC was absolutely successful, by any measure. Its most significant failure is its failure to secure reparations for its designated victims, especially given that many perpetrators of politically motivated violence have already been granted amnesty. See *infra* at Part III (A). Nonetheless, the international response to the TRC suggests that it, more than any other recent experiment in transitional justice, is the beacon to which other emerging nations are looking.

Only institutional mechanisms that are tailored to the specific attributes of the local society at the time of transition can hope to deal with the problems that characterized the society's dysfunction. Prosecution and amnesty may not even achieve the transitional goals attributed to them in many instances, let alone the transformational goals required by a new democratic regime. Thus, the middle path is appealing not just because it may be more pragmatic, but because it presents the opportunity of transforming the culture by tailoring the institutional response to past oppression to the needs of the particular society at a particular time. This requires transitional governments to study closely the nature of the ills from which they are emerging, in order to fashion an institution that is responsive to those ills.

In part one of this article, I elaborate on the difference between transitional and transformative justice and explain the importance of the transformational dimension of justice with particular attention to the role of reconciliation. In part two, I focus on the transformative opportunities of the new government's response to past abuse. It is here that the new government has the greatest prospect for promoting its transformative agenda. I therefore argue that the classic dualism of prosecution and amnesty are inadequate because they can not promote societal transformation. Rather, as part three explains, only institutions that are tailored to the particularities of time and place of the society in which they operate can hope to transform those societies. South Africa's Truth and Reconciliation Commission is an example of an institution whose success lay in its ability to promote the transformation of the South African polity because it was responsive to the nature of apartheid. At the end of part three, I contrast the TRC with an experiment that Rwanda is developing as a response to the genocide of 1994. This experiment, called the gacaca courts, is tailored to the particular nature of the Rwandan genocide and its aftermath.¹⁰ While gacaca raises many serious questions (primarily concerning the deficiencies in due process), the idea of gacaca is appealing because it may promote the transformation of Rwandan society more than any feasible alternative. Part three, therefore, fo-

¹⁰ Gacaca is pronounced ga-TCHA-tcha.

cuses on these two institutional responses from the perspective of transformative justice. Because the TRC and the gacaca courts are distinguishable in every meaningful respect, they illustrate, when considered together, the broad and creative possibilities of the middle path. I conclude that the TRC should not be taken as a panacea for all transitional ills, any more than the Nuremberg model should. Each country needs to develop a response to past abuses that permits the transformation of its own society in order to promote the reconstructive interests of reconciliation and, ultimately, deterrence.

I. THE TRANSFORMATIVE DIMENSION OF JUSTICE

A. *The many faces of injustice*

For two basic reasons, the standard form of retributive justice seems ill-suited to societies in transition attempting to deal with the wrongs of a previous regime.¹¹ First, the nature of injustice in these contexts is not necessarily conducive to correction by retribution or punishment. Second, the need for justice may be felt throughout the society at large, and not just in the isolated and individuated arenas that are the locus of retributive justice. Transformative justice offers a broader palliative that may be better suited to the needs of societies in transition.

Countries emerging from oppressive and unjust regimes confront a daunting variety of complex and profound problems. Injustice in these societies may have many different faces: it may be seen in the deep rifts between people in different socio-economic classes or in rank racial or religious division; it may manifest itself in the lack of information about the past regime; it may be felt in the instability of the economy, or in the lack of adequate housing, health care, education, and other basic needs; it may be noticed when known wrongdoers stay in power or office or receive perquisites. In Rwanda, the genocide of 1994 left millions of people homeless and traumatized, and in desperate need of all manner of social services; in South Af-

¹¹ Retributive justice is analyzed further below in the context of institutions that pursue retributive justice.

rica, apartheid was marked by the deliberate economic and civic repression of millions of blacks. In the former Yugoslavia, war left entire cities in tatters and in desperate need of repair. The number of homeless refugees in Afghanistan, East Timor, and Sierra Leone climbs daily. The list goes on.

All of these are forms of injustice that the new regime must address. Thus, in transitional societies, the scales of justice may lack equilibrium for a range of reasons, in a range of combinations and intensities. What counts as justice, then, must entail the correction of these various forms of wrongs.¹² Depending on the nature of the injustice(s) in the particular society at the moment of transition, different kinds of justice are needed to redress the balance. For instance, if the predominant feature of the society is the social cleft, then reconciliation may be the primary goal of the transitional government; if it is sheer turbulence, then the transitional government should focus on stability since no society can survive prolonged periods of social upheaval.¹³ If the principal problem is simply dire poverty, then justice must have a central economic component.

In addition to the different forms of injustice, there is a question

¹² Thus, I disagree with those who would argue that certain universal values must always be accommodated. See, e.g., Juan Mendez, *In Defense of Transitional Justice*, in McAdams, TRANSITIONAL JUSTICE AND THE RULE OF LAW, *supra* note 6, arguing that the successor regimes owe four duties to the polity: 1) to do justice (in the retributive justice sense), 2) to grant victims the right to the truth, 3) to grant reparations to victims, and 4) to ensure that perpetrators in the security forces should not continue in their positions under the new regime. While I agree that these may all be important, I believe that their relative value in any society may vary so widely that their enumeration does little to answer the question of what the successor regime's priorities should be. In addition, the society may have other needs (e.g. reconciliation or socio-economic equality or other rights) that may make stronger claims at the moment of transition. Thus, I do not believe it is useful to insist on abstract truths, except that each society's response should be formed by that society's needs during its transition.

¹³ Hence, self-styled governments of "national unity" as existed in South Africa and now exist in Rwanda and East Timor, are temporary creatures, usually ending with the first democratic transfer of power. The Rwandan government's extension of its "government of national unity" beyond its initial mandate evidences the delayed return to normality.

of the level at which injustice occurred and must be redressed. Countries embarking on transitions usually start by drafting constitutions, trying to stabilize their economies and adopting other policies aimed at showing to the domestic and international public that they are committed to the rule of law. But, as has increasingly frequently been noted, everyday people were also involved in and to some extent responsible for the oppression.

Public participation in oppressive governmental regimes ranges dramatically from one place and time to another. In some instances, the majority of the participatory population benefits rather passively, by simply enjoying the spoils of privilege. Thus, for instance, most white South Africans lived very comfortable lives thanks to the oppressive apartheid regime whether or not they actively supported it.¹⁴ In other cases, members of the public might benefit slightly more directly, as did, for instance, white Californians during World War II who bought land and household items at bargain prices from their neighbors of Japanese descent who were suddenly forced to evacuate.¹⁵ Further along the continuum are those who choose the oppressive policies by voting for it, as did Serbian voters who repeatedly elected Slobodan Milosevic to lead them into war.¹⁶ Some forms of oppression involve a wide swath of the population more generally, either wittingly (as in the case of the Stasi spies and informers¹⁷) or

¹⁴ Most whites were implicated in the crime of apartheid by passively enjoying the exclusive use of 87% of the land in South Africa, (Heinz Klug, *CONSTITUTING DEMOCRACY: LAW GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (Cambridge 2000) at 128), and a monopoly on non-menial skills, etc. (David Dyzenhaus, *supra* note 3, at 9). Many Tutsi in Rwanda may also have been in this position. *See also* Desmond Tutu, *NO FUTURE WITHOUT FORGIVENESS* (Image 1999) at 217-244 (discussing collusion of white population in apartheid).

¹⁵ *See Korematsu v. US*, 323 U.S. 214 (1944) (Jackson J. dissenting).

¹⁶ *See generally*, Misha Glenny, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (Penguin 1992) for an excellent account of the early years of the Balkan War and of the rise of Slobodan Milosevic.

¹⁷ *See* Rosenberg, *Foreword* in *COMING TO TERMS*, *supra* note 6; *and see generally* Rosenberg, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* (Vintage 1996).

perhaps unwittingly (as in the case of perhaps well-intentioned parents whose adoption of Australian aboriginal children contributed to the eradication of aboriginal culture¹⁸). Ultimately, there are those who actively participate in the oppression such as, perhaps most gruesomely, the hundreds of thousands of Rwandans who massacred their neighbors in 1994.¹⁹ Whatever the role of the public in these particular situations, it can fairly be said that in each instance, the dominant *culture* was one of violence, prejudice, or injustice. Countries seeking to transition out of these situations may therefore not be satisfied with just changing the rules that govern the governors; they must also change the culture that permeates the society. Justice must have a transformative dimension, so that the people themselves will never allow either their governors or themselves to backslide.²⁰

Transformative justice requires metamorphosis at all levels of

¹⁸ See generally BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Human Rights And Equal Opportunity Council, Australia 1997). See also Coral Edwards & Peter Read, eds, THE LOST CHILDREN (Doubleday 1997). The same could be said of white American couples who adopted Native American children, although the United States has not embarked on any systematic effort to understand this phenomenon comparable to Australia's Stolen Children report.

¹⁹ Alison Des Forges, LEAVE NONE TO TELL THE STORY (Human Rights Watch 1999) at 2.

²⁰ The bridge metaphor that has gained currency in the South African transitional culture suggests the distinction between transition and transformation. See e.g. INTERIM CONSTITUTION, *Postamble* (Act 200 of 1993). People walking across a bridge may move from one place to another, but they are the same people when they get to the other side. The bridge has moved them, but has not changed them. A transformative experience, by contrast, changes people in the process of moving them. "[T]he problem [of transitional justice] is not simply one of correcting previous unjust distributions, transactions and crimes, but of doing so in a way that promotes the transformation of the society into a society that consistently provides justice along all three fronts into the future." Christopher J. Roederer, 'Living Well is the Best Revenge' – *If One Can: An Invitation to the Creation of Justice Off the Beaten Path*, 15 S.A. J. Hum. Rts 75, 79 (1999). See also Willie Esterhuyse, *Truth as a Trigger for Transformation: From Apartheid Injustice to Transformational Justice*, in LOOKING BACK, REACHING FORWARD, *supra* note 1, at 146-154.

society. Victims become survivors; perpetrators become good neighbors; powerful people learn to wield their authority responsibly or become less powerful. Part of the process of transformation, therefore, entails inculcating new values in the society. In a transformed society, the people will not only have democratic elections or a constitution, they will actually believe in democracy, human rights, and the principles of constitutionalism. Institutions that are part of transitional justice must then do more than restore or even advance; they must actually foster change in the society, leaving it qualitatively different than it was when they found it. In South Africa, as Johnny de Lange has explained,

The government has called for a comprehensive and integrated approach to deal with the legacy of the past. This approach is best captured in the strategic objective – during this transitional period – that amounts to the social transformation of our society into a united, democratic and prosperous society. Transformation is seen as a holistic project to change the attitudes, consciousness and material conditions of our people, and in a meaningful way to reflect the values that we struggled for and are now embodied in our constitution and in the human rights culture we strive for.²¹

²¹ Johnny De Lange, *The Historical Context, Legal Origins and Philosophical Foundations of the South African Truth and Reconciliation Commission*, in LOOKING BACK, REACHING FORWARD, *supra* note 1, at 16-17. He continues:

“The main content of this programme is the transformation of the political, economic, social, ideological and moral aspects of the apartheid dispensation. This is achieved by building a single nation that acknowledges the diversity of its people; instilling a new sense of patriotism; healing the wounds of a shameful past; liberating black people from political and economic bondage; eradicating gender inequalities and women’s oppression in particular; improving the equality of life for all through the eradication of poverty and the attainment of the basic needs of the majority; and creating a culture of democracy and human rights. [¶] Flowing from the above, three elements of this programme, namely reconciliation, reconstruction and development, have been identified as forming the kernel of our social transformation project during the transition.”

He further explains that “the twin goals of economic justice (economic reconstruction) and the restoration of moral order in our country (moral reconstruction)

The Truth and Reconciliation Commission, then, emerged as the principal institutional mechanism “to deal with the past without dwelling on it and to establish the moral foundation from which to build a truly new South Africa.”²² Likewise, some aspects of Rwanda’s reconstruction program have the *potential* to promote societal transformation, although they may in reality fall considerably short of this ideal.

B. The goals of transformative justice: reconciliation and deterrence

Countries emerging from oppression are, by definition, deeply divided and wounded societies. Thus, the two principal goals of transformative justice are the related aims of reconciliation and deterrence. In general, reconciliation may be taken to mean that people learn to live with one another and deterrence means that they continue to do so in the future. Together, they represent the transformation that is necessary if countries are to transition from oppression to peace and stability.

Most nations attempting this transition put reconciliation at the top or near the top of their agenda: it is not only a desirable outcome, but often it is presented “the *primary* desirable outcome” of the transition.²³ This is especially true since South Africa has highlighted the theme of reconciliation in its program. Thus, even nations that instinctively embrace retribution eventually begin talking of reconciliation, either because they truly believe in it or because they truly believe that reconciliation has cash value insofar as donor nations in-

have crystallized as the two issues that have to be vigorously pursued to achieve social justice as a means of dealing with South Africa’s legacy of its power.” *Id.*

²² Johnny De Lange, *LOOKING BACK, REACHING FORWARD*, *supra* note 21 at 16-17.

²³ Jennifer Balint, *Law’s Constitutive Possibilities: Reconstruction and Reconciliation in the Wake of Genocide and State Crime*, in *LETHE’S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION* (Emilios Christodoloudidis and Scott Veitch, eds., Hart Publishing 2001) at 130. For instance, the 1994 Lusaka Accords that were meant to end hostilities in Angola created a Government of Unity and National Reconciliation. *See* Press Statement by Secretary of State Albright, April 11, 1997 at <<http://secretary.state.gov/www/briefings/statements-/970411.html>>.

sist on a conciliatory component of the transitional agenda. (With respect to Rwanda in particular, serious doubt has been expressed as to the genuineness of the government's commitment to reconciliation. In Jennifer Balint's view, "While official rhetoric supporting societal reconciliation can be heard in Rwanda, there are few officially supported or endorsed attempts on the ground to achieve this reconciliation."²⁴)

While the word itself is seen on every transitional government's "to do" list, its precise meaning is unclear. There is no consensus as to what reconciliation entails in general or in any particular set of circumstances, and most uses do not identify the meaning that they assume. This is a critical problem in transitional justice. Understanding what we mean by reconciliation is necessary both to identify the goals of these transitions and to recognize whether or when the goals have been achieved. In South Africa, for instance, where it can safely be said that the heart of the transitional period is over, there is a perception that reconciliation has not been achieved. But it is not at all clear that it would be recognized if it were there.

The Truth and Reconciliation Commission Report, which one would expect to provide a thoughtful elucidation of the term, disappoints: it offers instead a catalogue of examples of heartwarming moments in the life of the Commission without explaining how these exemplified the concept of reconciliation. The examples fall into three general categories. First, are the situations in which one could say that "human dignity" was "restored" in the sense that the fact of testifying or the existence of the Commission itself created the space in which catharsis or release was possible for an individual. Second, are the situations in which the victim and perpetrator of a gross violation of human rights come together and either verbally or otherwise, redefine their relationship in a way that is viewed by the TRC as positive. These often entail some form of forgiveness, acknowledgement, or coming to terms on the part of the parties. Finally, in a rather under-explored way, the TRC linked reconciliation to democracy-building. As the report explains, "Reconciliation requires that

²⁴ Jennifer Balint, *Law's Constitutive Possibilities*, *supra* note 23, at 141.

all South Africans accept moral and political responsibility for nurturing a culture of human rights and democracy within which and socio-economic conflicts are addressed both seriously and in a non-violent manner. Reconciliation requires a commitment, especially by those who have benefited and continue to benefit from past discrimination, to the transformation of unjust inequalities and dehumanising poverty.”²⁵ Thus, in the TRC’s understanding, reconciliation, though individually experienced, has national ramifications.

Others have tried to offer more precise definitions or at least to shed some light on aspects of reconciliation. Many of these conceptualizations involve change. A member of South Africa’s Human Rights Commission put it this way: reconciliation, says Pansy Tlakula, is “a turbulent process” in that it “takes people out of their comfort zone.”²⁶ In other words, it requires both sides to view their actions not from the safety of their own familiar world view, but from the outside, from the other side’s perspective. This journey entails some gain (a broader understanding of the events) and, inevitably, some loss -- loss of confidence in the justness of one’s actions, loss of invulnerability from criticism and judgment, perhaps material loss. At every level of society, from the individual to the institutional, this turbulent process is equally difficult in that, like any journey, it forces a departure from the status quo.²⁷ Bert van Roermund empha-

²⁵ TRC REPORT vol. 5 ¶¶ 151-152. The TRC Report can be found at <<http://www.truth.org.za>> and, at least at the time of this writing, in searchable format at <<http://www.struth.org.za>>.

²⁶ Speaking at “Genocide and the Rwandan Experience: A Rwanda-South Africa Dialogue,” sponsored by the Institute for Justice and Reconciliation on February 5-7, 2001 at Cape Town (materials on file with author). Mark Drumbl provides an alternative metaphor: “Individuals must peel off the layers of their own prejudice and involvement.” Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 PUNISHMENT & SOC’Y 288, 295 (2000).

²⁷ The structure of reconciliation in the South African context made this loss-and-gain aspect explicit. In the TRC, reconciliation entailed a bargain: truth for amnesty. Perpetrators lost anonymity but gained amnesty; victims and survivors lost the right to sue or prosecute but gained truth. This bargain was also perhaps meant to embody the reconciliation itself, by evidencing the ability of people on both sides of the apartheid divide to do business, and hence to live, with each other

sizes that reconciliation entails a change in the victim in particular: the victim must come to recognize that “what the oppressors did ... belongs to the evil humans do to each other, and not to a mythic evil that intrudes on the world of humans from the outside;” that is, the victim must “acknowledge[] being a sinner.”²⁸ Presumably this acknowledgement removes the instinct for retribution or vengeance. Conversely, reconciliation may entail the victim’s acknowledgement that there is good in the perpetrator.²⁹

Moving away from this theological and philosophical dimension of reconciliation, van Roermund offers what may be the most pragmatic explanation of reconciliation: “to defer the right to retribution to the extent that retribution would obstruct peace.”³⁰ This is useful although (or perhaps because) it is both abstract and minimal. It does not suggest national hugs, or tears, or even catharsis. It simply suggests that the victim (who, in van Roermund’s view is in charge of reconciliation³¹), recognizes peace as more valuable than

in post-apartheid South Africa. For an elaboration of the “bargain” nature of amnesty under the TRC, see Kader Asmal, *The Second Annual Grotius Lecture: * International Law and Practice: Dealing With the Past in the South African Experience*, 15 Am. U. Int’l L. Rev. 1211, 1226 (2000) (“This incentive scheme - a give and take arrangement [is], useful for a society aimed at reconciliation.”).

²⁸ Bert Van Roermund, *Rubbing Off and Rubbing On: The Grammar of Reconciliation* in LETHE’S LAW, *supra* note 23, at 182-83.

²⁹ Cynthia Ngwenu, the mother of a boy who was shot by the Apartheid police, expressed this thought:

“We do not want to see people suffer in the same way that we did suffer, and we did not want our families to have suffered. We do not want to return the suffering that was imposed upon us. So, I do not agree with that view at all. We would like to see peace in this country. I think that all South Africans should be committed to the idea of re-accepting these people back into the community. We do not want to return the evil that perpetrators committed to the nation. We want to demonstrate humaneness towards them, so that they in turn may restore their own humanity.”

TRC REPORT Vol. 5 ch. 9 ¶33.

³⁰ Van Roermund, *Rubbing Off and Rubbing On*, *supra* note 28 at 180.

³¹ “The peace envisioned is not a compromise because it is the oppressed who determine what could be obstructive for what they conceive of as a worthy peace in their future society.” *Id.* at 181.

retribution. What is achieved, then, may be described as “civil peace”³² or “social harmony”³³ or “*reconvivencia* – a period of getting used to living with each other again.”³⁴

Whether reconciliation entails a change of heart or a pragmatic commitment to moving on, it involves some measure of change or transformation, whether in the oppressed, the oppressor, or both. Once achieved, the conciliatory transformation is the precondition for civil peace and stability.³⁵

Whether any core meaning emerges when one considers these and other understandings of reconciliation is open to debate. There are, however, some themes that reappear throughout the discussions of reconciliation. It is clear, first of all, that reconciliation may operate on multiple levels. On an individual level, reconciliation may occur by oneself or with one or more individuals. A person may, on her own, “reconcile” herself to something that has happened. This involves little gain, but the opportunity to move forward which may have eluded the person until the moment of reconciliation. It is a self-affirming event. In other instances, reconciliation may produce affirmation from others, such as when victim and perpetrator come

³² *Id.*, at *passim*.

³³ Jennifer Balint, *Law's Constitutive Possibilities*, *supra* note 23, at 142.

³⁴ Charles Villa-Vicencio, *On the Limitations of Academic History*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA (Wilmot James and Linda van de Vijver eds. 2000) at 27, invoking a word that has gained currency in Chile.

³⁵ Another view of reconciliation takes a page from the theory of restorative justice. Here, reconciliation can be thought of “as meaning at its core the restoration of relationships, the rebuilding of trust, and the overcoming of animosity.” Jennifer Balint, *Law's Constitutive Possibilities*, *supra* note 23, at 144, *paraphrasing* P. Gobodo-Madikizela, *Truth and Reconciliation, Public Discussion: Transforming Society Through Reconciliation: Myth or Reality?*. This is useful only to the extent that relationships had previously been healthy and that trust and friendship had previously existed. This was probably not ever true, on a societal level, in South Africa where whites have oppressed blacks since Jan van Riebeck set down roots in Cape Town in 1652. In Rwanda, it is a point of debate whether relations between Hutu and Tutsi were ever friendly and, if so, how far back one has to go to find trust and friendship. In any event, even this return to the status quo ante is itself a change from the immediately preceding condition of strife.

together to reach a common understanding of the event for which reconciliation is sought or when a public institution acknowledges the victim's pain.³⁶

The gacaca courts in Rwanda may offer the possibility of reconciliation on a communal level, where communities come together to make sense of the past. Rwanda may also be providing additional examples: the United Nation's Special Representative reported on one organization called the Women's Consultative Committee. "Sixty per cent of its 2,055 members are widows of genocide victims. The rest are married to suspected killers, who are now in prison. Yet both groups till the fields together, prepare food for the wives to take to the husbands in jail, and stood together for election during the March local elections."³⁷ The TRC provides other examples of this where reconciliation – through gatherings and meetings – took place in various communities around South Africa often at the behest of the TRC. One example is the lengthy mediation process between Brian Mitchell (who was responsible for the deaths of 11 members of the Trust Feed Community, for which he served 5 years in prison before getting amnesty) and the community he had terrorized.³⁸

Reconciliation may occur at an institutional level as well. In June 2001, the health sciences faculty of the University of Cape Town launched a six-month "reconciliation programme" that "will involve introspection, examination of acts of discrimination or oppression against black students, and a look at acts of resistance to legalized discrimination during the university's long history."³⁹ Other institutions that may be in the throes of reconciliation are the now-

³⁶ See *infra* on the TRC's understanding of the importance of restoring personal dignity.

³⁷ Michel Moussalli, REPORT OF THE SPECIAL REPRESENTATIVE OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS ON THE SITUATION OF HUMAN RIGHTS IN RWANDA, 4 August 2000 (Hereinafter Moussalli 2000) at ¶ 197 available at www.unhcr.ch. Moussalli concludes that "Reconciliation of this kind is a lesson for the whole world. It belies the image of Rwanda as a country riven by ethnic hatred." *Id.*

³⁸ TRC REPORT, Vol. 5 ch. 9 ¶¶70-82.

³⁹ Vanessa Johnstone, *UCT apologises for role in Biko's death: Department begins reconciliation process*, CAPE ARGUS 11 (June 6, 2001).

integrated South African Defense Force and the South African police, both of which previously had a long and ample record of gross violations of human rights against South African blacks.⁴⁰ In Rwanda, likewise, institutions that have previously been bastions of Tutsi elitism might benefit from ethnic integration.

Ultimately, there is the possibility of national reconciliation. This is the most amorphous level: while one can measure the reconciliatory efforts of individuals and communities and institutions, it is very difficult to measure the extent to which constituencies at the national level have become reconciled. Nonetheless, this may be what is involved in Australia's efforts to acknowledge the wrongs perpetrated against aboriginals.⁴¹ It is what is meant by Desmond Tutu's reference to democracy-building.⁴²

One other aspect of reconciliation that can be gleaned by these varied efforts to define it is that reconciliation, in the context of transitional justice, is likely to be a two-step process. The first step may be finite and may be achieved by an organ of the transitional gov-

⁴⁰ During a TRC hearing, Ronnie Kasrils spoke of the appeal he had made to the soldiers who had fired on marchers at Bisho:

"I would like to say a few words about the Ciskeian soldiers who opened fire on the march. An irony of this rainbow nation of ours, as you've coined it Archbishop, is that, with all the strange things happening, Raymond Mhlaba is now here at Bisho where Oupa Gqozo used to lord it. Here I am, a Deputy Minister of Defence in this democratic government, and I have a responsibility to the soldiers of this country including [these] and to the members of former SADF who trained and commanded them. We are creating a new defence force of seven former antagonistic forces, and we can only do this on the basis of reconciliation, which is vital to the well-being of our society and our future."

