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## Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland

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Brandon Hamber

## **Abstract**

This Essay will argue that any transitional mechanism must be by its nature and temporal historical location a politically contested instrument. This can have differing political and social impacts, and impact on the human rights culture in the society in question. Based on the South African Truth and Reconciliation Commission ("TRC") experience, two rights-based issues – namely, human rights and victims' rights – will be discussed.

# DEALING WITH THE PAST

## RIGHTS AND REASONS: CHALLENGES FOR TRUTH RECOVERY IN SOUTH AFRICA AND NORTHERN IRELAND

*Brandon Hamber\**

### INTRODUCTION

The understanding of truth commissions — as one mechanism of transitional justice — has changed in the last few years.<sup>1</sup> In the past, truth commissions were largely understood as investigative mechanisms with the primary aim of publishing an authoritative and factual report on human rights violations committed in a country. The societal impact of gathering information was given little attention. Currently, however, “the possibility of holding public hearings, advancing societal and individual healing, and taking part in or promoting a process of reconciliation (however defined) has opened wide the question of means, independent of the final end reached.”<sup>2</sup>

The societal utility of truth commissions, and concepts such as healing and reconciliation, has become a core part of the critical discussion about the impact of such bodies. Whether transitional justice mechanisms — in this case, truth commissions — should be concerned with concepts such as healing is a point for debate. That said, the potential for truth recovery mechanisms to contribute to healing and reconciliation has been ubiquitously asserted. This is the case in societies as diverse as South Africa,<sup>3</sup> Northern Ireland,<sup>4</sup> Sierra Leone<sup>5</sup> and East Timor.<sup>6</sup>

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1. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001).

2. *Id.* at 252.

3. KADER ASMAL, LOUISE ASMAL & RONALD S. ROBERTS, *RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID'S CRIMINAL GOVERNANCE* (1994); *DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA* (Alex Boraine, A.J. Levy & R. Scheffer eds., 1994).

4. *HEALING THROUGH REMEMBERING, REPORT OF THE HEALING THROUGH REMEMBERING PROJECT* (2002).

This is particularly interesting, considering the degree to which truth commissions have proliferated. There have been over twenty truth commissions in the last two decades.<sup>7</sup> To locate the precise reason for the political popularity of such mechanisms is difficult. Does the trend for truth commissions as a primary transitional justice mechanism rest on their proven ability to play a role in uncovering the truth, promoting healing and fostering reconciliation?<sup>8</sup> Or, from a more cynical perspective, is the notion of “reconciliation” a complex modern foil used to market unfavorable compromises made during political negotiations?

This Essay will argue that any transitional mechanism must be by its nature and temporal historical location a politically contested instrument. This can have differing political and social impacts, and impact on the human rights culture in the society in question. Based on the South African Truth and Reconciliation Commission (“TRC”) experience, two rights-based issues — namely, human rights and victims’ rights — will be discussed. The implications of the points raised in that regard will be applied to the current debate in Northern Ireland about dealing with the past.

### I. THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION

The core justification (or perhaps rationalization) for the South African Truth and Reconciliation Commission is captured by Archbishop Desmond Tutu when he says that without the negotiations “we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for

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5. See Sierra Leone Truth and Reconciliation Commission Act, Sec. 6(1) (2000) (stating that one of its objectives is “to promote healing and reconciliation”).

6. See United Nations Transitional Authority in East Timor, Regulation 2000/10 on the Establishment of Reception, Truth and Reconciliation in East Timor, Sec. (d) (stating that the Commission is grounded in “the desire to promote national reconciliation and healing”).

7. HAYNER, *supra* n.1, at 291.

8. See Brandon Hamber, *Ere Their Story Die: Truth, Justice and Reconciliation in South Africa*, 44(1) RACE AND CLASS 61, 79 (2002) (discussing the different ways reconciliation was defined in the South African Truth and Reconciliation Commission (“TRC”) process).