⁴¹ See *BRINGING THEM HOME*, *supra* note 18. Australians also commemorated the oppression of aboriginals on Reconciliation Day in March 2000, when thousands of Australians marched across the Sydney Harbour Bridge. See also *Mabo v. Queensland and others (No. 2)* (1992) 175 CLR 1 (recognizing for the first time in Australian judicial history that Australia was not "terra nullius" when the whites came to it in the 18th century).

⁴² Certainly the euphoria that accompanied the election of Nelson Mandela as President in 1994 is an aspect of reconciliation. The challenge, however, is to maintain that commitment to the "rainbow nation" in the long term.

ernment such as the TRC or some other institution. Thus, it can be said that “the power of the Commission is really to define the terms, to set the terms of a social debate.”⁴³ In Jennifer Balint’s terms, this constitutes creating the “public space” in which reconstruction can happen; for instance, she says that the “very presence” of the TRC “provides a tangible set of reference points to which people were and are forced to respond.”⁴⁴ Viewed in this way, the transitional institution can become foundational by laying the groundwork for the reconciliation or creating the preconditions upon which it can take place. The second step, which is where most of the actual work of reconciliation takes place, is open-ended and can only be done by civil society and government, but can not be accomplished by the transitional institution itself. Indeed, as Francois du Bois argues, “Truly to entrust reconciliation to an unelected body such as the TRC would amount to handing over the reins of government, thereby defeating the very process of democratisation it is supposed to accompany.... National reconciliation is the stuff of government, not of appointed commissions.”⁴⁵ The transitional organ of government can do nothing more than start the process. It then leaves it to the rest of society to do the hard work of reconciling.⁴⁶

Whether or not the transformative institution is successful, then, should be measured not by whether reconciliation has in fact occurred but by the extent to which the institution has laid the ground-

⁴³ Mahmood Mamdani, *Truth and Reconciliation Commission Public Discussion: Transforming Society Through Reconciliation: Myth or Reality?*, cited in Balint, *Law’s Constitutive Possibilities*, in LETHE’S LAW, *supra* note 23, at 143.

⁴⁴ Jennifer Balint, *Law’s Constitutive Possibilities*, in LETHE’S LAW, *supra* note 23, at 143.

⁴⁵ Francois du Bois: “*Nothing but the Truth*”: *The South African Alternative to Corrective Justice in Transitions to Democracy*, in LETHE’S LAW, *supra* note 23, at 111.

⁴⁶ Thus, Archbishop Tutu’s statement in his Foreword to the TRC Report – “I commend this Report to you” seems particularly apt. He does not identify “you” implying that everyone who reads the report has the responsibility to follow up on it. In Rwanda, where the government has established a National Unity and Reconciliation Commission, the first step itself may be more open-ended. Nonetheless, its charge remains to create the public space in which reconciliation can take place.

work or established the preconditions by which reconciliation might occur. In other words, are the “points of reference” identified by the institution useful to people? Did it provide people with the tools – the attitudes, the vocabulary, the will – to use these points of reference to promote the new values? Are they consistent with what is both desirable and feasible in the new society? In the case of the TRC, the question is whether civil society follows up on the TRC’s programme by developing its own conciliatory programmes. The University of Cape Town’s programme is one of many examples of this. This programme was launched as a direct response to the TRC, which was perceived as having begun a process that civil society was meant to pursue. As Professor Njabulo Ndebele, who announced the programme, said, “The TRC hearings were not an event, but a process that will continue in the future just as apartheid was a process.”⁴⁷ The success of the TRC can be judged by the extent to which efforts like these are incorporated into the fabric of post-apartheid life in South Africa. In the case of the Rwandan *gacaca* courts, for instance, the test will be not just how well the courts themselves function but also how well the communities function outside the courts and after they are disbanded.

Given these themes, it is important to remember that reconciliation itself may have a contextual nature – that is, what counts as reconciliation in one society may be different from what is required in another situation. In South Africa, whites have been asked to live side-by-side with blacks and to participate in the new democracy with them and, for the most part, they have done so, with little racial violence.⁴⁸ Reconciliation involves transcending their psychic comfort zones by reexamining their beliefs about race and their relationships to their fellow South Africans. This is not too much to ask

⁴⁷ See *supra* at note 39. Interestingly, the launch of the programme was coupled with an apology for the role that UCT graduates had played in the death of student-activist Steven Biko and others. The TRC had identified graduates of the Health Sciences department who had issued false death certificates to cover up the actual causes of detainees’ deaths. “The complicity was an open secret,” said Professor Ndebele.

⁴⁸ Or, they have taken their capital and left the continent.

given that most South African whites live in material comfort. At this stage in Rwanda, however, when the reconcilers are the very people who participated in, witnessed, and survived the genocide and where more than 70% of Rwandans live below the poverty line,⁴⁹ it may be possible to ask people to live with one another, but it may not be feasible to expect more, at least not of this generation. People have been so traumatized by the genocide that they may have only the thinnest comfort zone, if any at all. Nor would it necessarily be healthy for individuals, communities or the society generally to disturb any comfort Rwandans have managed to regain in the years since the genocide. In Rwanda, therefore, this thin or weak version of reconciliation may be the only feasible goal.⁵⁰

If the meaning of reconciliation varies from one situation to another, so must the route that must be taken to achieve it. In South Africa, for instance, reconciliation was perceived as largely an interpersonal phenomenon, manifested by instances of victim forgiveness and perpetrator repentance. It was widely assumed that truth was a necessary precondition for this form of reconciliation; thus, the TRC's motto was "Reconciliation through Truth."⁵¹ If, however, reconciliation is reformulated to mean something else – simply forbearance, perhaps, or self-reconciliation – then it is not obvious that truth would be relevant to achieving that goal. Perhaps intensive individual therapy, rather than public vindication, would be more conducive to permitting people to move on with their lives. Another way of approaching the question is to ascertain what obstacles stand in the way of reconciliation in the current social climate. If the principal obstacles to reconciliation are viewed as lack of information about the other's motives and views (or, as in East Germany, lack of

⁴⁹ International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events – Special Report (7 July 2000) (hereinafter OAU) at ¶17.4 (*available at* <<http://www.oau.org>>).

⁵⁰ Another consideration is the question of "opting out." In South Africa, it is reported that many whites were not involved in the reconciliation process. Rwandans, almost all of whom were deeply affected by the genocide, may not have that option.

⁵¹ du Bois, *Nothing but the Truth*, in LETHE'S LAW, *supra* note 45.

information about who “the other” is), then revealing the truth would assist in overcoming that. If the principal obstacles are understood to be material, for instance, then a program of reparations or wealth creation and redistribution might be more productive than a program aimed at talking and catharsis. Alternatively, reconciliation might comprise an international component, as for instance in the Congo, where no fewer than 6 neighboring nations are waging war against the Congolese population.⁵² Given the transformative institution’s role in promoting reconciliation, it is critical that it understands what reconciliation means for that particular society at that particular time. It is therefore necessary that the institution be deeply rooted in the culture it seeks to transform – an institution that is not tailored to or “of” the culture will not be as successful in speaking to it or understanding its needs, promoting reconciliation, and transforming it.

While the goals of reconciliation may be amorphous and elusive, the goal of deterrence is much more straightforward: ensuring that the injustices of the past are not repeated. Again, transformative justice is necessary to achieve this goal because it entails changing the culture that tolerated or pursued the prior injustices. If the culture remains fundamentally violent, or racist, or nationalistic, or in whatever way retains the impulses that prompted the violence in the first place, then, absent societal transformation, there can be no guarantee that violence will not reassert itself. The prosecutorial response to successor justice raises this concern vividly. In Rwanda, for instance, the prosecution of Ferdinand Nahimana for promoting the propaganda that incited Rwandans to kill each other removes the threat of recurrence only at a superficial level⁵³: it makes it impossible for that person to incite people again. But it does not preclude another from doing substantially the same thing. Only when Rwandan society is sufficiently transformed that it resists the homicidal urgings of a leader or resists the leadership of a killer, can it be said that genocide is truly unlikely to recur. The same could be said of the arrest of Ser-

⁵² CAPE TIMES, July 1, 2001.

⁵³ See, *War Criminal Watch* – Coalition for International Justice at <<http://www.wcw.org>> (listing Nahimana as indicted war criminal responsible for propaganda).

bian leaders, and leaders throughout the world. Indeed, it is a hallmark of unstable societies to have successive transitions, precisely because the cause of the instability – the cultural tolerance for oppression – has not been rooted out.⁵⁴ Attention to transformative justice as the vehicle for reconciliation and ultimately deterrence indicates how profoundly difficult societal transformation is, but it also demonstrates its importance.

II. THE INSTITUTIONS OF TRANSFORMATIVE JUSTICE: CHARTING THE MIDDLE COURSE

Transitions, like stable regimes, are characterized by broad normative maxims about what the future should bring. In South Africa, for instance, the interim Constitution enshrined such values as “the need for understanding but not vengeance” and for “reparation but not retaliation” and the African principle of *ubuntu*.⁵⁵ But these goals can only be achieved through specific programs or institutions that promote the values of the new dispensation. Creating these institutions requires resolving difficult questions: Who should be the officers of the institution and what should their credentials be? What should be its budget? How much independence should it have? Should it be created by executive or legislative act? What should its term be? Which specific structural features, in other words, would most conduce to the transformation envisioned by the broad maxims?

As will be discussed, the standard approaches to transitional justice are ill-suited to these transformational goals. Transformative

⁵⁴ Thus, the recurring cycles of violence in places like Kosovo, where the same battles have been fought for six centuries. See Robert Kaplan, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* (St. Martin's 1993).

⁵⁵ INTERIM CONSTITUTION, *Postamble* (Act 200 of 1993). The interim Constitution recognizes a “need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.” *Id.* Ubuntu is an articulation of the intrinsic humanity of each person, as understood in the context of a larger community. The concept is discussed further below in Part III A (3) (b).

or reconstructive justice⁵⁶ requires an institutional response to past abuses that fits the particular needs of each transitional society.

A. *Features of transformative institutions*

There is an infinite variety of vehicles of transformative justice, depending on the nature of the abuses they seek to correct: trials, truth commissions, amnesty programs, lustration programs, and various forms of reconstructive projects have all been tried, with varying degrees of success. Nonetheless, successful transformative institutions or programs may share certain features. Some of these features are common to most agencies of good government, but even these may have additional salience in times of transition. Other features are peculiar to engines of transformative justice, particularly those that seek to foster reconciliation among a divided people.

First, the transformative institution must, in form and in content, exemplify the values it seeks to promote in the society at large.⁵⁷ This is especially important for transformative agencies because, as Ruti Teitel argues, “the conception of justice in periods of political change is alternately constituted by, and constitutive of, the transition.”⁵⁸ The agency is often an early and prominent instantiation of

⁵⁶ See Dyzenhaus, TRUTH, RECONCILIATION, AND THE APARTHEID LEGAL ORDER, *supra* note 3, at 6 (“If the TRC’s purpose is to do justice, the kind of justice at which it aims is best described as reconstructive – a mode of justice which seeks institutional transformation through an examination of the wrongs of the past.”). I would add that the reconstructive project seeks cultural transformation as well.

⁵⁷ As Francois du Bois has pointed out, “reconciliation has a mental subjective constituent that requires forging process and outcome and precludes separating them as one separates procedural and substantive justice.” *Nothing but the Truth*, *supra* note 45, at 103-104. The point may also be made as a moral imperative as well. Amy Gutmann and Dennis Thompson have argued that “the justification for a truth commission should be moral in practice: it should offer reasons that are to the extent possible embodied or exemplified by the commission’s own proceedings, and are not only intended to be put into practice by other institutions, observers, and future governments.” *The Moral Foundations of Truth Commissions* 23, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rothberg and Dennis Thompson eds., Princeton 2000).

⁵⁸ Teitel, TRANSITIONAL JUSTICE, *supra* note 3, at 6.

the values of the new government. If it seeks to promote trust in government, for instance, the institution itself should be transparent and its officers should be known to have integrity. If a priority is to ensure that the polity has a voice in policy-making, then the agency's structure should include a wide range of voices, whether as officers or through public input, or both. Otherwise, the institution appears hypocritical and the people have no reason to follow where the leaders themselves have failed to go. When the government is creating the agency, then, it is important to ensure that its structural features exemplify the values of the agency and of the new society generally.

Careful attention should also be paid to the legal and practical authority of the institution. The institution must have a legal mandate whose breadth demonstrates the commitment of the new government to an exhaustive exploration of the atrocities of the past. Furthermore, it must have the resources to do its job thoroughly. Although it is generally true that a government agency that is insufficiently empowered will be ineffective, this is particularly threatening to transformative institutions. Whereas an ordinary institution that fails in its mandate and thereby favors the status quo may be tolerable, even if not desirable, a transformative institution that favors the status quo completely betrays the transformative project *ipso facto*. It is critical, therefore, that such institutions are adequately resourced. Furthermore, in stable societies, an aberrationally weak institution will not threaten the legitimacy of the entire state; in transitional societies, however, where the state's legitimacy is generally tenuous, more rides on the legitimacy of the institution that was designed to mark the departure of the old regime. Here, failure could have widespread ramifications, imperiling the stability of the new government itself.

Certain features of these institutions are unique to the context of transformative justice. Almost by definition, these institutions are victim-oriented. The Final Report of the TRC regards this aspect of its enabling legislation to be its central feature.⁵⁹ This is necessarily true of transformative institutions that are products of an inversion of

⁵⁹ TRC REPORT, vol. 1, p. 53, ¶ 21.

power, where the formerly oppressed set the new agenda.⁶⁰ That agenda must reflect the values of the population that the new government represents. But this is not just a question of replacing the old values with new values. It is also a question of revealing the wrongfulness of the prior regime by reference to the experience of the oppressed. Crime may look justified from the criminal's point of view; its criminal nature may only emerge from the perspective of the victim, individually or collectively. Likewise, it may only be from the perspective of the victim class that widespread abuse becomes sufficiently apparent to warrant correction. Finally, where wrongdoing was widespread, the victim class is a large one and its experience permeates and defines the society generally. An institution that does not respond to the interests of that class can not hope to transform the broader society.

The victim orientation of the transformative institution balances precariously among competing interests. This can be conceptualized as the competition for room within the public space created by the institution. If the institution is insufficiently oriented towards the experience of victims – that is, if it creates too little space for victims – it will fail in distinguishing the new order from the old and transformation will be diminished. The victims of the old dispensation remain victims in the new. If, on the other hand, the public space created by the institution is excessively dominated by the victim class, transformation may occur so extensively that the non-victims may feel excluded from the new order. But reconciliation, by definition, requires some attention to both the former victims and the former perpetrators. The situations in Rwanda and South Africa illustrate the dangers of striking the wrong balance. In Rwanda, the Tutsi, who

⁶⁰ This was true, for instance, in South Africa where the ANC which was banned between 1960 and 1990, became the dominant political force of the transition. The victim-orientation of transformative institutions in other places may be less palpable, but no less important. For instance, in the former Yugoslavia, the current political power does not lie with the victims of Serbian aggression; nonetheless, any institution aiming to rebuild this society must attend to the needs of these victims and survivors. The same may be said of the importance of attending to the needs of women in post-Taliban Afghanistan.

were the primary victims of the 1994 genocide but who constitute only a small minority of the Rwandan population, control the present Rwandan government. While the reconstructive efforts there need to be responsive to their needs, they also need to guard against capitulating to a potentially vengeful class. In South Africa, the numbers are different, but the danger is nonetheless present: the TRC's embrace of victims and survivors of apartheid made many on the other side feel excluded and that the transformation of South African society would go on without them. Furthermore, an institution that does nothing more than reflect the balance of power within the society generally risks the criticism that has been lodged against the TRC, that it failed to "insert anything distinctive into the network of power relations" that govern modern South Africa.⁶¹ Where the line should be drawn in any given society is both a difficult and an important question, because on that decision may rest both the effectiveness of the institution and its perceived legitimacy.

Perhaps the most critical feature of transformative institutions is that they must attend to the specifics of time and place. Only by understanding the particular nature of the oppression that occurred can the institution hope to transform the culture in which it operates. This feature has been described as contextuality and is often ascribed to the uniqueness of the underlying atrocity.⁶² This is important for a number of reasons, but one reason that has been insufficiently understood is that the transformative power of an institution derives from its connection to the society. One can only transform a society that one understands and is connected to. This, as will be discussed further below, is where the TRC's power and the gacaca courts' potential lie. This contextuality, in turn, means that the middle path must indeed be broad enough to embrace the multiplicity of vehicles of transformative justice.

The test of the legitimacy of the transformative institutions should be whether the institution successfully promotes the transfor-

⁶¹ du Bois, *Nothing but the Truth*, *supra* note 45, at 110.

⁶² See Mark Drumbl, *Punishment, Postgenocide*, *supra* note 8, and sources cited therein (arguing that since each disaster is unique, so must each recovery program be unique).

mation of the new dispensation. If those values are legitimate, then the institutions promoting them would normally be as well.⁶³ In the situations that come under the rubric of transitional, the movement is from repression to democracy as the political ideology, and from violence to deliberation as the medium of choice for public discourse.⁶⁴ Transformative institutions should therefore promote the values of democracy and deliberation to enjoy the benefits of domestic and international legitimacy. As will be seen below, in the context of successor justice the best hope for transformation lies not in the old prosecutorial paradigm but in the emerging middle path.

B. Rejecting the traditional alternatives

The traditional view of predecessor abuse is that prosecution is the means of choice to avoid impunity and that amnesty is the means of choice to avoid open-ended and perhaps ultimately fruitless forays into the past.⁶⁵ Neither of these conventional options, however, nec-

⁶³ The test should not be how the institutions compare with an idealized version of retributive justice. If the values of the new government are not legitimate, there is no reason to think that conventional models would fare any better. Indeed, criminal trials are generally unable to transcend the illiberal values of a regime, as courts are generally only as independent as the government permits them to be. *See generally* David Dyzenhaus, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (Oxford 1991). Thus, in Rwanda, where there is a question as to the degree of genuine commitment to democracy on the part of the government, the best hope for transformation may lie outside the government, in civil society; to the extent that the gacaca courts diffuse power, they may be an ideal transformative vehicle.

The Rwandan example suggests another dimension that may animate transformative justice: whereas the TRC enjoyed sufficient goodwill and moral authority to promote the transformation of South African society, in Rwanda, the transformative project may work in the other direction: the grass-roots gacaca courts could earn sufficient moral authority to help instill transformative values in the governing structures.

⁶⁴ *See* Teitel, *TRANSITIONAL JUSTICE*, *supra* note 3 in Introduction.

⁶⁵ “The justifications for international criminal liability for perpetrators of the international crimes of genocide, war crimes, and crimes against humanity have remained essentially unchanged in the half century since World War II’s Nuremberg and Tokyo trials. Despite the vast literature on those famous prosecutions, in-

essarily even achieves its own goals, let alone the goal of transformation.⁶⁶

Blanket amnesty has virtually nothing to recommend it. It is

cluding extensive critiques leveled at what they accomplished, there is a remarkable degree of consensus among international lawyers in favor of international criminal accountability for mass murderers, rapists, and torturers." Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 365-366 (1999) (citations omitted).

I do not address the possibility that nations in transition may simply ignore the past violations. First, that option has no transformative potential and so is worthless from the perspective of transformative justice. Second, pressure from the international community to act precludes that option for any transitional nation needing or wanting international recognition or foreign aid. The ICC statute permitting jurisdiction if the state does not act codifies the international community's preference for action over inaction and, further, for criminal prosecution over alternatives.

⁶⁶ Of course, governments can, and most do, adopt a combination of responses. For instance, in South Africa, prosecution of perpetrators who did not get amnesty is possible. In Rwanda, in addition to the gacaca courts, the government has established a National Unity and Reconciliation Commission. In East Timor, the plan is to develop a Reception, Truth, and Reconciliation Commission (CRTR) which itself may have several components. As one commentator has explained, "The likely procedure would be for perpetrators to meet with the affected community, offer a public apology, and undertake some form of community service by way of atonement. This agreement would be registered by a court; following completion to the satisfaction of the CRTR, the perpetrator's debt to society would be deemed to have been paid. It is likely that a perpetrator would be required to make some sort of a declaration accepting that the result of the August 1999 popular consultation reflects the will of the majority of the Timorese population. A separate function would enable victims to enter testimony about violations suffered in the period 1974-1999." Simon Chesterman, *The International Peace Academy* (May 2001), available at <<http://www.globalpolicy.org/intljustice/general/2001/esttimor.htm>>. This CRTR would proceed along with traditional domestic courts, foreign courts (such as in the United States and elsewhere), and perhaps a UN-sponsored ad hoc International Criminal Tribunal. There is also talk of an international reconciliation tribunal. See East Timor Truth & Reconciliation Commission, *The World Today* (Broadcast May 1, 2001) on Australian Broadcast Corporation (transcript available at <<http://www.abc.net.au/worldtoday/s286769.htm>>). Given this range of approaches, the central questions are, first, whether any of the approaches a country chooses will promote societal transformation and, second, what the *primary* response will be.

quick, but it signals to the people that their suffering has no legal or public significance and that the government has no part to play in reconciliation.⁶⁷ Furthermore, blanket amnesty laws are susceptible to subsequent invalidation, as recent events in Peru and Argentina indicate.⁶⁸

At the other extreme, a strategy of extensive criminal trials -- what is referred to as the Nuremberg approach -- is not an appropriate resolution for most current transitions. First of all, in very few instances, is the victory by the new government as complete as the victory of the Allied Forces over the Nazis in 1945. Rather, victory is more often wrested from the previous regime through tenuous military victory or cautious negotiation and bargaining. This was certainly true in South Africa where the evolution from apartheid to democracy, known as "the negotiated revolution," would have been virtually impossible without the offer of amnesty to the National Party.⁶⁹ In most instances, long-lasting and secure peace will only emerge with the involvement of multiple parties no one of which would typically accept massive prosecutions against it.

Even if it is possible, prosecution as a primary response is unlikely to be effective. Most of the reasons for this are endemic in

⁶⁷ Blanket amnesty amounts to a rejection of the engagement of law which, "constitutes the official, legitimate recognition of wrongs done, and their integration into the official history of the states." Jennifer Balint, *Law's Constitutive Possibilities*, *supra* note 23, at 134.

⁶⁸ See Reed Brody, Justice: *The First Casualty of Truth?*, THE NATION 26 April 30, 2001 (noting the March 6, 2001 invalidation by an Argentine judge of that country's amnesty law as contrary to national and international law, and the March 20, 2001 invalidation of Peru's amnesty laws as violative of the American Convention on Human Rights by the Inter-American Court of Human Rights).

⁶⁹ It may also be fairly said that amnesty was in the ANC's own interest as well. The ANC approached the bargaining table knowing that there were skeletons in its closet, and the high proportion of amnesty applicants who were ANC members lends some credence to this theory. See Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, in TRANSITIONAL JUSTICE: vol. 1, pp. 225-261 (Neil Kritz ed., 1995). Ironically, of course, the entire negotiated revolution was impelled by the National Party's decision to release the political prisoners of the liberation movement and to remove the ban on their organizations which, itself, constitutes a general amnesty.

criminal prosecution, though some are exacerbated in the transitional context.

Criminal prosecution is notoriously time-consuming and incremental; it does nothing to tell the anxious population that something is being done now to ease the pain or that the battle really was worth fighting. As Christopher Roederer reminds us, “the standard of prosecuting criminals to the full extent of the law is a standard that is rarely achieved even in settled democracies. There are many compromises based on overloaded court dockets, and overloaded prisons. The vast majority of cases are plea-bargained and criminals rarely serve their full sentences.”⁷⁰ Punitive justice is inevitably characterized by compromises and pragmatism which become more prominent in times of transition because they are subject to closer inspection. The stakes in transitional situations may also be higher because of the precariousness of the new government. Criminal prosecutions should therefore be viewed with great caution before being adopted as the new government’s primary response to past abuses.

As has been extensively documented in both stable and transitional situations, the criminal justice system does not produce a reliable or comprehensive version of the truth both because of the limited scope of each trial’s inquiry and because of the use and manipulation of rules of evidence that govern the release of information. Production of the truth is not the primary purpose of a criminal trial.⁷¹ While this may be an acceptable cost of justice in stable societies, truth may not be expendable in times of transition and transformation. It is often thought to be a precondition to reconciliation as well as a necessary antidote to amnesia. The institutional response to

⁷⁰ Roederer, *Living Well is the Best Revenge*, *supra* note 20 at 94.

⁷¹ Trial courts “may impede or ignore truth. Democratic guarantees protecting the rights of defendants place those rights at least in part ahead of truth-seeking; undemocratic trials may proceed to judgment and punishment with disregard for particular truths or their complex implications beyond particular defendants.” Minow, *BETWEEN VENGEANCE AND FORGIVENESS*, *supra* note 6. See Drumbl, *Sclerosis*, *supra* note 26, at 293-296 and sources cited therein, for a discussion of the limits of the truth-revealing potential of criminal trials; *see also* Borraine, *A COUNTRY UNMASKED*, *supra* note 2, at 280-299, for a comparison between trials and the TRC.

past societal abuses would therefore normally incorporate truth-seeking.⁷²

There are pragmatic reasons as well why criminal prosecution may not be feasible in times of transition. First, courts in transitional democracies are either non-functioning (as in Rwanda) or, if they exist (as they did throughout the transition in South Africa), they are staffed by adherents to the old regime operating under old mental and legal frameworks which are inconsistent with the purported rule of law values of the new regime.⁷³ Second, money in transitional societies is always scarce and is inevitably more desperately needed elsewhere. By definition, the new government is taking over for one that harmed or oppressed the population as a whole and the rebuilding of society as well as individual or collective reparations may make a stronger claim on the nascent government's limited resources than punishing a fraction of the wrongdoers. In South Africa, the choice of criminally prosecuting the leaders of the apartheid regime was starkly put to the citizens: the twelve million rands (approximately US \$1.3 million) "in taxpayer-supported court costs" that were spent to prosecute the former Minister of Defense yielded an acquittal.⁷⁴ Punishment for wrongs is important, but so are electricity, medical care, jobs programs, education, housing, and so on.

There are also conceptual difficulties with using criminal trials

⁷² The rampant destruction of evidence that is common at the end of regimes may also impede the discovery of truth. *See* TRC REPORT vol. 1 ch. 8 ("The destruction of records"). While this may also besiege other types of institutions, as it did the TRC, innovative arrangements may at least alleviate this problem. For instance, the rules of evidence could be broadened to emphasize the disclosure of truth or incentives could be developed to secure truthful disclosure.

⁷³ Furthermore, rewriting the laws implicates some of the problems of retroactivity fruitfully explored by Martha Minow. *See* Minow, *BETWEEN VENGEANCE AND FORGIVENESS*, *supra* note 6, at 29 et seq.

⁷⁴ Elizabeth Kiss, *Moral Ambition within and beyond political constraints: Reflections on Restorative Justice*, in *TRUTH V. JUSTICE*, *supra* note 57, at 77 (noting that Magnus Malan later "appeared before the [TRC] and told his own story, denying some allegations but admitting to much more than his trial had disclosed."). *See also* Meredith, *COMING TO TERMS*, *supra* note 6.

to deal with gross society-wide abuses.⁷⁵ Many of these derive from criminal prosecution's focus on individuals and on the ideology of the individual responsibility of voluntary perpetrators. But this approach may not fit situations where mass segments of society are responsible for the deprivation of human rights: individuals often act collectively, with varying degrees of responsibility and under varying degrees of coercion. Responsibility in these situations is both more widespread and more resistant to the generalities that define non-transitional criminal law.

International and foreign criminal tribunals may be more appealing because they literally externalize the cost of prosecution. They nonetheless suffer from many of the same faults as domestic prosecution, and then create others, such as inconsistent penalties and the failure to resonate in the local society.⁷⁶

Even where criminal prosecution is fiscally and politically feasible, there are strong reasons why transitional governments should seriously consider alternatives. Even in their ideal form, criminal prosecutions are unlikely to achieve the goals that are important to transitional governments. Criminal trials do not foster social stability because criminal trials are designed for stable societies that operate well, where crime is an aberration. Assuming that the society is otherwise healthy, they simply seek to remove criminal anomaly. Trials address the problem of crime only incrementally, one perpetrator at a time. In transitional societies rife with massive violations of human rights, however, crime is the norm. It is not sufficient to remove an isolated offender, even a leader; rather, it is necessary to treat, and transform, the society as a whole.

Nor do trials promote reconciliation because they are both ad-

⁷⁵ Perhaps the most thorough exploration to date of this idea is in Teitel, *TRANSITIONAL JUSTICE*, *supra* note 3 at 27-67. *See also* Minow, *BETWEEN VENGEANCE AND FORGIVENESS*, *supra* note 6, at 25-51. I mention them here just to highlight the disjunction between criminal prosecution and transformative justice.

⁷⁶ *See sources cited in previous note.* This has been a chronic problem in Rwanda as tensions between the national government and the ICTR have plagued the processes since the ICTR's inception. *See* Goldstone, *FOR HUMANITY*, *supra* note 3.

versarial (due to the nature of the legal system) and divisive in that they reinforce the power that the new regime wields over adherents of the old.⁷⁷ Trials separate victims and perpetrators; a regime of criminal trials creates separate victim and perpetrator classes. They do nothing to bring people together. The result of a trial is the execution or incarceration of the perpetrator, not the strengthening of society. Moreover, because the emphasis in criminal trials is on the wrong done by the perpetrator *to the state*, the victim or survivor is often side-lined; far from empowering the victims of the old dispensation, this further marginalizes them.⁷⁸

Finally, criminal prosecution is unlikely to satisfy the goal of deterrence in transitional societies for two related reasons. First, criminal trials do not address the causes of the wrong; because they treat the wrong as aberrational, the primary concern is to remove it from society, not to understand it. But where the wrong is woven into the fabric of society, as in the case of mass atrocities, its etiology must be understood and treated. Second, trials only address the leaders of the prior regime. If society permitted or promoted the atrocity and violence and prejudice permeated the culture, then prosecuting only the leaders does not deter society generally. Only if the society is transformed from one that tolerated or promoted the wrong to one that does not is the likelihood of recurrence diminished. Ultimately, it is the transformation of society that is the best deterrence.⁷⁹

⁷⁷ See e.g. Minow, *BETWEEN VENGEANCE AND FORGIVENESS*, *supra* note 6, at 26 (noting that “Reconciliation is not the goal of criminal trials except in the most abstract sense.”). This may be a particular hazard of importing into the domestic sphere a mechanism that may have been appropriate when one nation vanquishes another as at the end of World War Two; the Allies were not interested in reconciling with the Germans or the Japanese, but of asserting their authority over them. But civil disputes may demand less retribution and more reconciliation.

⁷⁸ Recent efforts in the form of restorative justice have highlighted this failure of conventional retributive justice and have made steps to correct it.

⁷⁹ “Prosecutions and punishment of systematic human rights abuses seem to have little deterrent effect” Kader Asmal, *supra* note 27 at 1221. Asmal quotes Robert Jackson at the time of the Nuremberg trials saying: “Judicial action always comes after the event. Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war

Criminal trials are therefore most appropriate where the only form of injustice is the prospect of impunity; thus, in a stable society where crime is anomalous, a judicial regime that punishes the individual wrongdoer restores the balance and preserves order. As suggested above, however, transitional societies are beset with myriad forms of injustice. These different aspects of justice may call for a range of institutional responses. In one society, reconciliation may be promoted by a centralized, elite-driven institution, while elsewhere, a localized, participatory forum may be most appropriate. The one-size-fits-all nature of conventional criminal prosecution is unlikely to achieve these various kinds of justice or to suit the varying needs of each society. Rather, institutions that lie somewhere in the middle path may be more amenable to local tailoring.

C. *Shifting the Burden of Persuasion*

At some level, the shortcomings of criminal prosecution are recognized. As Ruti Teitel has pointed out, “[t]he relatively low incidence of successor trials reveals the dilemmas in dealing with often systemic and pervasive wrongdoing by way of criminal law.”⁸⁰ This is true despite the ideological affinity for criminal prosecutions within and among states. It is as if the theory that prefers conventional criminal law has not caught up with the practice that recognizes its deficiencies. Thus, nations that do choose alternatives are in the position of having to justify this choice as a departure from the norm.⁸¹ But the deficiencies are so pervasive that, in the context of

is lost, will probably not be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible.” *Id.* at 1221-1222. This points to another reason why deterrence is unlikely to result from criminal prosecution: while the fear of punishment may deter an ordinary criminal from committing a crime, politically motivated offenses are likely to be resistant to the threat of punishment: a political actor will abstain because the political motives change, not because of the fear of being caught.

⁸⁰ Teitel, TRANSITIONAL JUSTICE, *supra* note 3 at 7. “Punishment dominates our understandings of transitional justice. This harshest form of law is emblematic of accountability and the rule of law; yet, its impact far transcends its incidence.” *Id.* at 27.

⁸¹ See e.g. Amy Gutmann and Dennis Thompson, *The Moral Foundations of*

successor trials, the question ought perhaps to be reversed: nations choosing criminal prosecution (or amnesty) as their primary or sole response should be asked to account for their rejection of other more effective and more transformative mechanisms to deal with the past.

To look at it another way, the question becomes whether the goals that are attributed to the criminal justice system may be accomplished more effectively in other ways. These goals have been articulated in a variety of ways, although many descriptions of the contributions that trials are said to make overlap. One elegantly simple articulation of the goals of retributive justice is as follows:

“The ideal is equal dignity of all persons. Through retribution, the community corrects the wrongdoer’s false message that the victim was less worthy or valuable than the wrongdoer; through retribution, the community reasserts the truth of the victim’s value by inflicting a publicly visible defeat on the wrongdoer.”⁸²

Ruti Teitel ascribes a variety of more complex goals to criminal justice:

In much prevailing political theorizing, successor trials are thought to have the potential of playing a distinct role in drawing the line between the old tyrannies and new beginnings. Criminal justice offers normative legalism that helps to bridge periods of diminished rule of law. Trials offer a way to express both public condemnation of past violence and the legitimation of the rule of law necessary to the consolidation of future democracy. Successor criminal justice is generally justified by forward-looking consequentialist purposes relating to the estab-

Truth Commissions, in TRUTH V. JUSTICE, *supra* note 57 (premising their argument on the view that “In a democratic society, and especially in a society that is trying to overcome injustices of the past, trading criminal justice for a general social benefit such as social reconciliation requires a moral defense if it is to be acceptable” at 22). The Truth and Reconciliation Commission accepted this challenge and attempted to defend itself both politically and morally. *See* TRC REPORT vol. 1, ch 1 ¶¶ 20-32.

⁸² Minow, BETWEEN VENGEANCE AND FORGIVENESS, *supra* note 6, at 12 (citing Jean Hampton, *The Retributive Idea*, in JEFFRIE C. MURPHY AND JEAN HAMPTON, FORGIVENESS AND MERCY (1988)).

lishment of the rule of law and to the consolidation of democracy. This version of the consequentialist argument particular to transitions is characterized here as the “democracy” justification of punishment largely on the basis of the purposes of the transition. Criminal proceedings are well suited to affirm the core liberal message of the primacy of individual rights and responsibilities.⁸³

Thus, in this view, criminal trials are preferred because they achieve several goals. They draw lines between the old dispensation and the new. They promote rule of law interests including bridging past and present and expressing public condemnation for past violence. They promote or consolidate democracy interests (that is, the democratic purposes of the transformation) by affirming the liberal message of individual rights and responsibilities.

A perhaps more pragmatic formulation of similar ideas is provided by the late Judge Cassese of the International Criminal Tribunal: he suggests that prosecuting wrongdoers of a previous regime (and especially international prosecution) fulfills several goals, including, notably the goal of reconciliation.

[T]rials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus but individual perpetrators - although, of course, there may be a great number of perpetrators; justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just desserts, then the victims' calls for retribution are met; by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of atrocities so that future generations can remember and be made fully cognizant of what happened.⁸⁴

⁸³ Teitel, *TRANSITIONAL JUSTICE*, *supra* note 3 at 30.

⁸⁴ Alvarez, *Crimes of State/Crimes of Hate*, *supra* note 65 at 373-374, *paraphrasing* Antonio Cassese, *Reflections on International Criminal Justice*, 61 *MOD. L. REV.* 1 (1998).

In Cassese's view, the principal accomplishments of criminal trials are 1) to distinguish the culpable perpetrators from others within the same broad class or ethnic category, 2) to dissipate calls for revenge because, essentially, the victim has entrusted to the state the right to punish the perpetrator,⁸⁵ 3) to foster reconciliation by ensuring that perpetrators pay for the crimes which, Cassese seems to posit is a precondition for reconciliation, and 4) create a fully reliable record of the past atrocities.

Whether criminal trials actually achieve these goals, particularly in transitional settings, is debatable. But in any event, there is no reason to believe that they are *uniquely* positioned to do so. Nations in transition should consider whether the middle path can achieve these goals at least as effectively and, at the same time, achieve the societal goals of transformative justice. Sometimes, this assessment will point in the direction of a truth commission, though sometimes it might not. As Part Three demonstrates, home-grown solutions such as the TRC and Rwanda's gacaca courts may produce a broader form of justice than has been possible under the conventional paradigm.

III. THE DETAILS OF TRANSFORMATION: SITUATING THE INSTITUTIONAL RESPONSE

Because of the importance of the transformative project in times of transition, and because of the opportunities presented by the question of predecessor abuse, new governments need to carefully plan their institutional responses to the past. The traditional alternatives have become less appealing because of the fiscal, political, and pragmatic challenges they present as well as because they fail to deliver on the transformative promise. But simply opting for the middle course does not answer all the questions. One still has to determine what that middle course will be.

The middle course has yet to be charted. It can include any

⁸⁵ This dovetails with Van Roermund's conception of reconciliation, in which victims "defer the right to retribution to the extent that retribution would obstruct peace." See Van Roermund, *Rubbing Off and Rubbing On*, *supra* note 31.

number of institutional responses, including lustration,⁸⁶ truth commissions, and reparations programs, and reconstructive projects. Importantly, it includes yet-to-be-tried formulations that are tailored to each country's needs as it emerges from oppression and injustice.

Because emerging nations are currently in the midst of defining the middle course, this pathway presents the possibility of a degree of creativity that is unusual in lawmaking. Unlike other legal institutions, which are constrained by precedent and practice and established legal culture, a transitional government's treatment of past abuses, by definition, must not be guided by past practice; after all, it is the past government's practice that is being challenged. Indeed, it has been suggested that "law itself is being challenged to provide a new form of justice."⁸⁷ The consistency required of the rule of law in times of transition is necessarily modified to permit the rejection of the past and the installation of a new normative framework.⁸⁸

Although the nation's own history may not constrain the choice, international practice may ironically be more influential: transitional governments are unusually susceptible to foreign influence since they rely disproportionately on international legitimacy and material

⁸⁶ Lustration is the process of stripping power, office, or privilege from individuals who are found, non-judicially, to have been responsible for wrongs committed usually in a prior regime. *See* Teitel, TRANSITIONAL JUSTICE, *supra* note 3; *see also generally* Tina Rosenberg, THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM (Vintage 1996). Although the practice is not prosecutorial in nature, it shares a sufficient number of features with criminal prosecution that, for purposes of this paper, it can be considered a subset or an aspect of criminal prosecution. Like prosecution, lustration adopts an individualist presumption about responsibility, treating the wrongs committed as aberrations; thus, lustration removes the stain from the nation's consciousness without enquiring into the causes of the injustice or attempting to treat the conditions that gave rise to it. It therefore does no more to promote the transformative agenda of the transitional government than does criminal prosecution. Lustration does, however, generally cost less than criminal prosecution and removes the constant reminder of the past's injustice; furthermore, it promotes rule-of-law values by exacting punishment from alleged wrongdoers.

⁸⁷ Emiliios Christodoulidis and Scott Veitch, *Introduction*, in LETHE'S LAW, *supra* note 23, at xv.

⁸⁸ *See generally* Teitel, TRANSITIONAL JUSTICE, *supra* note 3.

aid. A transitional government, therefore, may shape its institution to conform to international norms. While these norms may have an important moderating influence, nations in transition should remain mindful of their own needs – to transform their *domestic* culture from one that tolerated the abuses of the past to one that would resist them.

By far the most influential of these middle path mechanisms has been South Africa's Truth and Reconciliation Commission. Indeed, the international response to the TRC suggests that it, more than any other recent experiment in transitional justice, is the beacon to which other emerging nations are looking. This is both good and bad. One of the most important contributions the TRC has made to the international community is to demonstrate that values other than retributive justice can and should be promoted during times of transition. Furthermore, the TRC has provided one example of how this can be achieved. In other words, it seems to have proven the viability of a middle path. However, the TRC's success in South Africa does nothing to predict the success of other TRCs elsewhere. It worked in South Africa, as will be shown below, because it was carefully crafted to respond to the specific needs of post-apartheid South Africa. It redressed the specific imbalances left behind by the end of apartheid. Other nations, experiencing other forms of injustice, will want to equally carefully craft their responses to injustice, but will want to create different mechanisms that are suited to their unique situation.⁸⁹

⁸⁹ In this regard, the example of East Timor is instructive. *See supra* note 66. The blueprint for East Timor's reconstruction project seems to braid together various strands: it combines a centralized, victim-oriented TRC-like truth and reconciliation commission charged with producing a comprehensive history with a more communal requirement of a public apology and community service that would earn the perpetrator amnesty. While the Commission would not be judicial, its findings regarding individuals' accomplishment of the requirements would be registered with a court. *See generally* Simon Chesterman, The International Peace Academy (May 2001), available at <<http://www.globalpolicy.org/intljustice/-general/2001/esttimor.htm>> . At this writing, the legislation is being drafted, so it is not yet known what the final form of the institution will be, and the extent of its success will not, of course, be known for years. *See National Council Debating Draft*

Contextuality is critical to transformational justice because transformation itself is deeply contextual: each nation's path from past to future is unique and so the engine that drives the transformation can not be generic but must be fitted to each nation's trajectory. As has been shown, where the society functions generally well and crime is aberrational, retributive justice may work well. But justice must be shaped to the society where crime is immanent in the law, as it was in apartheid, or where crime is pervasive, though not necessarily formally legalized, as it was in Rwanda. Both of these situations will demand a different mechanism for transformation, as will other situations in other places where the balance between law, violence, and other factors of the transition will vary.

A. The South African Truth and Reconciliation Commission

1. The Nature of Apartheid: the Past is Key to the Future

There are myriad ways to describe apartheid in South Africa but two of its features are especially striking and bear particular attention; as a result, they had, implicitly or explicitly, particular relevance to the architects of the TRC. The first is the role of the rule of law in apartheid. The second is the nature of victimhood under apartheid.

Unlike many other monumental atrocities, apartheid was a system of oppression that was defined by law.⁹⁰ As Kader Asmal has written,

Apartheid was distinct from other twentieth century atrocities in that it was an extended system of socio-economic pillage based on race and – crucially – underpinned by the entire legal sys-

Regulation On Reception, Truth And Reconciliation Commission (Timor Post/25/05/01) available at http://www.gov.easttimor.org/news/Media_Monitoring/-20010528am.php (noting that in the view of at least some members of the National Council, the reconciliation process will *not* preclude prosecution).

⁹⁰ In this regard, it resembles American slavery and segregation, but not the lawless Rwandan genocide or Pol Pot's Cambodia, or the ethnic cleansing of Kosovo. This aspect of apartheid may also be compared with Nazi Germany.

tem. The legalized nature of racial segregation is what set apartheid apart.⁹¹

A strong legal framework, including all branches of government, succeeding constitutions, and a vast array of laws duly passed by Parliament, supported this system of oppression. The apartheid Parliaments, which were unrepresentative of and unaccountable to the non-white majority, were also largely immune from judicial review thanks to the principle of parliamentary sovereignty.⁹² Members of Parliament exercised their unfettered power to enact into law the grossest oppressions, including racial registration laws, segregation laws, dispossession laws, removal laws, pass laws, suppression of expression and assembly laws, detention laws, disenfranchisement laws, dis-employment laws, dis-education laws, anti-miscegenation laws, and anti-injunction laws to name just a few.⁹³ Indeed, legality was so pervasive as to blur the line between what was legally authorized and what was not. As David Dyzenhaus argues, “one can say that even the illegal acts of the security forces were ‘under cover of the law’, since the law made it so difficult to get evidence of what was happening.”⁹⁴

⁹¹ Kader Asmal, *Foreword*, DYZENHAUS, TRUTH, RECONCILIATION, AND THE APARTHEID LEGAL ORDER, *supra* note 3, at viii. Minister Asmal continues: “Thus, apartheid is a case study in how legal norms and ideals – which ought to embody our common humanity at its most cultured and articulate – came instead to express violence, divisiveness and, in the end, lawlessness.” *Id.* For a fictional interpretation, see e.g. SINDIWE MAGONA, FORCED TO GROW 2-3 (David Philip 1992). (“I was jobless in a country with a myriad of laws, none of which was of any benefit to me or mine. As an African, I was not covered by any social security laws. Indeed, the laws that did cover me did so only to my detriment.”).

⁹² Not coincidentally, one of the principal changes wrought by the negotiated revolution of the early 1990s was the creation of a constitutional court that would have broad power of judicial review of parliamentary actions. See CONSTITUTION s. 165(2) et seq. *Act 108 of 1996* (“The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”). An insightful explanation for this turn to constitutionalism is given in Klug: CONSTITUTING DEMOCRACY, *supra* note 14.

⁹³ For a complete catalogue of apartheid laws, see TRC REPORT vol. 1, pp. 448-496.

⁹⁴ Dyzenhaus, TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER,

But as the TRC recognized,

“This preoccupation of the government with the law, with due constitutional process, with obtaining a legislative mandate for whatever acts (however heinous) it or its security forces committed, was frequently commented upon favourably by political analysts of the 1960s and 1970s. It was also used to mount a defence of the system. The argument made was that it was at least a system of law, albeit bad law, and thus preferable to the military or political dictatorships to the north.

“What these analysts failed to acknowledge was that the law was a veneer. Twentieth century law in SA, to paraphrase Hannah Arendt, made crime legal. [Apartheid law was described as] “crime which was institutionalized as the law.”⁹⁵

This was indeed no ordinary system of laws; it was law completely rent from justice. As a young lawyer and defendant, Nelson Mandela recognized this disjunction between law and justice under apartheid:

“[T]he whole life of any thinking African in this country is driven continuously to a conflict between his conscience on the one hand and the law on the other. ... The law as it is applied, the law as it has been developed over a long period of history, and especially the law as it is written and designed by the Nationalist government is a law which, in our view, is immoral, unjust and intolerable. Our consciences dictate that we must protest against it, that we must oppose it and that we must attempt to alter it.”⁹⁶

Eventually, this legal system unsupported by principles of justice foundered and the laws proved inadequate to maintain order; the government turned its legitimacy over to the security forces. As the

supra note 3, at 26.

⁹⁵ TRC REPORT, vol. 1, pp. 41-42, ¶¶73-74.

⁹⁶ Nelson Mandela, LONG WALK TO FREEDOM (Abacus 1995) at 392, quoting his unsuccessful plea in mitigation of sentence in his 1962 trial for sabotage, *inter alia*. Upon termination of this speech, he was given “the stiffest sentence yet imposed in South Africa for a political offense.” *Id.* at p. 395.

TRC Report explains, “in the 1980s, when the state was in crisis, it became clear that the law had run its course; that it could no longer do the job. ...At this stage, real rule-making power shifted from Parliament and the Cabinet to a non-elected administrative body, the State Security Council (SSC) which operated beyond public scrutiny.”⁹⁷ The TRC refers to this legislative oppression as “the tragic injustice of apartheid-at-law.”⁹⁸

Beyond being divorced from justice, the law of apartheid was itself a crime. As many have noted, apartheid has been for years considered a crime against humanity by the international community.⁹⁹ It was criminal in that it sanctioned, indeed mandated, that criminal acts be committed in its name. The fundamental conclusion of the TRC Report is that not just crimes but indeed gross violations of human rights were committed by and on behalf of the government of South Africa.¹⁰⁰ It was clear quite early on that men at the uppermost reaches of the government, including the last two apartheid state presidents, PW Botha and FW deKlerk, were at least aware of if not architects of some of the most extreme violence committed in the name of apartheid.

In a section entitled the “The law and violence in South African history,” the TRC shows how violence was inextricable from the legal regime. The Commission reports that “[v]iolence has been the single most determining factor in South African political history. The reference, however, is not simply to physical or overt violence – the violence of the gun – but also to the violence of the law or what is often referred to as institutional or structural violence.”¹⁰¹ Apartheid was a system of law, but the law was founded not on justice, but on

⁹⁷ Vol. 1, p. 42, ¶76.

⁹⁸ Vol. 4, p. 101, ¶31.

⁹⁹ TRC REPORT vol. 1 ch .1 ¶ 62.

¹⁰⁰ “On the basis of the evidence available to it, **THE PREDOMINANT PORTION OF GROSS VIOLATIONS OF HUMAN RIGHTS WAS COMMITTED BY THE FORMER STATE THROUGH ITS SECURITY AND LAW-ENFORCEMENT AGENCIES.**” (original in capital bold type). TRC REPORT vol. 5 ch 6 ¶77.

¹⁰¹ *Id.* at vol. 1, p. 40, ¶ 68.

violence.

The second striking feature of apartheid is the silencing of the victims.¹⁰² This is perhaps common to all oppressive conditions: after all, what good is a perpetrator who lets the victim tell his or her side of the story. Where there is an imbalance of power, the more powerful can define the world of the powerless. Law is an explicit mechanism for defining the world of others. But implicit mechanisms are also effective. The powerful can consistently and pervasively ignore and deny the reality of oppressed individuals. Silencing is a particularly painful aspect of oppression because it forces the internalization of pain. Yet, the silencing of apartheid was pervasive: the harm of apartheid was so widespread and so longstanding, that its silencing affected millions upon millions of lives, in one generation after another.¹⁰³ Until the commissions and inquests, for instance, it was a simple matter for whites to brush off the deaths and disappearances of thousands with the claim that detainees had committed suicide¹⁰⁴ or with the blanket denial of any knowledge at all about the incidents. People's perceptions that their loved ones were being system-

¹⁰² See TRC REPORT vol. 1 ch. 8 ¶ 1 ("The story of apartheid is, amongst other things, the story of the systematic elimination of thousands of voices that should have been part of the nation's memory. The elimination of memory took place through censorship, confiscation of materials, bannings, incarceration, assassination and a range of related actions. Any attempt to reconstruct the past must involve the recovery of this memory - much of it contained in countless documentary records. The tragedy is that the former government deliberately and systematically destroyed a huge body of state records and documentation in an attempt to remove incriminating evidence and thereby sanitise the history of oppressive rule. As this chapter will demonstrate, the urge to destroy gained momentum in the 1980s and widened into a co-ordinated endeavour, sanctioned by the Cabinet and designed to deny the new democratic government access to the secrets of the former state.")