South Africa.”<sup>9</sup> From this perspective, the agreement at the negotiations to grant amnesty to perpetrators of apartheid violence was a pragmatic choice enshrined in the interim Constitution. Amnesty, especially for apartheid forces — or so the argument goes — was the cost (especially to victims seeking justice through the courts) of saving the innumerable lives that would have been lost had the conflict continued. Using this argument, amnesty was about the advancement of “reconciliation and reconstruction.”<sup>10</sup>

Amnesty in South Africa, however — unlike many other countries, particularly those in Latin America — was neither blanket nor automatic. Conditions applied to the amnesty. The TRC was the vehicle for amnesty, assessing applications and adjudicating on them based on criteria set down in the Promotion of National Unity and Reconciliation Act.<sup>11</sup> Linking amnesty into the process was a unique development, and highly unusual for a truth commission.

To receive amnesty, perpetrators of political violence — from every side — had to disclose full details of each and every past crime for which they wanted amnesty. Amnesty had to be sought for each crime individually, and if successful only that crime was amnestied. Simply put, provided the perpetrators told the truth and confessed their involvement in a specific act that was found to be political in nature based on the criteria in the Act, justice would be overlooked. If granted amnesty, criminal and civil liability fell away for that crime.

Broadly speaking, although amnesty did not deliver justice through the courts, it was hoped it would at least produce truth. Truth was considered vital to understanding what had happened, assisting victims to come to terms with the past, and preventing its repetition. Truth was considered a basic building block of reconciliation.

Victims of political violence were also given the opportunity

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9. 1 REPORT OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION ch. 1, 22 (1998).

10. See The Promotion of National Unity and Reconciliation Act of 1995, No. 24 (1995) [hereinafter 1995 Act]; S.A. INTERIM CONST.

11. See 1995 Act, *supra* n.10 (discussing a full mandate of the South African Truth and Reconciliation Commission). See also HAYNER, *supra* n.1, at 32; ALEX BORAINÉ, *A COUNTRY UNMASKED: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2002) (both providing a detailed summary of the South Africa's TRC's mandate).

to divulge how they had suffered in the past, either publicly or through a statement to the TRC. Each case was to be documented, and if necessary investigated. The TRC then made proposals on how to prevent future human-rights violations, as well as recommendations regarding possible reparations for victims.

The South African TRC process began in December 1995 and ended — at least in terms of documenting and receiving victim statements — when the commission handed its 3,500-page report to then President Mandela in October 1998. The amnesty hearings dragged into 2002 and the final volumes of the report focusing on amnesty were published in March 2003. In total, about 20,000 people came forward and gave statements to the TRC, of which about 2,000 were heard in public. 7,700 people applied for amnesty, and roughly 1,200 of these individuals received amnesty for their crimes, which included murder, attempted murder, abduction or “disappearance,” and torture.

#### A. *The South African Case: A Brief Evaluation*

Public acknowledgement, breaking the silence of the past, creating an unforgettable record of the atrocities committed, and voicing of past crimes were the TRC's greatest successes.<sup>12</sup> Many of the horrors of apartheid were made public. Figures such as Tutu — and the TRC as a whole — humanized and individualized the impact of decades of apartheid. A new vision based on a reconciled future, arguably essential for that period of time, was created. Humanism and the possibilities of peace and even forgiveness, despite the legacy of brutality, became real, if not attainable in some cases.