¹⁰³ As the Commission report straightforwardly put it, "Secrecy was particularly characteristic of apartheid rule.... Along with secrecy went silence, and much of the country's populace was silent, through fear, apathy, indifference or genuine lack of information." Vol. 5 pp. 298-99 ¶ 138.

¹⁰⁴ The official story of the death of student activist Steven Biko, for example, was that he had slipped on a bar of soap and hit his head against the wall. The TRC findings made this denial, and many others like it, impossible to maintain.

atically abducted, tortured, and killed was just as systematically dismissed. As South Africa's new Constitutional Court has since explained:

Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.¹⁰⁵

The secrecy, of course, enabled the continuation of the violence, and eventually entangled the judiciary in the perpetrators' web. Judge Gerald Friedman's submission to the TRC's Legal Hearing describes the "dilemma" in which judges found themselves when considering the claims that evidence had been produced by torture.

The detainee would testify how he was assaulted. The police or security force members, on the other hand, would go into the witness box and deny these allegations. In this they would be corroborated by the district surgeon who would testify that no

¹⁰⁵ Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others, 1996 (8) BCLR 1015 (CC at 17), 1996 *SACLR LEXIS* 20 at 37-38.

evidence of any assault was found on the detainee. One knows now from the evidence which has emerged at hearings of the Commission that many of these witnesses were prepared to lie to the Court. ... The fact that it was commonplace for detainees to allege that they had been tortured, did not entitle the court, in any particular instance, to depart from the principle that each case must be decided on its own facts.¹⁰⁶

It has been suggested that one of the principal accomplishments of the TRC was to reduce the deniability of the abuses of the apartheid era.¹⁰⁷ Indeed, the failure of many whites, particularly Afrikaners, to embrace the TRC gives credence to blacks' fears that, but for the TRC, not just their reality but their history too would be white-washed. Giving the oppressors a monopoly over the past gives them too much power over the present and future.¹⁰⁸

2. *Legislating in the Middle Path*

The TRC emerged in the midst of phenomenal change in South African history. In 1990, the South African political landscape changed dramatically and permanently with the unbanning of opposition parties and the release of scores of political prisoners including Nelson Mandela. Three years of intense negotiation followed, with the adoption of the interim Constitution in 1993. In 1994, millions of

¹⁰⁶ Dyzenhaus, *supra* note 3, at 63-64, quoting the Friedman Submission to the TRC at 11-12.

¹⁰⁷ "All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse." TRC REPORT vol. 1 ch. 5 ¶ 33 (quoting Michael Ignatieff). *See also* Reed Brody, *Justice: The First Casualty of Truth?*, THE NATION April 30, 2001 at 27 (citing Richard Goldstone for the proposition that the "TRC's major accomplishment ... is that no one now can deny the worst manifestations of apartheid.")

¹⁰⁸ This Orwellian observation has been remodeled to fit the transitional setting. Various people have commented that the future is certain, it is the past that no one can be sure of. Tina Rosenberg attributes this to Jacques Rupnick (*see* Rosenberg, THE HAUNTED LAND, *supra* note 86 at xv), while Martha Minow attributes it to the South African satirist Pieter-Dirk Uys who reminds us that while the future is certain, the past is "unpredictable." *See* Minow, BETWEEN FORGIVENESS AND VENGEANCE, *supra* note 6, at 86.

South Africans voted for the first time, electing a transitional parliament, with Mandela as president; a Constitutional Court was instituted to provide a check on the political branches, and the transitional parliament began debating the TRC act. In 1995, the TRC act was drafted, debated, and ultimately passed, with the first meeting of the Commissioners occurring on December 16 of that year. Nineteen-ninety-six saw the first Human Rights Violations (HRV) hearings and the concomitant publicity surrounding the Commission, as well as the drafting and redrafting and ultimate adoption of the new final Constitution. The HRV hearings lasted into 1997 and then gradually gave way to the amnesty hearings, which proceeded from 1997 to 1998. The first five volumes of the final report were submitted to President Mandela in October 1998 and subsequently debated in Parliament. The following year, the first successor elections were held. Throughout 2000, the Amnesty Committee continued to hold hearings and consider backlogged requests for amnesty, with the last decisions coming in mid-2001. The sixth and final volume of the TRC Report is expected in September 2001 whereupon the Commission will close down.

Like any governmental initiative, the Truth and Reconciliation Commission was the result of political compromise and negotiation, simultaneously empowered and limited by constitutional and pragmatic considerations. Unlike most other agencies, however, there was no precedent for the TRC at all: it was obviously not like any other governmental agency or department within South Africa, nor was it directly modeled on any truth commission abroad.¹⁰⁹ It truly is

¹⁰⁹ Although it is true that the designers of the TRC were well schooled in the recent experiences with truth commissions throughout the world, (see Priscilla Hayner, *Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide*, in LOOKING BACK, REACHING FORWARD, *supra* note 3; see also THE HEALING OF A NATION? (Alex Boraine, Janet Levy, eds) (Justice in Transition 1994); DEALING WITH THE PAST (Alex Boraine, Janet Levy, Ronel Scheffer eds) (Idasa 1995); Boraine, A COUNTRY UNMASKED, *supra* note 2, for descriptions of international conferences held to inform South Africans about international experience), the TRC was unique in several important respects, many of which are discussed *infra*. These include the TRC adoption by statute rather than executive order, the TRC's linkage of amnesty with truth, its extensive subpoena

sui generis. The fundamental difference between the TRC and other truth commissions is that the South African version was designed to be not merely transitional but transformative.

The Government of National Unity (GNU) created the TRC pursuant to the mandate of the postamble to the interim Constitution.¹¹⁰ This brief but critical section is both broadly aspirational and pragmatically specific. On the one hand, it speaks in expansive terms about the achievement of national unity, justice, peace, opportunities for all, reconciliation, and transcendence of the divisions and strife of the past. The postamble itself is called “National Unity and Reconciliation.” It reads in part:

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

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

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

power, and its publication of perpetrator names, among other things.

¹¹⁰ The Government of National Unity was the name given to the transitional parliament between the elections of 1994 and 1999. The interim Constitution was negotiated by 19 parties, including most prominently, the outgoing apartheid National Party and its presumptive successor, the liberation movement-cum-political party African National Congress. Hassen Ebrahim, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* 104 (Oxford 1998); *see generally id.* for background to the making of the South African interim and final constitutions. Two salient features of the interim Constitution are 1) the epilogue or postamble (discussed in the text) and 2) the list of 34 principles to which the final Constitution was to adhere.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.¹¹¹

Against this ambitious vision of a healthy future is the rather stark announcement of the considerable concession made to the outgoing government that “amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.”¹¹² In the sense that the transition in South Africa required some form of amnesty as a political matter, South Africa was no different than many other countries.¹¹³ Nor was it different from other nations in recognizing the need for truth as a precondition to healing and justice. But the innovation of the TRC was to make *truth* a precondition for *amnesty*. By linking truth and amnesty, the TRC process was able to fulfill the transitional obligation of amnesty while realizing the transformational potential of the interim Constitution.¹¹⁴

The Promotion of National Unity and Reconciliation Act, which created the TRC, was passed in 1995.¹¹⁵ Most of the TRC Commissioners were appointed through a public process in December 1995 and the Commission began work immediately.¹¹⁶ Over the next 34 months, it would hold hundreds of hearings, receive statements from 21,000 individuals, process more than 7000 applications for amnesty, and make headline news regularly. On October 28, 1998, it presented

¹¹¹ INTERIM CONSTITUTION, *Postamble* (Act 200 of 1993).

¹¹² *Id.*

¹¹³ See Rosenberg, CHILDREN OF CAIN: VIOLENCE AND THE VIOLENT IN LATIN AMERICA (Penguin, 1992).

¹¹⁴ This is suggested but not elaborated on in the preamble itself: “In order to advance such reconciliation and reconstruction, amnesty shall be granted ...” But the link between the transformational agenda and the amnesty is not explicit, as the “mechanism” called for is directed only to deal with such amnesty. An Amnesty Committee, unattached to the TRC would have fulfilled the constitutional mandate.

¹¹⁵ Act 34 of 1995 (known as the TRC Act).

¹¹⁶ Boraine, A COUNTRY UNMASKED, *supra* note 2, at 76-97; see also TRC REPORT vol. 1, ch. 3 “*Setting up the Commission.*”

its 3500-page report to President Nelson Mandela.¹¹⁷

The Act requires the Commission to “promote national unity and reconciliation” by

- (a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights ... including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations,
- (b) by conducting investigations and holding hearings; facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;
- (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and
- (d) by recommending reparation measures in respect of them; compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights.¹¹⁸

As will be discussed in more detail below, many commentators, as well as the Commission itself, have criticized the Act for limiting

¹¹⁷ Although this marked the conclusion of the TRC’s work, one semi-independent committee of the commission, the Amnesty Committee, continues to process applications.

¹¹⁸ Act 34 of 1995 §3(1). The Act organized the Commission into three committees, responsible for investigating and disclosing gross violations of human rights (the Human rights Violations Committee), assessing reparations (the Reparations and Rehabilitation Committee), and amnesty (the semi-autonomous Amnesty Committee). Act 34 of 1995 §3(3).

the Commission's jurisdiction to only those human rights violations that occurred after 1960 and to those that amounted to gross violations of human rights.¹¹⁹ However, it could be argued that what Parliament limited through statutory language, the President expanded through personnel choices. First, staffing the TRC with officials from a wide-range of backgrounds, rather than with lawyers, virtually ensured that the Commission's approach in interpreting and administering its mandate would be capacious rather than strict.¹²⁰ Members were chosen specifically for their varied understanding of the struggle rather than for their skills in statutory construction.¹²¹

Second, the selection of Archbishop Desmond Tutu is roundly considered an inspired choice. As a Nobel laureate and leader of the Anglican Church, the Archbishop had no legal authority, but abundant moral authority.¹²² As David Dyzenhaus has argued, his appointment "resulted in a particular understanding of [the TRC's] role in reconciliation, one which was in no way suggested or required by the official statutory mandate. Under his direction," writes Dyzenhaus, "Commissioners go beyond the statutory mandate and actively seek professions of repentance from perpetrators of abuses and of forgiveness of their victims."¹²³ In this sense, then, the Commission's

¹¹⁹ This is by far the most common criticism of the statute. As will be shown below, however, some commentators have directed their criticism not to the legislators but to the Commissioners for interpreting their jurisdiction unnecessarily narrowly. See *infra* part III A (3) (a) (iv).

¹²⁰ See Boraine, A COUNTRY UNMASKED, *supra* note 2, for a subjective description of the Commissioners. The Amnesty Committee is a partial exception to this approach: it was staffed primarily by judges and lawyers because it was viewed as having the greatest legal authority given its power to grant (not just recommend) a very broad brand of amnesty which would immunize people from all civil and criminal liability in perpetuity.

¹²¹ The membership of the TRC has been criticized on grounds of balance, see generally AFTER THE TRC, *supra* note 34. However, no one has lamented the paucity of lawyers.

¹²² See Boraine, A COUNTRY UNMASKED, *supra* note 2, at, at 267-268. Boraine quotes Antjie Krog as saying that "the process is unthinkable without Tutu. Impossible. Whatever role others might play, it is Tutu who is the compass..." *Id.*, at 269, citing Krog, COUNTRY OF MY SKULL, *supra* note 2, at 152.

¹²³ Dyzenhaus, TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER,

approach was both narrower and broader than it might have been. The narrowing relates to the scope of jurisdiction in a virtually quantitative sense: how many abuses would be investigated? The broadening, however, relates to the complexity of the narrative and the richness of the truths that were revealed.

3. *The Responsive Nature of the TRC.*

Whereas the two most salient features of apartheid were the disjunction between law and justice and the silencing of the victims, the two most salient features of the TRC are the attempt to fuse law and justice and the acknowledgment and “restoration” of dignity to the victims. The TRC was a deliberate and explicit corrective to the evil of apartheid.

a. *Reconnecting Justice and Law*

Perhaps the most notable aspect of the TRC is its marriage of principles of law and justice. It is, on the one hand, a duly created legal institution: it is a creature of statute¹²⁴ and is obliged to operate within statutory and constitutional constraints. It is answerable in law:¹²⁵ on one occasion, it even sued its own Amnesty Committee.¹²⁶ On the other hand, it was empowered to transcend formal legalism in order, presumably, to achieve greater justice. For instance, it ac-

supra note 3, at 3.

¹²⁴ This distinguishes it from many other truth commissions, which were proclaimed by executive authority, often in order to avoid the political compromises and lengthy delays that legislation often entails. *See* Hayner, in *LOOKING BACK, REACHING FORWARD*, *supra* note 3, at 38-39. In South Africa’s case, the open deliberative process that resulted in the TRC contributed to its legitimacy.

¹²⁵ *See* Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others, *supra* note 105. *See also* Du Preez v. TRC 1997 (4) BCLR 531 (A) for legal challenges to the TRC. The TRC *instituted* legal proceedings against former State President P.W. Botha. *See* TRC REPORT v. 1, p. 197. *See generally id.* at pp. 174-200 for the Report’s own discussion of legal challenges in which the Commission was involved.

¹²⁶ Boraine, *A COUNTRY UNMASKED*, *supra* note 2, at 331; *see also* Mary Burton, *Making Moral Judgments*, in *LOOKING BACK, REACHING FORWARD*, *supra* note 1, at 79.

cepted evidence from survivors without cross-examination.¹²⁷ It solicited information from many quarters when none was volunteered, not being limited to information provided by the parties.¹²⁸ As Richard Goldstone has written, "On the one hand, there is the vital legal underpinning of the [TRC] without which such a commission could not succeed and would not exist. On the other hand, there are philosophical, religious and moral aspects without which the commission will be an empty legal vessel which would do a great deal of harm and achieve nothing."¹²⁹ For at least some of the Commissioners, this was the starting point of the TRC. Commissioner Mary Burton has written: "Any structure like the South African Truth and Reconciliation Commission created after a period of conflict as one of the mechanisms for sustaining peaceful co-existence between past adversaries, must necessarily base its findings on moral principles."¹³⁰ Thus, transcending legal strictures was inevitable.

The TRC's fusion of law and justice manifested itself in several different ways. Unlike law during the apartheid years which was shielded from public view and insufficiently understood, the TRC was committed to (perhaps excessive) transparency. Whereas apartheid law was gratuitously punitive, the TRC's brand of punishment was instrumental.¹³¹ Far from being solipsistic, the TRC's understanding of law was informed by other aspects of human experience and consistent with international norms.¹³² And unlike the apartheid

¹²⁷ TRC Act §11 (principles guiding Commission when dealing with survivors) and §14 (proceedings of Human Rights Violations Committee).

¹²⁸ TRC Act, §14 (b) "The Committee may (i) collect or receive from any organization, commission or person, articles relating to gross violations of human rights."

¹²⁹ Richard Goldstone, in *HEALING OF A NATION?*, *supra* note 109 at 120. *See also* TRC REPORT vol. 1 p. 104 ¶1.

¹³⁰ Mary Burton, *Making Moral Judgments*, in *LOOKING BACK, REACHING FORWARD*, *supra* note 1, at 77.

¹³¹ The extent to which the amnesty provisions of the TRC Act were punitive at all is debatable. *See infra* at text accompanying note 153. To the extent that amnesty did entail a punitive component, however, the punishment was not for its own sake but as a vehicle for ascertaining the truth and reconciliation.

¹³² Cf. John Dugard, *Is the Truth and Reconciliation Process Compatible with*

state which was defensive in the extreme, the TRC embodied a value system that was self-critical and committed to dialogue. In so doing, the TRC recast the image of law in South Africa – it reconfigured law’s normative framework.

*i. Justice through transparency: I was blind but now I see*¹³³

The TRC’s actions, like that of any agency, meld statutory mandate with administrative interpretation. The line between the two is not always clear.¹³⁴ In many ways the statute itself required a justice-infused conception of the law, and the TRC elaborated on this suggestion. The most visible aspect of the TRC’s capacious concep-

International Law? An Unanswered Question. Azapo v President of the Republic of South Africa, 13 S. A. J. Hum.Rts. 258 (1997). (arguing that amnesty was not consistent with international norms).

¹³³ One of the classics of anti-apartheid literature, Andre Brink’s “A Dry White Season” encapsulates – almost presages – the need for a truth commission in post-apartheid South Africa. Gordon Ngubene asks his white benefactor about Ngubene’s son’s death. “How did Jonathan die, Baas?” “That’s what we don’t know” [replies the white man]. “That’s what I got to know, Baas. How can I have peace again if I do not know how he died and where they buried him?” “What good can it do, Gordon?” “It can do nothing, Baas. But a man must know about his children. ... A man must know, for if he does not know he stays blind.” Andre Brink, *A DRY WHITE SEASON* (Vintage ed. 2000) at 48.

This may have been prophetic. The TRC Report recounts the story of Lukas Baba Sikwepere who “described to the Commission how he was shot in the face and lost his sight.” He also told of how, two years later, the police beat him with electric ropes, suffocated him, forced him to lie in an empty grave and tortured him in other ways.

When a Commissioner asked Mr. Sikwepere how he felt after having delivered his testimony, he replied: “I feel that what has been making me sick all the time is the fact that I couldn’t tell my story. But now it feels like I got my sight back by coming here and telling you the story.” TRC REPORT, vol. 5 p 352 ¶¶ 8 and 9.

¹³⁴ Critiques of the TRC do not commonly distinguish between the legislative mandate and its administrative interpretation. The exceptions tend to be those critiques that accuse the Commission of unnecessarily narrowing its mandate to exclude the quotidian violence of apartheid, as discussed above. See Mahmood Mamdani, in *AFTER THE TRC*, *supra* note 34, and see Asmal et al, *When the Assassin Cries Foul*, in *LOOKING BACK, REACHING FORWARD*, *supra* note 1, at 86.

tion of justice is the Commission's commitment to transparency.¹³⁵ This was consistent with the background of the Constitution and with the letter and spirit of the TRC legislation,¹³⁶ and the Commission viewed this as an essential part of its task.¹³⁷ This commitment to transparency operated simultaneously in three dimensions: the Commission shed light on itself, on the victims and perpetrators of extreme apartheid violence, and on the public generally.

The main purpose, of course, of the TRC was to discover the truth about human rights abuses during the mandate period. This was done from both the victims' and the perpetrators' perspectives by holding a series of hearings on Human Rights Violations and on Amnesty, respectively. These hearings were widely publicized. Reams of newspapers were published and hundreds of hours of television and radio programs about the TRC were broadcast as the hearings were being conducted. There are 87 hours alone of the weekly television programme on the TRC.¹³⁸

The role that publicizing the stories played in the success of the TRC can not be overstated. This massive public relations campaign had several effects. First, it brought attention to the TRC process itself. Although its planning and strategy meetings were not held in

¹³⁵ See <<http://www.truth.org.za>> This transparency was evident even before the Commission began its work, in the selection process. All but two commissioners were chosen through a public process that involved hearings. See Boraine, *A COUNTRY UNMASKED*, *supra* note 2, at 76-83.

¹³⁶ "It was the first time that a nation had created a truth commission through a public and participatory process, by way of an Act of parliament." Johnny De Lange, *in* LOOKING BACK, REACHING FORWARD, *supra* note 1.

¹³⁷ "From the outset, the Commission identified the mass media as critical in drawing all South Africans into the Commission process. It resolved, in particular, that one way of helping to restore the dignity of victims of violations of human rights -- and of reporting to the nation such violations and victims -- would be to promote maximum publicity for the Commission's activities, and in particular its hearings, by opening them fully to both broadcast and print media." TRC REPORT vol 1 p. 352 ¶ 1. Furthermore, the Commission tried to ensure that coverage of its work was available in all of the country's 11 official languages. TRC REPORT vol. 1 p. 352 ¶ 3.

¹³⁸ See, e.g. Boraine, *A COUNTRY UNMASKED*, *supra* note 2, at 270-271 on the role of transparency in the Commission's work.

public, the principal members of the TRC – Chairperson Archbishop Desmond Tutu and Vice-Chairperson Alex Boraine – frequently communicated with the public through the media.¹³⁹ This transparency distinguished the TRC from courts of law, and even from most governmental agencies, which do not normally see ongoing communication with the public as integral to their operations and necessary to their success. Although there was a purposive aspect to this openness—to facilitate the work of the Commission – there was also a symbolic aspect: to demonstrate the commitment to transparency of the new dispensation. Thus, a line was drawn between the covertness of the old regime and the openness of the new.¹⁴⁰ The TRC would prove, by its very operations, that the new order represented openness, not covertness, and that trust in government was now justified.

Second, the TRC's commitment to transparency promoted what could perhaps be described as its cardinal goal: to eliminate or at least reduce the deniability of apartheid-era violence. Eight months after the first victim hearings were held, Archbishop Tutu wrote in a newspaper article,

“Millions of South Africans have heard the truth about the apartheid years for the first time, some through daily newspapers but many more through television and, especially, radio. ... Black South Africans, of course, knew what was happening in their own local communities, but they often did not know the detail of what was happening to others across the country. White

¹³⁹ Mansoor Jaffer, *Tutu and Boraine at the Helm of the TRC Ship*, in TRUTHS DRAWN IN JEST (Wilhelm Verwoerd and Mahlubi 'Chief' Mabizela eds.) (David Philip 2000) at 44-58 (noting that “It is these two South Africans, both with strong spiritual roots, both opponents of the former apartheid government and both with long histories of public service, who are seen as the public faces of the TRC.”). *Id.*, at 44. For their efforts, they were rewarded with frequent appearances in often critical political cartoons.

¹⁴⁰ The transparency might have been overdone. Not only were the internal battles among the commissioners made public, but individual commissioners may also have complicated the work of the Commission through the public comments they made. See Sarkin, *The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda*, 21 HUM. RIGHTS Q. 767, 815 n. 317 (1999).

South Africans, kept in ignorance by the SABC and some of their printed media, cannot now say they do not know what happened.”¹⁴¹

Publicizing the stories had a dual effect: it revealed what the perpetrators had been doing as well as how the victims lived and survived. Twenty-one thousand victim statements and seven thousand amnesty applications each told a story, and these stories were then recounted to the public through the media and word of mouth. The TRC recognized that uncovering truth would have had no transformative impact had those truths not been made accessible to the public. It was as if the TRC had to weave into the fabric of society, on a daily basis, the reality of apartheid to replace the violence and blindness that it was weaving out.

Once told, these stories resonated in the public consciousness, thus involving the general public in the curative experience of the TRC – whether or not they wanted to participate. What can be uncharitably described as a “dog-and-pony show” or the TRC “circus coming to town” can also be seen as an effort to include as many people as possible in the reconstructive project.¹⁴² Whether a person testified or not, applied for amnesty or not, approved of the TRC or not, everyone was to be involved in the national drama unfolding before their eyes. The inclusiveness in the TRC process – as spectators, if nothing else – matched the breadth of public participation in apartheid.

In societies such as South Africa's, which have experienced prolonged periods of authoritarian rule, involving massive violation of entire groups' rights, there has been a collective experience of abuse and victimization. Conversely, these periods of abuse were supported and sustained in a systematic fashion by a large portion of South Africa's white population. Our own brand of transitional justice, therefore, required the treatment of inter-generational injustice. It required that individuals and groups

¹⁴¹ Reprinted in TRC REPORT vol. 1 p. 352 ¶ 5.

¹⁴² There is still grave concern that many people – particularly those living in rural areas – were left out of the TRC drama, even as spectators.

who were neither perpetrators nor victims in any uncomplicated sense had to be involved in this process. If you never pulled a trigger nor held a smoking gun, but yet you benefited from the societal system defended by the violence - if all you did was loaf around a poolside in an opulent white apartheid suburb - you still needed to be involved in the process.¹⁴³

Though it focused on the grossest violations of human rights, the transparency of the TRC process revealed the involvement of the society at large in the problem of apartheid and then invited the society at large in to participate in the correction. Apartheid needed to be resolved by a mechanism that was at least as expansive as the problem itself. In this sense, it was more effective at responding to apartheid than criminal prosecution, which would touch only the trigger-pullers. The TRC's democratized solution contributed to the perception that the new dispensation understood and exercised democracy in a way that distinguished it markedly from the old regime. The new regime not only invited everyone's participation, but expected it. This also may have contributed to the construction of a positive "common" experience to replace the common nightmare of apartheid.

ii. Justice through truth and truth through amnesty

The TRC experiment also aimed to integrate justice back into law through the process of amnesty. If it succeeded, this would be a public relations tour de force. Many blacks saw the grant of amnesty as a complete abdication of the ANC's responsibility towards its long-suffering constituency. In fact, one of the two principal challenges to the TRC argued -- ultimately unsuccessfully -- that the granting of amnesty violated several sections of the interim Constitution in that it denied victims their day in court.¹⁴⁴ The argument

¹⁴³ Kader Asmal, *International Law and Practice: Dealing With the Past in the South African Experience*, 15 AM. U. INT'L L. REV. 1211, 1226 (2000).

¹⁴⁴ See AZAPO *supra* note 105 (upholding the amnesty provisions on the ground that they were politically necessary and not inconsistent with the other provisions of the Constitution). The Court was deeply sympathetic to the petitioners though ultimately ruled against them.

that amnesty is *unjust* is obvious: people who do bad things should be punished, and people who do especially bad things should especially be punished. Amnesty – particularly the broad brand of amnesty adopted in South Africa that precluded *all* criminal and civil liability forever – is akin to impunity which is akin to injustice.¹⁴⁵

The acceptance of amnesty as a form of *justice* required a more elaborate thought process and a conception of justice that transcends retribution. The framers of the interim Constitution intimated this approach when they linked amnesty with reconciliation¹⁴⁶ although the thought was not developed in the Constitution itself. It was left to the TRC and the courts to explain why amnesty was in fact more just than the alternative. The Constitutional Court, in upholding the amnesty provisions, explained it this way:

That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many

¹⁴⁵ Not one to mince words, Archbishop Tutu noted the asymmetrical nature of the outcry when the Amnesty Committee actually granted amnesty in certain cases. “Sadly, in almost all cases,” he wrote in the Foreword to the TRC Report, “there was an outcry only when the victim was white and the perpetrator black. I wonder whether people have considered how the Trust Feed Farm community must have felt when Brian Mitchell got amnesty since it was his misinterpreted orders that led to the death of eleven persons in the community.” TRC REPORT vol. 1 p. 12 ¶ 49. Mitchell is white; his victims were black.

¹⁴⁶ “In order to advance such reconciliation and reconstruction, amnesty shall be granted ...” INTERIM CONSTITUTION, *Postamble*.

long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction" which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.¹⁴⁷

Viewed this way, amnesty is an essential part of justice: justice requires truth and truth required the promise of amnesty. This explanation reveals several important things about the South African understanding of justice and about the transformative project generally. As a preliminary matter, however, it must be recognized that this explanation assumes the existence of criminal trials as an adjunct to the TRC process. Trials are necessary because they make the threat of punishment credible, thereby creating an incentive to apply for amnesty; without the threat of criminal prosecution, there would be no need to apply for amnesty.¹⁴⁸

First, the Constitutional Court's approval of amnesty recognizes the limits of criminal trials as truth-seeking mechanisms: if trials could produce truth, we would not need amnesty, but since we have no stick, we need the carrot to get the truth. Second, the Court maintains that truth is a necessary component of justice. Thus, justice must entail something broader than the retributive kind that criminal prosecution produces. It may even entail something broader than "restorative justice" – a term that the TRC itself seems to favor.¹⁴⁹

¹⁴⁷ AZAPO, *supra* note 105.

¹⁴⁸ Indeed, this is the calculation that many perpetrators have made in declining to apply for amnesty. It is telling that the vast majority of amnesty applicants are black, whereas the majority of perpetrators of gross human rights abuses are white. The difference may be explained by the different perceptions of the likelihood of criminal prosecution, even in post-apartheid South Africa.

¹⁴⁹ See TRC REPORT vol. 1 at ¶¶ 36 et seq. Restorative justice assumes that the status quo ante was desirable and therefore that return to, or restoration of, the previous condition is the appropriate aim of justice. Thus, restorative justice has salience in the context of individualized crime, where the criminal act is anomalous and the goal is to return the victim to her or his previous unharmed condition. Thus, as Desmond Tutu has explained, "The African understanding [of justice] is far more restorative – not so much to punish as to redress or restore a balance that

Third (and this follows from the first two), if criminal trials can't reliably produce truth and truth is a necessary component of justice, then some conception of justice other than retribution is called for. The corollary to this conclusion is that some institution other than criminal trials must be necessary.

This broader conception of justice has a transformative dimension – its aim is “the ethos of a new constitutional order.” One critical aspect of this new order, as conceptualized by the Court, is that it engages individuals and the broader society simultaneously. The individuals it engages are both the victims (who become empowered to seek the truth) and the perpetrators (who are released from anxiety and guilt). Through these individual instances of transformative justice, the country as a whole emerges stronger and more “mature,” and able to face the challenge of reconstruction and reconciliation.

As understood by the Court and throughout the TRC process, this form of justice is characterized by medico-religious images of healing, cleansing, curing, and nursing wounds.¹⁵⁰ While justice and healing are not synonymous, there is a certain commonality in the sense that both are concerned with achieving a balance, within the body or the body politic. Martha Minow posits that “[h]ealing and justice are most compatible for groups poised to reclaim or restart a nation under terms conducive to democracy,”¹⁵¹ that is, in situations

has been knocked askew. The justice we hope for is restorative of the dignity of the people.” Minow, *BETWEEN VENGEANCE AND FORGIVENESS*, *supra* note 6, at 81, *quoting* Tina Rosenberg. Crime, or even an amalgamation of criminal acts such as apartheid, threatens individual dignity which can then be replaced through restorative justice. The problem with transporting this notion of restorative justice to the national context, however, is that there may be no desirable status quo ante: in the context of South Africa, the project is to create something new – a non-racial, non-sexist South Africa – that never existed before.

¹⁵⁰ See *e.g.* TRC REPORT vol. 1 at ch. 1 ¶ 27: “However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.”

¹⁵¹ Minow, *BETWEEN VENGEANCE AND FORGIVENESS*, *supra* note 6, at 63; see generally *id.* at 61-66 for an insightful discussion of the intersection between

of transformation. Arguably, healing is the only alternative to punishment. Francois du Bois notes that the TRC's "task was not to establish guilt, but to establish responsibility. Since it could not judge and punish, it had to diagnose and heal."¹⁵² Healing and justice share one other feature: for both, while the negative (that is, sickness and injustice) can be devastating and immediate, the positive (that is, healing and justice) is invariably incomplete and incremental. People and nations both recover slowly from severe trauma.

Finally, the question of punishment is addressed implicitly by the Constitutional Court in this passage. The punishment borne by the perpetrators is not the classic model of incarceration, or even forced community service; rather, punishment is of a moral dimension, entailing shame, opprobrium, and disgrace. It is a punishment that a person feels, and has to live with, even if it doesn't show on the outside.¹⁵³ This, too, is consistent with the extra-legal nature of the Commission's conception of justice.

Thus, the TRC's incorporation of amnesty as a necessary component of justice exemplifies a more capacious understanding of justice than is often adopted, either in the context of transitional or non-transitional justice. Whereas the traditional approach to justice for past crimes is retributive and accomplished through criminal trials which produce punishment, the TRC recognized a form of justice that goes beyond punishment, to transformation and reconstruction, and that is achieved not through harm to the perpetrator (as in incarceration) as much as through gain to the victim (as in enhanced knowledge and understanding of the truth). The emaciated version of justice that existed in the apartheid state required a curative that produced a new, more holistic understanding of justice for the post-

healing and justice.

¹⁵² du Bois, *Nothing but the Truth*, in LETHE'S LAW, *supra* note 45.

¹⁵³ For instance, in the view of the Chilean Truth And Reconciliation Report, "the truth itself constitutes a 'moral conviction.'" Teitel, TRANSITIONAL JUSTICE, *supra* note 3, at 89. "Exposure of perpetrators' offenses is itself a form of punishment, of "shaming," subjecting perpetrators to social censure and ostracism." Teitel cautions, however, that "[t]his form of sanction risks the possibility of limitless condemnation, ultimately threatening the rule of law." *Id.*, at 90.

apartheid period.

iii. Justice transcends the boundaries of the domestic law

The TRC experiment not only expanded South Africa's conception of justice but of law as well. It exhibited a willingness to transcend the boundaries of legal thinking and seek to locate the legal issues in the broader context of human experience. This effectively repudiated the apartheid version of law which solopsistically based its legitimacy on itself.

The Commission's religious influence, in particular, was very controversial. Some people viewed the constant references to religion and the religious tenor of many of the hearings as being inappropriate given that this was obviously intended to operate in a secular context.¹⁵⁴ Members of the classes from which the perpetrators came in particular objected to what was viewed as moralizing.¹⁵⁵ On the other hand, it should not have surprised anyone that a commission chaired by an archbishop would have a religious orientation (not to mention that the deputy chair had been a Methodist minister.)¹⁵⁶ As Priscilla Hayner has recognized, whether good or bad, the religious tenor of the TRC highlighted the difference between this and other truth commissions. "Perhaps the ramifications of this approach, and

¹⁵⁴ South Africa does not even have a single official language, let alone an official religion. In a country marked by racial and ethnic diversity, an official religion is oxymoronic. *See* CONSTITUTION, Sect. 15, Act 108 of 1996. (Protecting Freedom of Religion, Belief, and Opinion).

¹⁵⁵ William Esterhuyse, *TRC Cartoons and the Afrikaner Community*, in TRC IN JEST, *supra* note 139 at 63-76 (noting that "'Biegbank' [confessional bench] became the everyday term for the TRC" at 67). This is ironic, if not downright hypocritical, given the incestuous relationship between the apartheid policies of the National Party and the Dutch Reformed Church. *See generally* Wynand Malan's minority position at TRC Report vol. 5 ch. 9b ¶ 16, *noting* "I learnt my politics in church and much more of my religion in politics."

¹⁵⁶ *See* Boraine, A COUNTRY UNMASKED, *supra* note 2, at 18-20 (describing his own career in the church). *See also id.*, at 265-268 (evaluating Tutu's religious disposition and the religious character of the Commission). *See also* Desmond Tutu, NO FUTURE WITHOUT FORGIVENESS (Image 1999) at 80-87 discussing his religious approach to the Commission's work.

the positive, as well as limiting influence of this religious tone, have not yet been fully appreciated. However, it is a striking difference when the TRC is compared to other commissions that have generally been regarded more as legal, technical or historical investigations, with little suggestion of a process rooted in religious conviction.”¹⁵⁷ This emphasized the reality that this was not an ordinary governmental institution, but deeply marked by other influences.

Literature seems to be another non-legal source of inspiration for the Commission. The report does not cite many literary sources, but when it does, it uses them poignantly. Archbishop Tutu’s foreword opens with a quote from Emily Dickinson: “the truth must dazzle gradually ... or all the world would be blind.”¹⁵⁸ Perhaps this is an implicit acceptance of the limited nature of the Commission’s mandate, or perhaps it is just a cautionary note to the Commissioners themselves about the likely repercussions of the information about to be revealed. By the time the report came out, of course, most people knew much of its contents, because the information had come out gradually during the two-year life of the Commission. But there would still be the shock of the seeing the revelations in black and white, page after page after page.

Another example is the reference to Ariel Dorfman’s “Death and the Maiden.” The Report explains that victims can begin to heal when perpetrators come forward to admit their involvement in past abuses. Describing the situation of the characters in “Death and the Maiden,” the Report says: “his admission restores her dignity and her identity.” Recourse to literature suggests that it can sometimes reveal truth more poignantly than reality can.¹⁵⁹ In another place, the Commission uses literature to learn, and teach, a moral lesson. In explaining the importance of forgiveness, and that to forgive is not to forget but merely to forego resentment, the Report recalls “the struggle of memory against forgetting” described in Milan Kundera’s

¹⁵⁷ Priscilla Hayner, in *LOOKING BACK, REACHING FORWARD*, *supra* note 1, at 41.

¹⁵⁸ TRC REPORT, vol. 1 p. 4 ¶ 16.

¹⁵⁹ *Id.* at vol. 1 p. 7 ¶ 26

“The Book of Laughter and Forgetting.”¹⁶⁰ The Commission’s willingness to go beyond the relatively narrow boundaries of positive domestic law has simultaneously permitted it to reach a deeper truth that resonates more broadly in human experience, and to illustrate, through its actions, that the law is not isolated from human experience or, as it was during the apartheid regime, in opposition to it, but rather a part of the human experience.

Like the literary sources the Report draws on, the legal sources extend beyond national or cultural boundaries. Embracing non-indigenous sources of law is not, of course, a transcendence of the idea of law, since the sources consulted are still legal. It is, however, a broadening of the conception of law beyond the traditional state-centered notion that still prevails throughout much of the world (and notably in the United States). This effort to situate the new order in South Africa within the norms of the international order parallel the TRC’s efforts to locate its conception of law within the broader framework of moral philosophy.

Fittingly, this theme first emerged when the TRC was in its embryonic stage when prominent South Africans convened two international conferences to elicit the experiences and views of experts on truth commissions worldwide.¹⁶¹ The integration of the international into the domestic was perpetuated in some places in the Report as where, for instance, the Commission documents the treatment of apartheid as an international crime against humanity.¹⁶² This ability

¹⁶⁰ Id. at vol. 1 p. 116 ¶ 51.

¹⁶¹ “[T]hose preparing the groundwork for the truth commission in South Africa were aware of many of the previous truth commissions, as well as other transitional mechanisms (such as lustration in Eastern Europe) that had been put in place around the world. South Africa very consciously reached out to persons, who had played pivotal roles in Chile, El Salvador, Argentina, Germany and elsewhere, bringing a number of central actors to Cape Town in 1994 for two international conferences to discuss transitional justice options.” Priscilla Hayner in *LOOKING BACK, REACHING FORWARD*, *supra* note 1, at 35. *See also*, *HEALING OF A NATION?*, *supra* note 109 *and see*, *DEALING WITH THE PAST*, *supra* note 109.

¹⁶² Boraine, *A COUNTRY UNMASKED*, *supra* note 2, refers to frequent trips abroad and to the international contributions made to the President’s Fund, which is the fund from which reparations are to be paid.

to locate the South African experience within the international community contrasts markedly with the international isolation which characterized the waning years of the apartheid era: at that time, the public face of the international community was characterized not by cooperation but by boycotts, divestment, and ostracism. Archbishop Desmond Tutu, in fact, came to international prominence (and earned a Nobel Peace Prize) largely as a supporter of this program of international ostracism. The TRC's invocation of international experience, from its inception to its final report, as well as the reciprocal acceptance of the TRC by the international community exemplifies one aspect of the transformation that South Africa has undergone in the past few years.

This also distinguishes the TRC process from criminal prosecution. Trials are either conducted domestically or internationally but the sources of law are generally kept separate. Nor is there generally any significant effort to locate the domestic outcomes in the broader international context, nor to justify the outcome by reference to international norms.

At first glance, the TRC is marked by features that would seem to threaten, rather than enhance, its prospects for legitimacy. As noted, its most striking feature was its straddling of law and justice. While it partook of some legal traditions, it was not, strictly speaking a legal tribunal. It had the power to issue legally binding decisions (on amnesty) and it was created by statute and was expected to comply with the statutory mandate, an expectation that was judicially reviewable and in fact judicially reviewed. But it was not, as it reminded the public on several occasions, a court of law.¹⁶³ Thus, it

¹⁶³ See e.g., TRC REPORT, noting, "On the one hand, the Commission was a legal institution with the responsibility of making defensible findings according to established legal principles...On the other hand, the Commission embodied a moral and therapeutic process that aimed at acknowledging suffering and giving victims an opportunity to tell their stories. This aspect of the work would have been greatly diminished had the findings process been approached in too technical a manner, focusing narrowly on rules of evidence and requirements of proof. The methodology of the Commission sought to reconcile these potentially conflicting objectives in various ways." TRC REPORT vol. 1 p. 144 ¶ 27. See also Minow, BETWEEN VENGEANCE AND FORGIVENESS, *supra* note 6, at 72 *et seq.*, noting some

was not held to strictly legal standards. Witnesses testified without cross-examination and without regard to rules of evidence. It sought out witnesses, designed the questions, assisted in the testimony, and made its sympathies known from the outset.¹⁶⁴

Whether this was an asset or a defect is open to question. Indeed, the obligation of the Commission to adhere to legal procedures was made explicit by the Du Preez decision that excoriated the Commission for failing to provide sufficient notice to individuals who were to be identified as perpetrators during live testimony by victims.¹⁶⁵ Supporters of the decision would argue that the Court corrected the defects caused by TRC's amorphous nature by insisting that legal procedures be followed; detractors argued that the TRC's amorphous nature was an asset that needed no correction.

While this free-form might have hampered the TRC's legitimacy, the Commission itself tried to use its hybrid nature to its advantage, playing on legal forms when appropriate but replacing them with others when not. The TRC used its legal authority to obtain materials through subpoena power, for instance, or to summon witnesses. But it resisted formalist obligations when it viewed those as impeding its pursuit of justice. And when legal authority seemed insufficient, it transcended legal constraints and relied on other forms of power as, for instance, the extraordinary cases of P.W. Botha¹⁶⁶

of the differences between the TRC and a court of law (perhaps encapsulated in Justice Albie Sach's comment that "Tutu cries. A judge does not cry." *Id.* at 73).

¹⁶⁴ As Commissioner Wynand Malan wrote in his minority position, "Evidence was not tested. It was not intended to be tested. Except for a few statements, they were not even attested to under oath. Most deponents giving oral evidence, when taking the oath, made it clear that they would speak the truth 'as they see it'." TRC REPORT vol. 5 ch. 9b ¶ 23.

¹⁶⁵ Du Preez v. TRC 1997 (4) BCLR 531 (A).

¹⁶⁶ When the Commission's efforts to get the former State President to appear before the Commission failed, Nelson Mandela "telephoned him on a number of occasions and pleaded with him to appear before the Commission. He had gone so far as to offer to accompany Botha to the Commission hearing. And this from a man who had suffered twenty-seven years of imprisonment with the enthusiastic support of Botha and his colleagues." Boraine, A COUNTRY UNMASKED, *supra* note 2, at 202.

and Winnie Madikizela-Mandela¹⁶⁷ demonstrate. In both these instances, Tutu and the Commission relied on political, moral, and even emotional suasion to promote their goals (of securing testimony from Botha and an apology from Madikizela-Mandela). Although in neither case was the blurring of boundaries successful,¹⁶⁸ the well-publicized efforts permitted the Commission to create its own tradition that blended legal and non-legal influences. In all these ways, the TRC process demonstrated a conception of justice that balanced the formalism of law with other aspects of human experience, which of course marked a sharp contrast with the prior regime.

iv. Justice through self-examination

Another means the Commission used to create faith in the new legal order is, perhaps paradoxically, to be self-critical. One aspect of this was the Commission's criticism of its enabling legislation. This accomplished several things. Against the backdrop of the apartheid regime, which held itself out to be immune from criticism from the international community, from the polity (hence the secrecy), and from the courts (as guaranteed by parliamentary sovereignty), the TRC's public criticism of its organic act showed the new government to be amenable to criticism from the public, as well as from other organs of the government itself. In this new dispensation, the courts have the power of judicial review, the people have the right to com-

¹⁶⁷ The TRC held nine days of hearings on matters relating to Winnie Madikizela-Mandela's involvement in the torture, murder, and disappearance of several youths. At the close of the hearing, Desmond Tutu entreated Madikizela-Mandela to acknowledge her central role that had become clear during the hearing. Tutu "stressed the need to demonstrate that the new dispensation was different qualitatively and morally and the need to stand up to be counted for goodness, for truth, and for compassion." In closing, he said, "I speak to you as someone who loves you very deeply. Who loves your family very deeply. I would have said to you, let us have a public meeting. And at that public meeting for you to stand up and say there are things that went wrong, there are things that went wrong, and I don't know why they went wrong." Boraine, *A COUNTRY UNMASKED*, *supra* note 2, at 251-252. These are obviously not the words of a judicial officer.

¹⁶⁸ The Commission failed to secure either Botha's appearance or Madikizela-Mandela's apology.

ment on the government's work, and the government can be trusted to acknowledge its own shortcomings, all without fear of reprisal.¹⁶⁹ This was an early and highly visible manifestation of the paper guarantees of free speech that have been written into the new Bill of Rights.

The content of the TRC's criticism of its own organic act ranged from mild annoyance – for instance, over the use of the term “victim” rather than survivor¹⁷⁰ -- to severe frustration over the limitations in the legislation both in time and in scope. The clearest limitation on the Commission's jurisdiction was a temporal one. The Commission was authorized to investigate only those abuses that took place between March 1, 1960 and May 10, 1994. This mandate period is thus substantially shorter than the period during which racism has existed in South Africa – which began when whites began to settle permanently in South Africa in 1652, and continues to this day – and shorter even than the apartheid era – which began officially in 1948 when the National Party gained control of Parliament. March 1, 1960 marks the events leading up to the Sharpeville Massacre (March 21, 1960), at which point tensions between the majority and the governing minority escalated dramatically. This temporal limitation would seem to prevent the Commission from examining, and therefore explaining, the historical context that gave rise to the extreme violence that characterized the mandate period.

The other limitation had more profound implications for the work of the TRC. The statute authorized the TRC to “promote national unity and reconciliation” by “(a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the [mandate]

¹⁶⁹ TRC criticism of the legislation is not limited to its report, but can be found in writings by the Commissioners themselves, in their individual capacities. See Mary Burton, *Making Moral Judgments*, in LOOKING BACK, REACHING FORWARD, *supra* note 1, at 77-85; and see Boraine, A COUNTRY UNMASKED, *supra* note 2, at 300-339. See also dissenting view of Wynand Malan in TRC REPORT vol. 5.

¹⁷⁰ TRC REPORT, vol. 1 p. 59 ¶¶ 37-39.

period....”¹⁷¹ It then defined “gross violations of human rights” as “(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)...”¹⁷² The Commission took this definition to mean that specific acts of extreme violence were within its jurisdiction, but that acts that were committed on a widespread basis – i.e. through legislation requiring forced removals and passbooks – were outside its jurisdiction.

This limitation on the Commission’s authority virtually forced an emphasis on individual acts and individual suffering rather than on the collective and cumulative experience of apartheid. While this permitted some individual stories to be highlighted and thus seared into the public consciousness, it might have minimized the impact of the actual nature of apartheid which was felt as day-after-day oppression, as well as in individual instances of extreme violence. Twenty-one thousand people told their stories, but millions did not. This has material implications for the millions of people who were victimized by apartheid but whose experiences did not amount to “gross violations of human rights” within the meaning of the statute: people who are not “victims” of gross violations of human rights are not entitled to reparations under the Act. It is therefore possible to read the report as an indictment of apartheid on the ground that it entailed individual acts of torture and murder, rather than because it entailed widespread racial oppression.¹⁷³

¹⁷¹ Sect. 3(1)(a) of the TRC Act.

¹⁷² Sect. 1(ix)(a) and (b) of the Act.

¹⁷³ Mahmood Mamdani offers this analogy: “Imagine that a truth commission had been appointed in the Soviet Union after Stalin, and this commission had said nothing about the Gulag. What credibility would it have had? The South African equivalent of the Gulag was called forced removals. Between 1960 and 1982 an estimated 3.5 million people were forcibly removed, their communities shattered, their families dispossessed and their livelihoods destroyed. There were not inert outcomes of socio-economic processes, but outcomes of active violence by state agents. [¶] These 3.5 million victims comprise faceless communities, not individual activists. They constitute a social catastrophe, not merely a political dilemma. Were these removals not gross violations within the terms of reference set by the law? Why, then, did the TRC not include these people among ‘victims’?”

Narrowing the mandate, however, might be defended on certain grounds. A broader mandate might have been impossible to fulfill and attempting to do so would have discredited the Commission. In 34 months -- the time allowed by the statute and probably by the public's patience -- the Commission could hardly have been expected to investigate and write the definitive history of severe racism in South Africa, and it would not have redounded to the Commission's benefit to try. Furthermore, as Albie Sachs has suggested, the violence of the forced removals and other legislative incidents of apartheid were not shrouded in secrecy, as were the more extreme acts that violated even apartheid's own warped conception of law.¹⁷⁴ Thus, the Commission might have reasoned that its resources would be better spent shedding light on the extraordinary theretofore unknown violations than on the widely felt and widely known injustices. Finally, the Commission might have perceived a material advantage to limiting the class of "victims" to those who had suffered most egregiously: the Commission might have calculated that asking the government for less would increase the chance that the government would pay the recommended reparations.¹⁷⁵ Arguably, the mandate was tailored to what it was thought possible and most important for the Commission to accomplish

Whether or not the limitations in the statute are ultimately desirable, the Commission clearly viewed them as constraints that prevented it from delving more deeply into the nature of apartheid. But unlike an ordinary government agency that would simply stay within its statutory limits without drawing attention to them, the TRC effectively circumvented them without appearing to do so. The Commission took advantage of another section of the statute -- empowering it

Mamdani, *A Diminished Truth*, in AFTER THE TRC, *supra* note 34, at 59-60.

¹⁷⁴ See Albie Sachs, *His Name was Henry*, in AFTER THE TRC, *supra* note 34, at 94-95 (suggesting that the TRC focused its attention on the cases that had previously been "hidden, secret and denied" as opposed to the Group Areas Act and the Land Act and the "wars of dispossession [which] were known.").

¹⁷⁵ To date, this calculation has turned out to be erroneous, as the government has not paid even the moderate amounts recommended by the TRC. See *Report on Khulumani Reparations Indaba*, *supra* note 9.

to “compil[e] a report providing as comprehensive an account as possible of the activities and findings of the Commission”¹⁷⁶ – and wrote an exhaustive report¹⁷⁷ detailing that which it was not authorized to investigate. This theme is repeated throughout the Report; it is perhaps most succinctly raised in the “historical context” chapter, a chapter devoted to describing what was excluded from the mandate. In purely legal terms, this would be *ultra vires* and a commission committed to legalism would have taken advantage of the restriction to avoid the broader issues. By contrast, the TRC took the position that commenting on the contours of its authority was entirely within its authority. The Commission explained that

“...[the] governing Act limited its investigation to gross violations of human rights defined as the “killing, abduction, torture, or severe ill-treatment” and the “attempt, conspiracy, incitement, instigation, command or procurement to commit” such acts. In essence, therefore, the Commission was restricted to examining only a fraction of the totality of human rights violations that emanated from the policy of apartheid – namely, those that resulted in physical or mental harm or death and were incurred in the course of the political conflicts of the mandate period. [¶] The Commission’s focus was, therefore, a narrow or restricted one, representing what were perhaps some of the worst acts committed against the people of this country and region in the post-1960 period, but providing a picture that is by no means complete. For, simultaneous to the ‘gross’ abuses documented later in this report, millions of South Africans, and more particularly those who were not white, were subjected to racial and ethnic oppression and discrimination on a daily basis – in pursuit of a system which [this Report] describes as ‘systemic, all-pervading, and evil.’”¹⁷⁸

The Commission recognized the obvious point that gross violations of human rights were part of the fabric of apartheid. People

¹⁷⁶ Sect. 3(1)(d)

¹⁷⁷ The first five volumes comprise 3500 pages; the last volume will add another few hundred pages.

¹⁷⁸ TRC REPORT vol. 1 p. 29 ¶¶ 19-20

who were simply black in South Africa were victims of gross human rights violations, whether or not they were also victims of torture, abduction, severe ill-treatment, or the killing of their loved ones. It was impossible, the Commission seemed to say, to fulfill its task of comprehensively investigating, understanding, and telling of the violations of the past when these were statutorily defined in such a limited way. In these sections of the Report, the Commission makes it clear that it is not exceeding its legal mandate because doing so would contravene the rule of law. Rather, the Commission was doing all it legally could do to import an understanding of the role of justice, and injustice, into its work. Failing to comment on the limitations in the statute would itself be unjust.

It has been argued that the Commission itself read its mandate unnecessarily narrowly.¹⁷⁹ Severe ill-treatment, the argument goes, is broad enough to include the forced removals and day-to-day deprivations imposed on generations of South Africa's blacks. According to this argument, the Commission compromised its own effectiveness in achieving justice by restricting itself to only the most egregious and individualized human rights abuses. For present purposes, it is not as important to resolve this dispute of statutory interpretation as to recognize the significance of the TRC's approach to its organic legislation. The TRC's overt criticism of certain aspects of the law ushers in a new era in which open debate can be conducted on matters of public importance. This, as much as the substantive conclusions drawn by the report, can contribute to South Africa's transformation to a liberal democracy.¹⁸⁰

¹⁷⁹ See Asmal et al., *When the Assassin Cries Foul*, in LOOKING BACK, REACHING FORWARD, *supra* note 1, at 86-98.

¹⁸⁰ One feature which oddly reinforces the legal or judicial side of the Commission's work is the dissenting view of Commissioner Wynand Malan. This is a fascinating document in which he simultaneously excoriates the Commission for being too indulgent of the victims and for being too sympathetic of the perpetrators. His comments are at times well-taken (is it really possible to "restore" human dignity to someone else, or do people retain their dignity, despite the suffering and humiliation?), but at other times his critique is explainable only by his failure to have committed fully to the enterprise. For the most part, however, his comments were not taken well by the majority of the Commissioners, who wrote a terse re-

b. Untold suffering from unspeakable acts

The previous section illustrates how the TRC deliberately embodied the joinder of justice and law that would characterize the new South Africa. Another part of the transformative project was the strong orientation of the TRC towards the people it called the “victims” of apartheid and towards South African blacks generally. Again, this had a transformative purpose – to integrate the majority of the population (namely blacks) into the polity, to promote a trusting relationship between the population and the government, to promote reconciliation as the foundation on which the new South Africa stands. It sought to end the “untold” suffering by giving everyone a chance to speak and by listening. Furthermore, this victim orientation exhibited a preference for aspects of black South African culture over the culture of the previously dominant minority.

The victim orientation of the TRC manifested itself in many ways. Again, some of these were mandated by the statute, while others were devised by the TRC itself or by its interpretation of the statute. Perhaps the most obvious was the extensive series of victims hearings held throughout the nation. The TRC took great pride in the lengths it went to communicate with victims. On its own and with the help of NGOs, the TRC located victims; it visited them in homes, community centers, and churches; it invited them to speak in the language they were most comfortable in; it gave referrals for physical and mental health facilities. It was the only truth commission in the world to create a witness protection programme.¹⁸¹ Furthermore, victims were also able to make use of the TRC’s mental health unit.¹⁸² This section was created by the Commission itself, unmandated by the statute.¹⁸³ The emphasis on the victim hearings in the

sponse. See TRC REPORT Vol. 5 ch. 9c.

¹⁸¹ See Promotion of National Unity and Reconciliation Act, Sect. 35; see also Priscilla B. Hayner, *Fifteen Truth Commissions, 1974-1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994).

¹⁸² See generally TRC REPORT vol. 1 pp. 364-371.

¹⁸³ “The almost complete lack of reference to the issue of psychological support in the Promotion of National Unity and Reconciliation Act created some ambivalence with issues relating to psychological support services remaining an on-

press for the first year and a half of the Commission's life reinforced that this was the orientation of the Commission.

Indeed, it is hard to imagine a more sympathetic governmental agency. As part of its interpretation of its mandate, it used a broad conception of the word "truth" in order that peoples' experiences might be accepted and acknowledged even if they could not be corroborated with scientific evidence. The report quotes from a statement made by Chairperson Tutu at one of the hearings:

This Commission is said to listen to everyone. It is therefore important that everyone should be given a chance to say his or her truth as he or she sees it.¹⁸⁴

The Commission took this obligation to accept everyone's truth as he or she sees it as directly mandated by the statute. According to the Commission, section 3(c) of the Act, which states that the Commission shall achieve its objectives by "restoring the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims" requires the Commission to hear and "create" narrative truth.¹⁸⁵

The Commission's explicit endorsement of the narrative, as well as historical and other forms of truth, concretizes its empathy with the victims of apartheid. Although the Commission did not equate narrative with scientific truth, it recognized the value of four different types of truth. This conveyed the message to witnesses that their experience – articulated in whatever form – is legitimate and, furthermore, that the experiences of victims generally are an integral part of the official story of apartheid. This distinction, between the old regime which negated the experience of black South Africans and the new regime which enshrines it, was made explicit by the process through which the TRC obtained information and in the re-

going source of debate throughout the life of the Commission." TRC REPORT vol. 1 p. 364 ¶ 1. One witness told me that the psychologist from the TRC actually phoned her and insisted that they meet, and meet again. (Meeting with Shirley Gunn, March 13, 2001).

¹⁸⁴ TRC REPORT vol. 1 p 112 ¶ 35.

¹⁸⁵ Id. vol.1 p. 112 ¶ 36, n. 6.

sultant story woven together in pages of the final report.

The environment created by the TRC and the messages conveyed by it can be analogized to the sense of ubuntu of which the new constitution and the TRC both speak. As the TRC Report explains,

“As far as traditional African values are concerned, the fundamental importance of ubuntu must be highlighted. Ubuntu, generally translated as 'humaneness', expresses metaphorically in umuntu ngumuntu ngabantu - 'people are people through other people. In the words of Constitutional Court Justice Makgoro: "Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation.”¹⁸⁶

This sense of ubuntu is reflected throughout the new Constitution, from its “Founding Provisions” in chapter one to its extensive Bill of Rights. But the TRC provided tangible evidence of what ubuntu is and of its central place in the new South Africa. If the TRC – and particularly the Human Rights Violations Hearings – can be said to have restored people’s individual dignity, they did so by listening, understanding, empathizing with the victims. People became (newly re-dignified) people through the TRC. The process allowed survivors to be reintegrated into society and it reshaped society to incorporate survivors.

In hearings, victims often approached the Commission almost in a foetal position as they came to take their seats and relate their stories. They told stories as they saw them, as they experienced them, as they perceived what had happened to them. As they left their seats, the image was wholly different. They walked tall. They were reintegrated into community. They could re-assume their roles in society; they could manage themselves and the world them again. They were healthy cells of the national organism. This too is restorative justice. This too is the spirit of ubuntu.¹⁸⁷

By suggesting that human dignity was impaired until the hear-

¹⁸⁶ TRC REPORT vol. 1 ch. 5 ¶ 85.

¹⁸⁷ TRC REPORT vol. 5 ch. 9B ¶ 37.

ings, the TRC recognized the relevance of other people – the larger community – to making people whole. It gave survivors a space in which to speak their deepest thoughts, and it validated them by acknowledging, without judging, them. By evidencing, each day for more than 2 years, this spirit of ubuntu, the TRC helped to make it an intrinsic part of the new South African culture.¹⁸⁸

It should also be noted that in many important ways the Commissioners have individually continued to work for the enhancement to victims' lives that was evident during their tenure as Commissioners. In addition to their writings about the ongoing process of reconciliation, Commissioners remain involved in almost all aspects of the transition. At a recent meeting of uncompensated victims in Cape Town, no fewer than three (of seventeen) Commissioners appeared and contributed meaningfully and honestly to the discussion about how to secure reparations.¹⁸⁹

c. Situating the Dialogue

The TRC's contextuality – the fact that it could not have been designed or have operated anywhere or at any time but in post-apartheid South Africa -- means that it was perfectly situated to engage in a dialogue with South Africans. It understood the new South Africa and the people who inhabited it; it had spent more than 2 years getting to know the victims, perpetrators, and bystanders. This was a critical feature of the TRC because of the nature of transformative justice. No institution can accomplish the transformation; it can only set the course and begin the process. It must invariably

¹⁸⁸ It could also be said that the TRC's manifested ubuntu in its negative aspect as well: by morally indicting perpetrators – from the poolside beneficiaries to the torturers – it diminished the dignity of those who supported the apartheid regime. Furthermore, this whole approach may have also contributed to the alienation that some whites felt from the TRC process. If the tenor of the hearings was one that was intended to promote ubuntu, it may have resonated profoundly with black South Africans, but may have been antithetical to white South African culture.

¹⁸⁹ See *Report on Khulumani Reparations Indaba*, *supra* note 9 (reflecting appearances by Yasmin Sooka, Dumisa Ntsebeza, and Hlengiwe Mkhize).

leave it to others to accomplish the goals identified and embarked on by the institution itself. One measure of the TRC's success, then, is how well it got the conversation started.

Nothing illustrates the dialogic potential of the TRC so much as its final report.¹⁹⁰ The Report was quite obviously intended to create faith in the new legal order. The Chariperson's Foreword ends with the words: "I am honoured to commend this report to you."¹⁹¹ To whom? The report looks and reads, not like memoranda of an agency to the President, nor even like judicial decisions but rather like a high school textbook. It is available at bookstores, on the web¹⁹², and on CD-ROM. This suggests that the authors of the report wanted its contents to reach a larger audience, not confined to academics or lawyers, but to the people at the most general and impressionable level. Indeed the Report recommends that posters should be made for distribution in schools, and that web sites be created, and that all other media be considered as vehicles to communicate the TRC's message to South Africans in this and future generations. The TRC sought to *speak* to the nation, to entreat the nation to heed its call of reconciliation and responsibility and to understand the need for accountability and transformation. This is an offering from a governmental agency to the people, a demonstration of the government's responsiveness to the people.

Beyond suggesting this overture from the government to the people, the report indicates that it expects an answer.¹⁹³ The report is peppered with caveats that the TRC is just the starting point but can not be responsible for ascertaining the whole truth nor accomplishing reconciliation. In doing so, the TRC is creating the modality of an

¹⁹⁰ The first five volumes of the Report were submitted to President Nelson Mandela on 29 October 1998. The sixth and final volume, containing an exhaustive list of victims' names and the complete tally of amnesty grants and denials, was expected in September 2001.

¹⁹¹ TRC REPORT, vol. 1 p. 23, ¶ 95.

¹⁹² See *supra* note 25.

¹⁹³ "It is up to each individual to respond by committing ourselves to concrete ways of easing the burden of the oppressed and empowering the poor to play their rightful part as citizens of South Africa." TRC REPORT vol. 5 ch. 8 ¶115.

ongoing dialogue between the people and the government that, again, had never previously existed, nor even been thought possible. Judging by the sheer size of the report, the dialogue envisioned by the TRC is meant to be deep and comprehensive, not superficial or skimpy. This approach, of speaking to the nation, is of course consistent with the TRC's general commitment to communication, as seen in its own transparency and in the importance it attaches to bearing witnesses to the past.¹⁹⁴

The result of this effort was to encourage popular faith in a new legal order. The TRC showed people a new kind of law, one that resonated with people because it was connected, not opposed, to their religion, their sense of morality, or their personal experience. Furthermore, it exemplified the importance of the populace to government, in a democracy, by seeking and indeed depending on the involvement of individuals in the truth-ascertaining and reconciliation programme. In this sense, the TRC in 1996 was of a piece with the holding of public elections in 1994 and the making of the constitution in the early 1990s. All three required for their success, for the first time in South African history, the participation of vast numbers of South African citizens. But as an ongoing process and an institution with public faces attached, the TRC, perhaps more than anything else, exemplified the new government's genuine commitment to the ideals of the liberation struggle.

4. Assessing success.

The success of a nation's response to past abuses can be measured in two ways. First, one can compare how well the institutional response achieved the goals traditionally associated with retributive justice – consolidating rule of law values, instilling individual responsibility, achieving respect for human rights, and drawing clear lines between the old dispensation and the new. Second, one might evaluate how well the institutional response achieved the transfor-

¹⁹⁴ Alex Boraine writes, "almost as important as the process of establishing the truth was the process of acquiring it. The process of dialogue involved transparency, democracy, and participation as the basis of affirming human dignity and integrity." Boraine, *A COUNTRY UNMASKED*, *supra* note 2, at 290.

mational goals of the new order. Although the TRC was not without its “imperfections,” as Nelson Mandela said upon receiving the Report, it achieved a measure of success by either of these two standards.

Initially, it must be recognized that the traditional values of retributive justice may operate in varying degrees in transitional societies. For instance, while South Africa’s past was marked by an excessive legalism, Rwanda’s genocide was marked by complete lawlessness. Thus, promoting the rule of law will mean different things in these two places at the moment of transition. In South Africa, the goal of transformation would be the establishment of a more humanized and moral form of law, whereas in Rwanda, the goal would be initially the establishment of a formal system of law that confirms the centrality of law in an organized society. The TRC was the appropriate instrument for promoting not “rule of law” in the generic sense, but the kind of rule of law needed in South Africa. It promoted the rule of law by presenting itself as an authoritative (though not authoritarian) organ of government that, overall, dealt fairly and respectfully with the public at large.

Another goal of retributive justice is said to be the individuation of responsibility.¹⁹⁵ In order to avoid general indictments of an entire group, it is important to distinguish between those who are culpable and those who are not. The TRC accomplished this goal by remaining focused on the role of individuals in apartheid. It refused to accept applications for blanket or collective amnesty, insisting that each person who desires amnesty must on her or his own accept the responsibility of his or her acts by fully disclosing the truth.¹⁹⁶ Individual sufferers as well as individual perpetrators took center stage during the TRC drama; indeed most of the piercing images of the TRC are of individuals engaged in certain extraordinary acts: Tutu crying, Jeffrey Benzien demonstrating his “wet bag” method of torture,¹⁹⁷ Nomonde Calata’s wail.¹⁹⁸ Indeed, this is one of the most

¹⁹⁵ See *supra* at Part II C.

¹⁹⁶ TRC REPORT Vol. 1 p. 118 ¶59 (noting that “a considerable degree of accountability was built into” the amnesty provisions of the TRC Act).

¹⁹⁷ See Martin Meredith, *COMING TO TERMS* for a particularly powerful de-

common criticisms of the TRC – that it ignored the collective suffering endured by the collective evil of apartheid.¹⁹⁹

In the context of transitional justice, however, it may not be sufficiently precise to say that some people are guilty and some are not. In periods of massive oppression, it is more likely that many people are guilty in different ways and to different degrees. It is therefore not sufficient to convict some while acquitting others; the task of individuating responsibility must in these circumstances be more nuanced. Unlike criminal trials, the TRC was able to accomplish this more subtle version of individuating responsibility by assessing the relative culpability of all the major players in apartheid, from the leaders, to the foot soldiers, to the institutional promoters of apartheid, to the passive beneficiaries.²⁰⁰

In the context of the TRC, the punishment imposed on those found “guilty” of apartheid crimes was not retributive punishment – although of course those who are denied amnesty are amenable to criminal trials. Rather, the punishment of the amnesty hearings is the weaker form of punishment comprising shame, ostracism, and opprobrium. While this may not be as harsh to the defendant, it may equally well achieve the goal identified by Martha Minow of assert-

scription of Benzien’s testimony; *see also* TRC REPORT vol. 5 ch. 6 ¶ 36.

¹⁹⁸ On the second day of the first hearing of the Human Rights Violations Committee, Nomonde Calata testified about her husband’s death. “In the middle of her evidence, she broke down and the primeval and spontaneous wail from the depths of her soul was carried live on radio and television, not only throughout South Africa but to many other parts of the world. It was that cry from the soul that transformed the hearings from a litany of suffering and pain to an even deeper level. It caught up in a single howl all the darkness and horror of the apartheid years. It was as if she enshrined in the throwing back of her body and letting out the cry the collective horror of the thousands of people who had been trapped in racism and oppression for so long.” Borraine, *A COUNTRY UNMASKED*, *supra* note 2 at 102. *See also* Desmond Tutu, *supra* note 156, at 147 (describing same incident as “the defining sound of the TRC – as a place where people could come to cry, to open their hearts, too expose the anguish that had remained locked up for so long, unacknowledged, ignored, and denied.”)

¹⁹⁹ Mahmood Mamdani, in *A Diminished Truth*, in *AFTER THE TRC*, *supra* note 34.

²⁰⁰ *See supra* at text accompanying notes 142-143.

ing truth of the victim's value by inflicting a publicly visible defeat on wrongdoer.²⁰¹

For similar reasons, the TRC was able to demonstrate the new dispensation's respect for human rights at least as well as courts could have done.²⁰² By listening to victims and chastising perpetrators, the TRC demonstrated the importance of respect for the rights of all people. Indeed, the TRC's most controversial decision – to investigate the gross human rights abuses committed by the liberation movements and in particular by the ANC – showed that it respected human rights so much that it would respect the rights of even those who supported apartheid. Nonetheless, it was also able to nuance its message about the respect for human rights by examining the differences between various kinds of human rights violations: the TRC distinguished between human rights abuses that were committed to support apartheid and those that were committed to resist and change it and, as suggested above, it distinguished among different degrees of abuse.²⁰³ The TRC's uniqueness and prominence meant that its message was more effectively communicated than a court's decision (or a series of court decisions) would have been. With criminal trials, the possibility of acquittals creates the risk that the message of human rights respect will be defused. The correlative risk with the TRC is the grant of amnesty, although the TRC (with the assistance of the Constitutional Court²⁰⁴) has done all it could to demonstrate that amnesty furthers the values of human rights more than it impedes them, at least in the context of post-apartheid South Africa. This may not be persuasive to all, but it is no less persuasive than an acquittal under similar circumstances.

The TRC's central accomplishment, however, was not only in achieving retributive goals at least as well if not better than criminal

²⁰¹ See *supra* at text accompanying note 82.

²⁰² See *supra* at text accompanying notes 83-84.

²⁰³ TRC REPORT vol. 1 ch. 4 ¶¶60-81 (justifying decision to investigate human rights abuses committed by non-governmental as well as governmental actors). The ANC in particular took issue with this decision and it remains controversial.

²⁰⁴ *AZAPO v TRC* 1996 (4) SA 562 (C); see above.

prosecution could have done; the TRC also promoted the transformational goals of the new South Africa. On this score, assessing the success of the TRC is difficult for two related reasons.

First, there appears to be a schism between the reactions to the TRC of South Africans and non-South Africans. While the worldwide reputation of the TRC is extremely high, many South Africans are very skeptical of it.²⁰⁵ As one commentator has written, the Truth and Reconciliation Commission was a misnomer²⁰⁶, having produced neither truth²⁰⁷ nor reconciliation.²⁰⁸ Indeed, it has been argued that the goal of reconciliation, as achieved through truth was incoherent, and therefore impossible to attain.²⁰⁹ What it produced instead, the

²⁰⁵ This generalization, like any, is only true in the main. There are many South Africans who did and continue to support the TRC, including most of the black population at large and some elites like Albie Sachs, Antjie Krog, and Jeremy Sarkin as well as the Commissioners and staff themselves. See Gibson, James L., and Helen Macdonald. 2001. *Truth— Yes, Reconciliation – Maybe: South Africans Judge the Truth and Reconciliation Process*, in RESEARCH REPORT, INSTITUTE FOR JUSTICE AND RECONCILIATION (finding that 76% of South African blacks but only 37% of South African whites approve of the TRC) at 3. Most of the criticism of the TRC comes from within South Africa and it is deep and cutting. See e.g., AFTER THE TRC, *supra* note 34 and LOOKING BACK REACHING FORWARD, *supra* note 1 (containing multiple essays by South Africans critical of the TRC process). What follows is only a brief mention of some of the most prevalent criticisms of the TRC. As a general rule, it can be said that South Africans who criticize the TRC tend to overemphasize its faults while foreigners who laud it tend to overrate its accomplishments.

²⁰⁶ Kaiser Nyatsumba, *Neither Dull Nor Tiresome*, in AFTER THE TRC, *supra* note 34, at 90.

²⁰⁷ See Mahmood Mamdani, *A Diminished Truth*, in AFTER THE TRC, *supra* note 34; du Bois, *Nothing But the Truth*, in LETHE'S LAW, *supra* note 45.

²⁰⁸ As one commentator has put it, "The sad truth is that, for a host of reasons, South Africans today are not any more reconciled now, especially across the racial divides of old, than they were before the inception of the Commission. We have had wonderful and very moving examples of reconciliation taking place between victim and perpetrator or a victim's family and a perpetrator after the truth had been told. However, such reconciliation as has taken place has not found resonance across the country." Kaiser Nyatsumba, *Neither Dull Nor Tiresome*, in AFTER THE TRC, *supra* note 206, at 90-91.

²⁰⁹ du Bois, *Nothing but the Truth*, in LETHE'S LAW, *supra* note 45 (arguing

skeptics argue, was division and pain and very high but unfulfilled expectations of closure and healing. Thus, the view from inside, from those who live day-to-day with the aftermath of the TRC, seeks answers to why the end of the rainbow seems so dull.

From a purely material point of view, the TRC produced an imbalance of justice: it granted amnesty to some perpetrators but did not secure meaningful reparations to any victims. This may have been failure in planning,²¹⁰ the result of excessive, indeed unrealistic, optimism about the government and the private sector's willingness to engage in a reparations program that could be perceived as naked wealth redistribution,²¹¹ or perhaps just evidence of the inevitable schism between advisory panels and government.

Other criticisms have also been made, with some justification. First, there are the general criticisms: from the left that it was too conciliatory to the leaders of apartheid and too insistent on documenting the ANC's human rights abuses; and from the right, that it was a witch-hunt that was intended to indict all whites in the crimes of apartheid.²¹² The next level of criticisms are more nuanced: that

that the truth would inevitably divide people and therefore frustrate the goal of reconciliation).

²¹⁰ This result might have been avoided if, for instance, the TRC had withheld its amnesty decisions until reparations had been paid. This would have created the political pressure necessary to ensure the payment of reparations. While the Commission itself was bound by statute to make amnesty decisions and was limited by statute to hortatory power with respect to reparations, the statute did not designate the order in which these issues had to be resolved.

²¹¹ This theme was sounded repeatedly at the Khulumani Indaba held in Cape Town in April 2001 at which members of the victim class and their political allies (including former TRC commissioners) tried, largely unsuccessfully, to secure commitments from government officials about the government's intentions to pay constitutionally and statutorily mandated reparations. *See Report on Khulumani Report on Khulumani Reparations Indaba, supra* note 9.

²¹² *See* Boraine, A COUNTRY UNMASKED, *supra* note 2, at 300-339 (describing reactions to the publication of the TRC Report). These criticisms culminated in last-minute efforts by both the ANC and the National Party to prevent publication of the Final Report. *See e.g.* Wally Mbhele, *ANC, TRC clash over Final Report*, MAIL AND GUARDIAN October 9, 1998 (*at* <<http://www.mg.co.za>>) and *see e.g.* Howard Barell, *What FW did not want you to see*, MAIL AND GUARDIAN, October

the TRC was selective in its search for truth²¹³ (and in particular, that it selected out the quotidian gross violations of human rights committed in the name of apartheid²¹⁴), that it failed to transcend the politics of the day or to “insert anything distinctive into the network of power relations” that govern modern South Africa,²¹⁵ that it was insufficiently welcoming to whites who, if given a bit more encouragement, would have participated more openly.²¹⁶

While these may all be true, outside commentators tend to focus not on what the TRC failed to achieve but on its promise. This is a luxury that outsiders have because they do not live with the problems of quotidian life in South Africa and can think about how the lessons learned in South Africa can be used in other parts of the world. Because there is no neutral observer, no one standing behind the veil of ignorance who is neither insider nor outsider, there is no way to mediate who is right and who is wrong. I do not wish to argue that the truth lies somewhere in between, but rather that the truth is both inside and outside simultaneously. The TRC has both shortcomings

30, 1998 (at <<http://www.mg.co.za>>).

²¹³ See e.g. *Minority Position of Wynand Malan*, TRC REPORT vol. 5 ch. 9b ¶¶23-28.

²¹⁴ See *supra*. See also Asmal in LOOKING BACK, REACHING FORWARD, *supra* note 1, at 86-98; Colin Bundy in AFTER THE TRC, *supra* note 34, at 18-19; Mahmood Mamdani, *id.*

²¹⁵ du Bois, *Nothing but the Truth*, in LETHE’S LAW, *supra* note 45 at 110.

²¹⁶ This was suggested to me by Jeremy Sarkin in conversation, May 30, 2001. The TRC lobbed widespread criticism at all those who did not participate in the process to the Commission’s satisfaction (see extended criticism of the response to the TRC process of the white community (vol. 5, p. 196 ¶¶ 3-4), leaders of the National Party, the South African Defence Force, and the South African Police (*Id.* at ¶¶ 4, 7-8, 10-16, 39-42), the African National Congress (*Id.* at ¶¶ 17-20, 43), the United Democratic Front (*Id.* at ¶ 21), the Inkatha Freedom Party (*id.* at paras 22-26), the Pan Africanist Congress (*Id.* at ¶ 27), and organizations representing various sectors of civil society especially the legal sector (*Id.* at ¶ 28)). This almost reflects back on the Commission itself. Though it may be correct in its assessment that “the spirit of generosity and reconciliation enshrined in the founding Act was not matched by those at whom it was mainly directed” and that “Few grasped the olive branch of full disclosure.” (Vol. 5 p. 196 ¶ 3), it may have been the responsibility of the TRC to ensure that civil society participated satisfactorily.

and promise. It is for that reason that we must be especially careful about the lessons we think we can draw from the TRC process.

The TRC's success is difficult to assess for another, though related, reason. Notwithstanding its extensive legislative mandate, it is difficult to ascertain exactly what the TRC was supposed to accomplish. As was suggested above, the meaning of reconciliation can be slippery and, even in the specific context of the TRC, it was not clearly defined. Likewise, the meaning of "truth" can be debated endlessly. It may be important to recognize in the concepts of both truth and reconciliation that they entail not an absolute but a continuum. There is a range of responses between covering up, making possible the preconditions for disclosure, making some disclosure, and revealing the whole truth. Likewise, there is a continuum between the weakest form of reconciliation – which may be described as "some kind of basically shared understanding of the terrible things that were done, and of who did them"²¹⁷ – and a national hug. In both instances, the strongest form is undoubtedly impossible as a pragmatic matter and may even be conceptually incoherent.

No institution should be measured by its ability to achieve the last rung on the ladder of either truth or reconciliation; this is something that only civil society can do over time. Rather, the institution should be judged by whether it moves the society up that ladder and whether it enables the society to move itself up the ladder once the institution has disbanded. Thus, the charge of these institutions should be to open up a "public space" in which reconciliation and truth-telling may occur or establishing a "set of reference points" for society to use when it continues the truth-telling and reconciliation process on its own.²¹⁸

In South Africa, as perhaps in any country marked by strife and division, the critical question of the transition was whether the disparate elements within South Africa could come together to make real the aspirations of the transitional government of "national unity" and

²¹⁷ Albie Sachs, *His Name Was Henry*, in AFTER THE TRC, *supra* note 34, at 97.

²¹⁸ Jennifer Balint, *Law's Constitutive Possibilities*, in LETHE'S LAW, *supra* note 23, at 143.

“reconciliation.”²¹⁹ It is true that, for a few days in April 1994, 90% of South Africans came together to vote in the first ever democratic elections, and that was indeed an impressive show of national unity. And it is true that in a series of meetings and negotiations, representatives of the various warring factions came together to produce not one but two impressive constitutions in 1993 and 1996. But the question remained whether the citizens of South Africa share enough to make the nation work on a continuing day-to-day basis.

In a way that recalls Ruti Teitel’s point that transitional law both constitutes and is constitutive of the society, the TRC both answered the question in the affirmative and helped to ensure it would continue to be so. As the Afrikaans poet and TRC chronicler, Antjie Krog, has written: “Against a flood crashing with the weight of a brutalizing past on to new usurping politics, the Commission has kept alive the idea of a common humanity.”²²⁰ The TRC thus embodied, and thereby promoted, twin ideas that are critical to the new South Africa. First, the “common-ness” of all South Africans represents a unity that has been the centerpiece of the ANC’s liberation struggle for decades²²¹ and that is explicitly enshrined in the 1996 Constitution.²²² Second, the substantive element of “humanity” entails the respect for human rights that had all but disappeared in the pre-apartheid and apartheid years, but surfaced with zeal in the transitional period. The combined sense of the “common humanity” marks an emphatic departure from apartheid which was, at its core, an inhumane policy of division.²²³ This common humanity of which Krog speaks evokes the African concept of “ubuntu.”

This is perhaps the most important and lasting contribution that

²¹⁹ See “National Unity and Reconciliation” Postamble to 1993 Interim Constitution and “Promotion of National Unity and Reconciliation Act”. See above for discussion of both.

²²⁰ Krog, *COUNTRY OF MY SKULL* at 278.

²²¹ See the Freedom Charter (1955) in Ebrahim, *THE SOUL OF A NATION*, *supra* note 110.

²²² “There is a common South African citizenship.” Ch. 1, ¶ 3(1)

²²³ The word “apartheid” means separateness; apart has the same meaning in Afrikaans as in English.

any organ of transitional justice can make, and it is for this reason that the TRC is regarded throughout the world as a model. It failed to write the definitive story of apartheid, it failed to deliver reparations, it failed to secure reconciliation, but it did something perhaps more important. After enduring 350 years of racism and 50 years of apartheid, South Africans might well have felt that justice is chimerical. By embodying and promoting principles of justice and humanity, the TRC demonstrated that justice was possible in South Africa and that it would be a central feature of the new dispensation.

Viewed as such, the TRC was not simply an instantiation of transitional justice, but of foundational and transformational justice as well. Jennifer Balint describes the foundational moment as “a break from the past, a basis for the transformation of state and society, a turning point for it, a reconfiguration of its normative framework.”²²⁴ The TRC reconfigured the “normative framework” of South Africa by infusing the public discourse with the incidents of justice – respect for human dignity, acknowledgement of unjustifiable inequality, awareness of the harm caused to others by one’s own passive tolerance or active participation in injustice – and by demonstrating the viability of justice in South Africa in the present and for the future. Indeed, the TRC report may have said more about the new dispensation – the values and priorities of the “new” South Africa – than it revealed about the old.

B. A Counterpoint: Recovering from the Rwandan Genocide

1. Rwanda at the turn of the century

In April 1994, as South Africa was exhilarating over the impending inauguration of Nelson Mandela as the first democratically elected President, another kind of drama was unfolding a few thousand miles to the north, in Rwanda. If the events in South Africa showed the miraculous triumph of reason over racism, contemporaneous events in Rwanda demonstrated the triumph of evil over eve-

²²⁴ Jennifer Balint, *Law’s Constitutive Possibilities*, in LETHE’S LAW, *supra* note 23, at 133.

rything.

Between April and July of that year, the population of Rwanda endured 100 days of the most brutal killing any nation has seen. It is estimated that up to one million people (roughly one-seventh of the pre-genocide population) were killed,²²⁵ sometimes individually and sometimes in groups, sometimes with guns, and sometimes with pangas, knives and sticks.²²⁶ Most were murdered not by professional military personnel, but by fellow citizens, neighbors, friends, teachers, priests, and even family members.²²⁷ The genocide was organized by politicians but it was carried out by hundreds of thousands of citizens in their villages and churches and schools and homes.²²⁸ By July 1994, when an invading army took control of the capital's airport and established itself as the new government, it was mostly over.²²⁹

The genocide left Rwanda in tatters. When the genocide ended with the installation of the Tutsi-led RPF government, Rwanda was one of the poorest nations on earth. By the end of the genocide, much of Rwanda had no electricity, no running water; there were millions

²²⁵ Alison Des Forges, *LEAVE NONE TO TELL THE STORY* (Human Rights Watch 1999). The Organization of African Unity puts the number at between 500,000 and 800,000. International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events – Special Report (7 July 2000) (hereinafter OAU) at 14.2 (*available at* <<http://www.oau.org>>). It notes, however, that “[s]erious authorities disagree by hundreds of thousands of deaths – a quite remarkable variation” *id.* at 14.80.

²²⁶ Mark A. Drumbl, *Punishment, Postgenocide: From Guilt To Shame To Civis In Rwanda*, 75 N.Y.U.L. REV. 1221, 1246 (2000). *See also* OAU at 14.26.

²²⁷ OAU at 14.25-14.27

²²⁸ As the OAU found, “Nor can there be the slightest doubt about the goal, as Jean Kambanda, the Prime Minister during these months, confessed at his trial four years later when he pleaded guilty to genocide. Not only had it been planned in advance, he admitted that ‘there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them.’ Mass killings of hundreds of thousands occurred in Rwanda, including women and children, old and young, who were pursued and killed at places where they sought refuge: prefectures, commune offices, schools, churches, and stadiums.” OAU at 14.4.

²²⁹ The OAU puts the ending date at 18 July 1994. OAU at 17.1.

of homeless people, millions of refugees, and many millions of survivors who were profoundly physically and emotionally scarred. There were 50 lawyers in the entire country.²³⁰ Most of the doctors and other professionals had been murdered. The new government included only *two* people who had any previous government experience; most members of that government had never been in Rwanda before. This may have been the greatest reconstructive challenge any nation has ever faced.²³¹

²³⁰ OAU at 18.4.

²³¹ The OAU's International Panel of Eminent Persons described Rwanda in the wake of the genocide as follows:

"17.4. The country had been poor even when it was ostensibly booming. It became poorer as a result of the economic crash and poorer still during the pre-genocide civil war. Now it was absolutely devastated. The economy was in a shambles. The GDP had shrunk by 50 per cent. Per capita GDP was a pathetic \$95.00, a decline of 50 per cent in one year; inflation stood at 40 per cent. More than 70 per cent of Rwandans lived below the poverty line. Nothing functioned. There was a country but no state. There was no money; the genocidaires had run off with whatever cash reserves existed. There were no banks. Thirty thousand victorious soldiers had not been paid. The infrastructure had been destroyed. There were no services. There was no water, power or telephones. There were no organs of government, either centrally or locally. There was no justice system to enforce laws or to offer protection to the citizenry.

"17.5. Eighty per cent of cattle were lost, farmland was abandoned, land was destroyed by the movements of millions of internally displaced persons. The support systems for agriculture were destroyed and more than \$65 million was required for food aid for 1995. Similarly, the entire health and education systems had collapsed. Despite exclusionary policies governing political and military positions, Tutsi had been disproportionately represented among the professions; as a result, over 80 per cent of health professionals had been killed during the genocide. Medicine stocks had also been looted. Three-quarters of all primary schools had been damaged, school equipment and material stolen. Over half the teachers were dead or had fled.

"17.6. Rotting bodies were everywhere; they filled school playgrounds and littered the streets, with neither people nor equipment to remove them. Hospitals, churches and schools had been turned into stinking stores of human bodies. An estimated 150,000 homes, mostly belonging to Tutsi, had been destroyed.

The causes of the genocide are not thoroughly understood. It was clearly a tribal war: a faction of Hutu extremists organized a campaign of terror against the Tutsi who have, since their arrival in Rwanda in the fourteenth century, exerted power beyond their numbers -- never more than about 15% of the total population.²³² These extremists, who may have been responsible for the fatal airplane crash of moderate Hutu President Juvenal Habyarimana, took advantage of the power vacuum created by it and immediately launched their effort to kill all the Tutsi in Rwanda.²³³ Nonetheless, it remains obscure how ethnic conflict could have erupted so astonishingly violently. Among the suspected sources of strife are the centuries-old rivalry between the Tutsi herders with better diets and greater military prowess than the Hutu cultivators, the Germans who initially colonized Rwanda and Burundi,²³⁴ the Belgians who came in later and reinforced the ethnic divisions between Tutsi and Hutu, the Catholic Church,²³⁵ poverty,²³⁶ overpopulation, and the failure of the

“17.7. Few governments can ever have faced greater challenges with fewer resources. On every front, internal and external, crises loomed. Only two members of the Cabinet had ever had experience running a government; few knew anything whatever about public administration or government. Most had never been to Rwanda before the war. Most of the educated, the skilled and the professionals were dead or in exile; many had supported the genocide.”

OAU at 17.4-17.7.

²³² Paul J. Magnarella, *JUSTICE IN AFRICA: RWANDA’S GENOCIDE, ITS COURTS, AND THE UN CRIMINAL TRIBUNAL* (Ashgate 2000).

²³³ See Des Forges, *supra* note 225 at 1. This point was also made by Minister of Justice Jean de Dieu Mucyo at “Genocide and the Rwandan Experience: A Rwanda-South Africa Dialogue,” sponsored by the Institute for Justice and Reconciliation on February 5-7, 2001 at Cape Town (materials on file with author).

²³⁴ For a useful history of Tutsi-Hutu relations, see Magnarella, *supra* note 232.

²³⁵ As the International Panel of Eminent Persons of the OAU explained, “Together, the Belgians and the Catholic church were guilty of what some call “ethnogenesis” – the institutionalization of rigid ethnic identities for political purposes.” OAU at 2.17.

²³⁶ “Both experts and ordinary people, especially those who witnessed the 1994 killings, agree that poverty played a key role in pushing people to participate

international community to prevent or stop the genocide when it was clearly indicated.²³⁷

While all of these causes may have had some influence, the distinguishing feature of the genocide was its broadbased nature. As the United States Institute for Peace has reported, "In many countries that have suffered a campaign of massive violations of human rights, the violence has been perpetrated mainly by military and political organizations associated with the regime, leaving the rest of society to go [about] its business with relatively clean hands. In striking contrast, the Rwandan atrocities were characterized by the attempt to force public participation on as broad a basis as possible, co-opting everyone into the carnage [of] Tutsis and moderate Hutus."²³⁸ Rwanda thus presents an archetypical case of the need for *societal* transformation.

Yet, the Rwandan government's response to the genocide has emphasized retributive justice. The government has embarked on an extensive campaign of arresting and incarcerating suspects believed to have participated, in any way, in the genocide.²³⁹ The result has

in the genocide." www.nurc.org (website of Rwandan National Unity and Reconciliation Commission).

²³⁷ Every authority cites this. See e.g. Gourevitch, *We Wish to Inform you That Tomorrow We will Be Killing You with Your Families: Stories from Rwanda* (Farrar Strauss & Giroux 1998); Magnarella, *supra* note 232; Des Forges, *supra* note 225; Amnesty International, *The Troubled Course of Justice* (April 2000) available at www.amnesty.org; the OAU Report in chapters 9 ("The Eve of the Genocide: What the World Knew") and 10 ("The Preventable Genocide: What the World Could Have Done").

²³⁸ United States Institute for Peace, *Rwanda: Accountability for War Crimes and Genocide* (1/1995) at <<http://www.usip.org/>>. Each account of the genocide is newly devastating. Human Rights Watch gives this description: "Like the organizers, the killers who executed the genocide were not demons nor automatons responding to ineluctable forces. They were people who chose to do evil. Tens of thousands, swayed by fear, hatred, or hope of profit, made the choice quickly and easily. They were the first to kill, rape, rob and destroy. They attacked Tutsi frequently and until the very end, without doubt or remorse. Many made their victims suffer horribly and enjoyed doing so. [¶] Hundreds of thousands of others chose to participate in the genocide reluctantly ..." Des Forges, *supra* note 225 at 2.

²³⁹ In 1996, the government passed an Organic Law that classified all geno-

been disastrous. It is estimated that 125,000 individuals are in jails or community “cachots” (literally hiding places) while only 3000 trials have taken place. Thousands are dying of disease and malnutrition while the wheels of justice turn ever so slowly.²⁴⁰ The government itself has estimated that, at this rate, it would take more than *two centuries* to try all the genocide suspects.²⁴¹

Only recently has the Rwandan government begun to address the issue of reconciliation, having said up until now that reconciliation would have to wait until justice has been done.²⁴² But clearly, if

cide-related crimes into 4 categories, according to their severity. *See infra* note 270.

²⁴⁰ The wheels of international justice are turning even more slowly. Six years after the genocide, the International Criminal Tribunal for Rwanda had convicted fewer than 10 people for war crimes. *Rwandans on Trial*, N.Y. TIMES May 1, 2000 at A26 (editorial).

²⁴¹ According to the Rwandan government, “The sheer bulk of genocide suspects and cases due for trial has placed severe strain on Rwanda’s criminal justice system which is already crippled by poor infrastructure and the death of professionals during the genocide. Rwanda’s prisons are heavily congested, and the cost of feeding and clothing prisoners is a drain on the economy. [¶] The lack of an adequate number of prosecutors, judges and lawyers to try the cases exacerbates the already bad situation. At the present rate, it would take over 200 years if Rwanda was to rely on the conventional court system deliver justice.” Official website of the Government of Rwanda at <http://www.rwanda1.com/-government/index.html>. *See also* Drumbl at 1233: “Approximately 125,000 individuals - roughly ten percent of the adult male Hutu population - are incarcerated in Rwandan jails designed to hold 15,000.” Mark A. Drumbl, *supra*, note 226 at 1242-1243.

²⁴² As the government has explained, “it is pertinent to the reconciliation process that Rwandese feel that justice is being done. There can be no reconciliation without justice.” <<http://www.rwanda1.gov>> But as the UN Special Representative has noted, “After five years of refusing to talk of reconciliation until justice is seen to be done, Rwandans have accepted that reconciliation must be a national goal in its own right.” Michel Moussalli, REPORT OF THE SPECIAL REPRESENTATIVE OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS ON THE SITUATION OF HUMAN RIGHTS IN RWANDA, 4 August 2000 (Hereinafter Mousalli 2000) at ¶ 187 *available at* www.unhcr.ch. Thus, it is significant that the newly established National Unity and Reconciliation Commission has undertaken to examine “the link between justice and reconciliation and in particular addressing

Rwanda is to survive, reconciliation can not wait 200 years and must be promoted in conjunction with Rwanda's other immediate needs.

The actual, if unrecognized, need for reconciliation may be as strong in Rwanda as it is in South Africa, though it manifests itself quite differently. As in all transitional societies, the meaning of reconciliation must be determined by reference to both the nature of the past abuses and the pragmatic realities of the present. In South Africa, the reconstructive project required citizens to understand what their government had done in their names; in Rwanda, citizens must come to terms with what their neighbors and friends have done. In South Africa, apartheid's segregation ensured that the victim class and the perpetrator class avoided contact.²⁴³ Face-to-face reconciliation would occur only when chosen by both parties; otherwise, perpetrators would return to their own, welcoming communities and victims could perhaps be forgotten. In Rwanda, where survivors and

the question of how the gacaca justice system could promote reconciliation efforts." Michel Moussalli, SUPPLEMENTAL REPORT OF THE SPECIAL REPRESENTATIVE OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS ON THE SITUATION OF HUMAN RIGHTS IN RWANDA, March 2001 (Hereinafter Mousalli 2001) at ¶ 14 (*available at* www.unhcr.ch).

Perhaps the failure of the Rwandan government to place reconciliation high on its list is simply a matter of realpolitik. The Rwandan government fought its way to victory, whereas in South Africa, the new government took power by negotiating with the old and negotiation requires at least enough reconciliation to bring the parties to the same table. Furthermore, the South African government realized that while it had a surfeit of voting power, it had a deficit of economic power; reconciliation was therefore necessary to induce the holders of South Africa's capital to stay and remain a part of the "new" South Africa. Rwanda's new government, on the other hand, does not have these constraints: it does not need the Hutu for either power or capital; thus, it may believe that it can afford to privilege retribution over reconciliation. This is, of course, short-sighted. If Rwanda wants to become a democracy and gain the respect (and capital) of the international community, it needs to develop a program to reconcile the two principal groups. Or, perhaps it is a matter of realpolitik in another sense. There is only one Nelson Mandela – avatar of reconciliation -- and he is not Rwandan.

²⁴³ Indeed, Gibson and MacDonald report that – *even in 2001* -- 81% of South African blacks have "never shared a meal" with whites." Gibson and MacDonald, *supra* note 205 at 15.

perpetrators lived and live side by side, acknowledgement of the “other” is unavoidable as perpetrators return to the villages inhabited by both their supporters and their victims. Reconstruction will necessarily involve “hundreds of thousands of localized reintegrations.”²⁴⁴ In Rwanda, furthermore, the pillage was local, the damage done in every village, in every home so that the material and psychological devastation are inextricably intertwined.²⁴⁵ In many instances Hutu who have been acquitted of genocide-related crimes return to their homes to find Tutsi living there. In other cases, “Returning refugees who found their homes occupied, sometimes by powerful local figures, often consented to live in the same house with these occupants. Sometimes victims had no other option but to live next to suspected killers.”²⁴⁶ Reconciliation in Rwanda is not an option but a necessity.

If South Africans have reason to distrust the state, Rwandans have reason to distrust their own families and communities. It is here, at the local level, that the hard work of reconciliation is to be done. It is up to the communities and the families to make sense of what happened and to find a way to live with one another again. Reconciliation, as thus understood, does not require the dissolution of ethnic identity, nor the embrace of former enemies, nor the forgiveness of past wrongs, and it certainly does not demand amnesia. It simply means that people learn to live with each other. In the Rwandan context, therefore, it might be useful to adopt van Roermund’s minimal notion of reconciliation discussed above: “to defer the right

²⁴⁴ Mark Drumbl, *supra* note 226 at 1262.

²⁴⁵ In South Africa, this issue is more complicated because, as the above discussion of the TRC suggests, there are competing views on the nature of the harm of apartheid. If the harm of apartheid is viewed as the extreme instances of gross human rights abuses, then it may be possible to disentangle the material and the psychological aspects of reconstruction; discrete reparations are due for those who sustained gross human rights violations. This is the principal view of the TRC process. If, however, the damage of apartheid is deemed to encompass economic oppression (limits on employment, property ownership, etc.), then the reconstructive efforts must address not only the psychological harm wrought by the extreme abuses but the material needs of the black majority of South Africans.

²⁴⁶ Moussalli 2000, *supra* note 242 at ¶ 189.

to retribution to the extent that retribution would obstruct peace.”²⁴⁷

Given the unique nature of the Rwandan genocide, it is not obvious that a TRC would achieve transformative goals in Rwanda.²⁴⁸

First, although there remains much that is ill- or mis-understood about the genocide, the disclosure of additional facts and details may make it more difficult for victims to defer the right to retribution: knowledge may fuel rather than quell people’s desire for retribution and indeed vengeance. Furthermore, the intellectual truth uncovered by a truth commission may not sit comfortably next to the profound emotional experience of survivors. If the official truth contradicts the emotive truth, then it will not be accepted, but if it merely corroborates it, then it will not be useful. To the extent that Hutu and Tutsi experienced the genocide in dramatically different ways,²⁴⁹ furthermore, the truth may be so excessively contested that its divisive effects would vastly outweigh its conciliatory power. Second, the Rwandan government may be skeptical about its ability to produce reconciliation. This may result from a realistic assessment of the government’s lack of connection with its constituency; certainly the Rwandan government entirely lacks the moral authority over Rwandans that the new Mandela-led government enjoyed with respect to the vast majority of South Africans. Moreover, it may reflect the

²⁴⁷ Van Roermund, *Rubbing Off and Rubbing On*, in LETHE’S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION (Emilios Christodoloudidis and Scott Veitch, eds., Hart Publishing 2001), at 180.

²⁴⁸ Indeed, the Rwandan government has rejected the efforts of South Africa as well as donor nations to adopt a TRC approach. See Sarkin, *TRC for Rwanda*, *supra* note 140 (noting that “The idea of having a truth commission has ... been explored by the Rwandan Government” and describing an exchange of visits between the TRC Commissioners and the Rwandan government in 1996 and 1997). Furthermore, the truth commission that had operated in Rwanda in 1992 had done nothing to prevent the subsequent genocide.

²⁴⁹ Mark Drumbl reports that “the overwhelming majority of the detainees we interviewed do not believe they did anything ‘wrong’, or that anything really ‘wrong’ happened in the summer of 1994 in Rwanda.” Mark Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 PUNISHMENT & SOC’Y 288, 289 (2000). Unlike the situation in South Africa, these detainees can not claim that they did not “know” what happened; the disconnect here is in how the genocide was experienced by the perpetrator class.

view that reconciliation may be nurtured, but may not be imposed by law.²⁵⁰ Third, and perhaps most significantly, a centralized, elite-driven program like the TRC would not be nearly as effective in Rwanda as it has been in South Africa because in Rwanda, the deepest need for reconciliation is in homes and in communities and villages. Indeed, there is no reason why the efforts must be uniform throughout the nation. Communities may very well differ in what they need in order to move forward and in what they are capable of.

2. *Charting the Course of Rwanda's recovery.*

The fact that the genocide was so pervasively and deeply experienced by most Rwandans has enormous repercussions for Rwanda's efforts to repair the damage. Given the extreme needs of the local communities in Rwanda, it is clear that transformation of Rwandan society is critical and that reconciliation must be its centerpiece. As discussed, community reconstruction must be a principal feature. But the reconstructive program must also address other needs. The psychological needs of Rwandans are extraordinary,²⁵¹ exacerbated by the extensive incidence of intra-family violence.²⁵² Material needs are also urgent. As the Rwandan National Unity and Reconciliation Commission has said, "The issue of development is crucial for the reinforcement of the reconciliation process. Without the improvement of the living conditions, the Rwandan society will

²⁵⁰ See National Unity and Reconciliation Commimssion, <<http://www.nurc.org>>. See also du Bois, *Nothing but Truth*, in LETHE'S LAW, *supra* note 247, at 110 (suggesting that reconciliation's subjective element makes it resistant to law.)

²⁵¹ The name of the Human Rights Watch report – Leave None To Tell The Story – may have dual significance in Rwanda. The most obvious meaning refers to the effort to eliminate the Tutsi population by killing every Tutsi. That was the explicit aim of the genocide. However, to the extent that was not accomplished, the result of the genocide may nonetheless have been to leave none psychologically able to recount what happened – too emotionally scarred to verbalize what they experienced.

²⁵² See comments of Jean de Dieu Mucyo at "Genocide and the Rwandan Experience," *supra* note 233.

remain fragile and unstable.”²⁵³ Thus, the government’s response(s) to the genocide must address these needs. Furthermore, however, the program must be more efficient than national criminal prosecutions but not be so expedient as to lack all legitimacy.²⁵⁴

The reconstruction project must also address the needs of Rwandan women. The experience of women both during and since the genocide is quite different from that of many men and the government’s response should embrace both.²⁵⁵ This is important for obvious humanitarian reasons as well as for pragmatic reasons. Women are likely to have been more profoundly traumatized than men both because they may have stronger bonds to children and because rape leaves survivors (whereas murder does not). Furthermore, women are likely to head households with fewer material resources than men and so their wellbeing for purposes of leading families is critical. Some progress has been made along this front already. The government recognized in its organic law that rape was a widespread crime

²⁵³ <<http://www.nurc.org>>. See also Moussalli 2001, *supra* note 242 (noting that land tenure “is a key issue, which needs to be resolved for reconciliation and sustainable development.”)

²⁵⁴ Recent mass trials have raised questions about the availability of due process in Rwanda’s domestic criminal trials. See editorial, *Rwandans on Trial*, N.Y. TIMES, May 1, 2001 at A26 (noting that “several thousand mostly low-level people have been tried [in domestic courts in Rwanda] in proceedings that fall far short of international due process standards.”).

²⁵⁵ If the experience of the TRC is any guide, the involvement of women in the transformative project is both critical and difficult. See TRC REPORT volume 4 for details of the special hearings that the TRC held in order to better understand the experience of women in the apartheid years. As a general matter, the Commission found that although women participated significantly in the TRC process, they testified about the experiences of their husbands, siblings, children, parents, but not about their own experiences. To the extent that telling one’s story was a critical part of the healing process, women generally did not partake in that aspect. The reasons for this are difficult to ascertain. One reason may be that the TRC’s modus operandi – talking as a curative – reflected men’s needs but not women’s needs. For many women, talking about the experience of being raped is more likely to feel like revictimization than therapy. The Rwandan government, and transitional governments generally, need to ensure that the form of the transformative project is one that will promote healing for women’s ills as well as for men’s ills.

of the genocide and classified it in Category 1, with the most serious genocide related crimes. In addition, several of the individuals currently heading reconstructive projects are women: the Supreme Court official who is responsible for the gacaca courts is female, as is the head of the National Unity and Reconciliation Commission.²⁵⁶

With all these critical needs, it is important for the Rwandan government to define its goals clearly and pragmatically. It must de-emphasize (or abandon) its program of prosecuting every last genocide suspect as it lacks the resources and the country lacks the patience to pursue this goal to a successful conclusion.²⁵⁷ It must emphasize reconciliation and define it in a way that is feasible. It is not obvious that the present course – of denying ethnicities²⁵⁸ – will be successful given the strong ethnic bonds that many Rwandans currently feel. It might be more productive to allow people to feel ethnic ties but to encourage a better understanding of the roles those ethnic ties should play in society.²⁵⁹

²⁵⁶ Some have suggested that women will play a more prominent role in post-genocidal Rwanda. Aloisea Inyumba, who heads the National Unity and Reconciliation Commission has said that “The heart of the gacaca will be women...Traditionally, women were excluded from the local justice system, a male preserve, but after the genocide women head many households and are playing an important role in reconstruction.” Jane Ciabattari, *Rwanda Gambles on Renewal, Not Revenge*, October 9, 2000. <<http://www.womensenews.org/>>. In other areas, there have also been signs of reform (see Moussalli 2000, *supra* note 242, describing reform in inheritance, employment, and land tenure laws to the benefit of women), although there is still a long way to go.

²⁵⁷ For instance, Mark Drumbl has suggested releasing all the category 4 suspects. See Sclerosis, *supra* note 249.

²⁵⁸ The government of Rwanda’s official position is that Rwandan identity is more important than Hutu or Tutsi identity. See Government web site <www.rwanda1.gov>. See also OAU at ¶¶ 2.6-2.8.

²⁵⁹ Although, at present, it may be possible to achieve only the most minimal version of reconciliation, the Government might consider promoting the idea of stages of reconciliation: It would now promote the importance of merely fore-swearing vengeance or the right to retribution but in three years, for instance, it could embark on a program of understanding and appreciating differences, and in ten years it could promote a more aggressive program of meaningful social integration.

As noted, the Rwandan government has begun to recognize these needs. In 1999, the National Unity and Reconciliation Commission was established and in 2001, the government embarks on an innovative and controversial program of participatory retributive justice using “gacaca” courts.

The Unity and Reconciliation Commission was required by the terms of the 1992 Arusha Peace Accords,²⁶⁰ which were intended to end the war between the Tutsi exile army and the Hutu government.²⁶¹ Although still young, the agency has made important strides in the direction of placing reconciliation on the national agenda. Its approach has been to listen²⁶² and learn from Rwandans and to engage with the domestic and international public “in dialogue on how to foster unity and reconciliation in Rwanda.”²⁶³

As the Commission itself has said,

“The Rwandan communities across the country constitute the basis of the URC work and policies. In all its work, the URC seeks to operate in a participatory way to permit Rwandans of all walks of life to shape and influence the way[s] and means of how unity and reconciliation is to be achieved. In this sense, the role of the Unity and Reconciliation Commission (URC) is essential that of providing a platform upon which Rwandans air their vie[w]s on what has divided them in past, and how to build a lasting united and reconciled Rwanda. The URC programs draw from these exercises.”²⁶⁴

The United Nations has seconded the Commission’s optimism and supports its work. One year after the Commission opened, Mi-

²⁶⁰ See NURC web site at <<http://www.nurc.org>>

²⁶¹ The Tutsi have consistently urged adherence to the Accords and, now that they hold the balance of power, they have begun to implement some of its terms. In fact, it is believed that President Habyarimana’s commitment to honor the terms of the Accords was his fatal error, as the Hutu extremists repudiated them. See Gourevitch *supra* note 237 at 54-60 (discussing unity among Rwandans).

²⁶² Moussalli 2000, *supra* note 242 ¶189.

²⁶³ Moussalli 2001, *supra* note 242 ¶13, describing the first National Summit on Unity and Reconciliation, held in September 2000.

²⁶⁴ URC website <<http://www.nurc.org>> (typos in original).

chel Moussalli, the United Nations' special representative to Rwanda catalogued some of the Commission's accomplishments:

"Besides completing the nationwide consultations, [the Commission] it has embarked on a large number of other activities. It has produced promotional material; organized reconciliation workshops and taken over the running of the solidarity camps, including leadership training, reintegration of returnees, especially demobilized soldiers, development of youth programmes; and supported initiatives of other partners, including the Catholic Church and other Churches. It has organized many conferences and seminars at the national and local levels and in schools, and a nationwide art expressions competition on the theme of unity and reconciliation at the end of 1999. It has promoted cooperation (*jumelage*) between communes, established regional offices with two regional officers in each of the prefectures, formed partnerships with government departments, United Nations agencies and other institutions of the international community. It has organized visits to Rwandese communities abroad and is planning a yearly National Summit with international participation, the first of which is to be held in September 2000. [¶] Its plan for the second year is the following: to build more effective grass-roots exercises in civic education, conflict mediation, monitoring and local initiatives; constructing and equipping a National Peace and Reconciliation Education Centre; strengthening the spirit for open discussion and debate at the grass-roots level; renovating the conference facilities at its Kigali headquarters; promoting practical reconciliation activities among communities; developing a professional media campaign promoting reconciliation; and organizing the second National Summit."²⁶⁵

Moussalli concluded his report on the Commission by "urg[ing] the High Commissioner for Human Rights and members of the international community and partners of Rwanda to extend their full support, both financial and technical, to NURC."²⁶⁶ From the perspec-

²⁶⁵ Moussalli 2000, *supra* note 242 at ¶¶ 192 and 193. See also <<http://www.nurc.org>>.

²⁶⁶ Moussalli 2000, *supra* note 242 at ¶ 195.

tive of transformative justice, this support is warranted. The URC's recognition that reconciliation is a long-term project that will entail government leadership over time is an important one. Annual summits, for example, are a valuable approach to a problem whose nature may change with time but that will remain critical for years to come.²⁶⁷ Furthermore, as discussed in greater detail below, the URC's efforts to find solutions in the communities rather than imposing them from above by a central and distant authority, should likewise be commended. Reconciliation efforts must, if they are to be transformative, be concentrated where people live, since that is where the hurt is and where reconciliation will take place.²⁶⁸ Thus, Rwanda is correct to reject a centralized TRC model and to embrace a more rigorous, less centralized, and more pervasive approach to reconciliation.

The second, and more controversial, prong of the Rwanda's social reconstruction project is the gacaca program. The word "gacaca" refers to the grass upon which village elders would sit to resolve civil disputes, often involving land.²⁶⁹ Thus, gacaca courts have traditionally been used in Rwanda to decide matters of some significance to local communities. The current government has resurrected this idea and adapted it to genocide-related crimes. This is both impressively innovative and risky.

It is innovative because, like the TRC, the gacaca program is site- and time-specific, formed by the unique conditions of Rwandan society. It therefore holds the promise of transformative justice because it can respond to the particular needs of post-genocidal Rwanda. The gacaca courts will satisfy the need to produce retribu-

²⁶⁷ In South Africa, by contrast, it was hoped that a limited-term, intensive focus on reconciliation would be sufficient to change the cultural climate which would, in turn, permit the society at large to continue the reconciliation agenda. While this expectation may have been justified in South Africa, it would be unrealistic to expect Rwandan society to change so dramatically in the immediate future.

²⁶⁸ This illustrates the distinction that Jose Alvarez makes between Crimes of State (as in apartheid, predominantly) and crimes of hate (as in Rwanda). See Alvarez, *supra* note 65.

²⁶⁹ Des Forges, *supra* note 225 at 761.

tive justice, which the Rwandan government says is essential for promoting rule of law interests. But retributive justice in Rwanda is neither feasible, nor sufficient. Although Rwandans, particularly Tutsi, would want to see that some form of retributive justice was done, retribution will not rebuild a strong foundation for Rwandan society nor will it minimize the likelihood of a recurrence of the genocide. In Rwanda, justice must also encompass a conciliatory component.

The gacaca tribunals have jurisdiction over intentional and unintentional homicides, other assaults against persons, and property crimes committed between 1 October 1990 and 31 December 1994. They do not have jurisdiction over crimes relating to organizing or inciting the genocide, nor over sexual violence.²⁷⁰ The tribunals are organized, hierarchically, by region, with each level encompassing a larger region. The smallest level, called the “cellule,” has jurisdiction over property crimes, while the next level has jurisdiction over assaults and other non-fatal bodily crimes, and the following level has jurisdiction over homicides. Each superior level has appellate jurisdiction over the cases from the next level down. At each level, the court has two components. A “general assembly” functions as prosecutor, identifying the crimes, the victims, and the alleged perpetrators, and giving evidence to the court. The general assembly at the most local level comprises all the adult inhabitants of that cellule. (At the higher levels, the general assembly consists of representatives

²⁷⁰ The Organic Law of Rwanda, passed in August 1996, places genocide-related offenses into 4 categories. Category 1 offenders are the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; Persons who acted in positions of authority at the national, Prefectorial, Communal, Sector or Cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes; Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; and Persons who committed acts of sexual torture or violence.” <<http://www.rwanda1.gov>>. “The density of the administrative and political hierarchies [is] characteristic of Rwanda for many years.” Human Rights Watch at 10. Gacaca courts, as described in the text, will have jurisdiction over crimes in categories 2 (murder), 3 (non-lethal personal violence), and 4 (property crimes).

from the Cellule General Assembly). The Court Council is the tribunal responsible for trying cases and hearing appeals. A special department of the Supreme Court of Rwanda administers the program.

On October 4, 2001, the Rwandan population elected 260,000 “respectable” adults to act as judges at the local level of the gacaca courts.²⁷¹ After a three- to six-month training period for the new judges, the courts may begin operating in mid-2002.²⁷²

If successful, gacaca’s brand of retribution could maximize the involvement of individuals at the community level. This would promote several goals. It would empower individuals by involving them in an important process of national and historical significance. This could counterbalance the disempowerment produced by victimization and poverty.²⁷³ Gacaca could also strengthen community ties by fostering mutual cooperation and an *esprit de corps* among the participants, which is important because reconciliation in Rwanda must occur at the local level and can not be imposed by fiat; it must emerge from the right conditions on the ground. Gacaca may also effectively decentralize power by locating decisionmaking authority in the local communities rather than in the central government.²⁷⁴ This is necessary because of the widespread distrust of the central government by the population.²⁷⁵ A program is most likely to earn the

²⁷¹ “The Judges of the Gacaca Courts will be respectable people of at least 21 years of age, and elected by people of voting age. They will take responsibility for ensuring orderly and fair proceedings.” <<http://www.rwanda1.gov>>.

²⁷² See Fondation Hirondelle, *Gacaca Judges to be elected October 4th*, at www.hirondelle.org (noting that judicial elections are in October and trials are expected to start by May 2002).

²⁷³ Similarly, the South African process emphasized restoring personal dignity to victims of apartheid. The need is much greater in Rwanda because of the widespread involvement of people in all aspects of the genocide (victims, perpetrators, witnesses, escapees, orphans, etc.)

²⁷⁴ See Moussalli 2000, *supra* note 242, on decentralization generally.

²⁷⁵ Hutu distrust the Tutsi-led government; Tutsi victims distrust the elite-refugee government. Twa (a perennially marginalized ethnic group who constitute about 1% of the Rwandan population) distrust the government because they are not sufficiently numerous to wield political power. See Sarkin, *The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing With the Genocide* (forthcoming; on file

respect of the citizens and thereby promote transformational goals if it involves and is connected to the citizens. If they have the opportunity to shape the program and influence the outcome of individual decisions, they are more likely to trust it. This has a pragmatic advantage as well – there has been a tendency of acquitted prisoners to face popular retribution when they return to their villages as a result of a distant bureaucratic decision.²⁷⁶ If the villagers themselves are responsible for the release of a former suspect, retributive violence is less likely.

In this way, the gacaca process achieves many of the goals that criminal prosecution is said to promote and, in addition, many of the transformational goals of the new order in Rwanda. For instance, by incorporating a judicial-type forum, gacaca consolidates the rule of law values of the new government. By defining justice as largely retributive, gacaca promotes principles of individual responsibility favored by liberal democracies.²⁷⁷ In doing so in explicit and highly visible ways, gacaca emphasizes the line drawn between the current Rwandan government and its immediate predecessor which instigated a rule of lawlessness. Furthermore, gacaca promotes the conciliatory agenda of the new government by strengthening intra-community ties and fostering a culture in which people from both sides of the divide can live together. Finally, by depending on individuals within the community, for elections to gacaca posts and for administering the tribunals and providing evidence, the gacaca process fosters self-reliance.

Like the TRC, the gacaca system has transformative potential in large part because it responds to the particular deficiencies in Rwanda that allowed the 1994 genocide to happen. Whereas that society was characterized by a highly centralized administration, the gacaca process will be localized. Law, which had essentially disappeared in Rwanda, will make its comeback in a highly visible and accessible way and in a way that is dependent for its success on the

with author).

²⁷⁶ See comments of Jean-Jacques Badibanga at “Genocide and the Rwandan Experience” *supra* note 233.

²⁷⁷ See Teitel, *TRANSITIONAL JUSTICE* (Oxford U. Press 2001).

integrity of the people at all levels. Furthermore, to the extent that the Rwandan genocide resulted from the distortion of Belgian colonial rule on traditional Rwandan society, the *gacaca* tribunals could herald the return of indigenous forms of justice and a familiar conception of law as a forum for resolving problems within the communities. In the *gacaca* tribunals, lawyers and professionalization will be absent; the people will control the process and the outcome.

But all this is achieved at a great cost, particularly from a western perspective. These courts do not conform to many of the requisites that many countries including Rwanda would expect of their courts in normal times. They do not provide a professional bench or bar; they do not provide for decision according to precedent or other components of due process; they do not envisage impartial justice, just to name a few deficiencies. Furthermore, and particularly in the context of the genocide, they run the risk of legitimating mob justice. These are of course very serious concerns; the extent to which the risks are realized will not be known for a few years, as practice under the *gacaca* system becomes operational and is evaluated.²⁷⁸

²⁷⁸ These criticisms are significant and should be taken seriously. Organizations such as Amnesty International have emphasized the serious shortcomings of *gacaca*. “Although the *gacaca* system of holding trials at the grassroots level could encourage people to testify to events they witnessed personally during the genocide, Amnesty International remains concerned that: the accused in the *gacaca* trials will not be allowed representation by a defence lawyer; those judging these extremely complex and serious cases will have no legal training or may have a personal interest in the verdict, thus potentially undermining the competence, independence and impartiality of these courts; fundamental aspects of the *gacaca* proposals do not conform to basic international standards for fair trials guaranteed in international treaties which Rwanda has ratified...” <<http://www.amnesty.org>> AI INDEX: AFR 47/15/00.

These criticisms reflect in part a tension between the desire to mandate international standards of due process and judicial legitimacy and the need for nations with non-western traditions to develop their own solutions to local problems. See Moussalli 2000, *supra* note 242, at ¶ 160, noting that “[t]ime and time again [the UN special representative] was told that ‘justice as it is practised in the West is not working. We need to find an alternative.’” Without trivializing the concerns of the west, Moussalli nonetheless “applaud[ed] the boldness of the *gacaca* proposal,” *id.*, ¶ 159, and “reiterate[d]his support for the courageous efforts of the

Given the Rwandan government's commitment to gacaca despite its shortcomings from the perspective of the international community,²⁷⁹ the Rwandan government might be open considering ways to retain the participatory aspect of the gacaca courts while eliminating some of their more problematic features. For instance, the gacaca tribunals could be empowered not to mete out punishment but to grant amnesty. This might be conditioned on full disclosure (as with the TRC Act), a showing of remorse, or the fulfillment of some sort of community service, or some other value identified by the Rwandan people. This would promote the pragmatic purposes of the gacaca system, which include alleviating the burden on the central criminal justice system²⁸⁰ while promoting the retributive interests the government is committed to pursuing.²⁸¹ This would in no way detract from the strengths of gacaca as presently envisioned. In fact, it would promote community reconstruction by fostering the "common humanity" of which Antjie Krog speaks in the context of the TRC: neighbors would join together in acts of generosity and forgiveness rather than in the spirit of retribution.²⁸²

Government to tackle the problem of justice, through the new justice system of gacaca." He further noted that, "After an initial hesitation on the part of the international community on gacaca, there seems to be growing support for this policy, particularly following recent successful pre-gacaca trials ... and given the unsustainable and undesirable situation of overcrowded prisons and cachots." Moussalli 2001, *supra* note 242 at ¶ 22 .

I do not wish to resolve this tension, and I remain agnostic as to the merits or demerits of gacaca, as a matter of criminal law and procedure. I refer to gacaca as an example of a program that is valuable in its transformative potential and responsiveness to the needs of Rwandan society and as a counterexample to the truth commission model.

²⁷⁹ See Des Forges, *supra* note 225, generally for repeated examples of Rwandan susceptibility to international pressure. Conversely, the failure of the international community to intervene is a major contributing factor to the genocide.

²⁸⁰ In other words, it could function like some sort of mandatory dispute resolution mechanism as is required in some jurisdictions in the United States to weed out cases that can be resolved without trials.

²⁸¹ This is the case in South Africa, those who do not get amnesty are still subject to the normal course of criminal prosecution.

²⁸² It may also be that as more time passes, the reliability of convictions di-

The Rwandan government recognized that, even in conjunction with the international community, classical justice was impossible. The solution was either to abdicate completely or to develop a program that had advantages that could potentially offset at least some of the disadvantages. The advantages of the gacaca system are that the tribunals draw heavily on the community and family bonds, integrating them into the process of reconciliation and justice, and thereby strengthening them. If the building blocks of the society – community and family – are strengthened, then the society itself is stronger and more amenable to reconciliation. Reconciliation can not grow from a weakened or turbulent society.

Neither conventional prosecutions nor conventional amnesty promote the transformation that is necessary for reconciliation and for deterrence. If the fundamental aim of transitional governments is that this type of atrocity should happen “never again,” then radical societal transformation is necessary in which the once-prevalent becomes unthinkable.

CONCLUSION: LOCALIZING SOLUTIONS

The South African TRC will not work in other nations, emerging from different histories and facing different challenges. But all of these nations share some common tasks. The institutions they develop to deal with past abuses must come from their societies. While any governmental body should conform to the relevant international norms, it is nonetheless critical that they are as tailored to the specific challenges of their cultures as the TRC was to South Africa in the wake of apartheid.

Certain features of the TRC can not be copied elsewhere: the TRC was immeasurably assisted by two of the world’s most eminent personalities – Nelson Mandela who supported and nurtured the TRC and fellow Nobel Laureate Archbishop Desmond Tutu, who chaired

minishes, because of the availability of evidence, if for no other reason. Grants of amnesty may for this additional reason become more acceptable than convictions. It is instructive in this regard to remember that, even if the gacaca courts begin operating as scheduled, the first trials will take place at least 7 or 8 years after the events in question.

it and imbued it with moral authority and gravitas. It is unlikely that the TRC would have weathered the many storms that beset it with as much grace and rectitude had it not been for the faith that South Africans put in these two individuals. Unfortunately, other nations can not expect to have leaders of such stature lending their names to transitional institutions.

There are other features that could be, but should not necessarily be, copied elsewhere. The TRC was a national, centralized institution. This was appropriate in South Africa given the centralized nature of apartheid and the need of the new government to replace the perception that people had of the old government with faith in the new. In other societies, however, where the harms are less bureaucratic and more widespread, for instance, the institutional response might need to be decentralized. For instance, in Rwanda, where the new government itself does not garner much trust and where the 1994 genocide was the result of hundreds of thousands of people acting in concert, a participatory and populist response might be more effective at transforming the culture than one that is centralized and elite.

The TRC, as has been shown, straddled principles of law and of justice. This was necessary in South Africa, where the two had been disjointed by apartheid. It was possible in South Africa because the TRC was part of a broader reconstructive program that included a variety of mechanisms for ensuring that the rule of law would be thoroughly respected in post-apartheid South Africa. Therefore, one institution that blurred the line between law and justice did not threaten the legal authority of the new state; rather, it proved its humaneness. In many other transitional nations, the rule of law is sufficiently tenuous that it may be inappropriate to empower a prominent institution to depart from legal strictures.

The TRC's victim-orientation is another feature that many transitional nations may be tempted to copy. While, as a general matter, this will often be an important feature of a transformative institution, the balance between excessive and insufficient attention to victims should always be borne in mind. If the institution is excessively sympathetic towards victims, it risks alienating members of the pre-

viously dominant class. This may interfere with the institution's goals because it may be viewed as vengeful; to the extent that the previously dominant class continues to constitute an important constituency, it may impede reconciliation between those who are gaining power and those who are being asked to give it up.

Bearing in mind that reconciliation is a long-term goal that the transitional institution can only hope to begin, it would generally be important that the institution create the terms for ongoing dialogue and social transformation. How it does this, however, is as specific to the society as the languages in which it operates.