For a minority of victims, suppressed truths about the past were also uncovered. Missing bodies, at least in some cases, were

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12. Through research with some twenty-five organizations across South Africa, it was felt that the process of unleashing the stories, revealing hidden traumas and uncovering latent tensions was the TRC's most positive contribution. See Hugo van der Merwe, Polly Dewhirst & Brandon Hamber, *Non-governmental Organisations and the Truth and Reconciliation Commission: An Impact Assessment*, 26(1) *POLITIKON* 55, 79 (1999); Brandon Hamber, *Does the Truth Heal: A Psychological Perspective on the Political Strategies for Dealing with the Legacy of Political Violence*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* (Nigel Biggar ed., 2001) [hereinafter *Does the Truth Heal*]; Mary Burton, *The South African Truth and Reconciliation Commission: Looking Back, Moving Forward – Revisiting Conflicts, Striving for Peace*, in *PAST IMPERFECT: DEALING WITH THE PAST IN NORTHERN IRELAND AND SOCIETIES IN TRANSITION* (Brandon Hamber ed., 1998).

located, exhumed and respectfully buried. For others, the confessions of perpetrators brought answers to previously unsolved political crimes — crimes which the courts, due to expense and inefficiency, might never have tried or dealt with. In many senses, the chain of command, especially in terms of State terror, was laid bare and it was made clear who held ultimate responsibility.<sup>13</sup>

That said, although the TRC has on the whole been seen as successful in revealing the broad and essential story of what happened in South Africa between 1960 and 1994, not all the truth about the past has emerged.<sup>14</sup> This factor undermined the process of reconciliation as it was originally envisaged. The TRC began a process it was unable to complete. There is a huge amount of evidence yet to be uncovered, and many of the guilty remain in positions of considerable power.<sup>15</sup>

Many relatives of the missing and the murdered, including high profile cases such as Biko, Ribeiro, Mxenge, Slovo, Schoon, Asvat, and Madaka, are still seeking justice and fundamental elements of the truth.<sup>16</sup> Scores of victims feel let down in that they did not get the whole truth through the TRC process.<sup>17</sup> Although it would never have been feasible to investigate every case, many victims' high expectations were dashed and the commission's credibility consequently undermined in their eyes. On the psychological front, the process may have helped some with healing, but was hardly sufficient and the impact not necessarily beneficial.<sup>18</sup>

Justice, in the retributive sense, remains a burning issue and the entire justification for amnesty was often unacceptable to

13. TERRY BELL & DUMISA B. NTSEBEZA, UNFINISHED BUSINESS: SOUTH AFRICA APARTHEID AND TRUTH 209 (2001).

14. Jonathan Klaaren & Howard Varney, *A Second Bite at the Amnesty Cherry? Constitutional and Policy Around Legislation for a Second Amnesty*, 117 S. AFR. L.J. 572, 593 (2000).

15. BELL & NTSEBEZA, *supra* n.13, at 286.

16. *Id.*

17. See Brandon Hamber, Dineo Nageng & Gabriel O'Malley, *Telling It Like It Is . . . : Understanding the Truth and Reconciliation Commission from the Perspective of Survivors*, 26 *PSYCHOLOGY IN SOCIETY* (2000) [hereinafter *Telling It Like It Is*]; Piers Pigou, *False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission* in *COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (Deborah Posel & Graeme Simpson eds., 2002).

18. Brandon Hamber, *The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African Truth and Reconciliation Commission*, 55(1) *AMERICAN IMAGO* 9, 28 (1998); *Does the Truth Heal*, *supra* n.12.

many victims.<sup>19</sup> Politicians may have been able to justify the exchange of formal justice for peace, but it has been difficult for victims to watch while the perpetrators have received amnesty. Justice is an important and sometimes essential component of a victim's recovery and psychological healing;<sup>20</sup> so, too, are reparations. At the time of writing, the African National Congress ("ANC") government of Thabo Mbeki had just acted on the TRC's recommendations regarding long-term reparations submitted to the government in October 1998.<sup>21</sup> On April 15, 2003, South African President, Thabo Mbeki, announced that victims of apartheid who testified before the TRC would receive a once-off final reparations grant of R30,000 (US \$3,842). A total of US \$85 million would be paid to 19,000 victims — considerably less than the US \$360 million recommended by the TRC. Ntombi Mosikare, co-ordinator of the Khulumani Support Group, said that Mr. Mbeki's words still stung like salt in a wound: "we only want the country to acknowledge us. What they are giving us is too little."<sup>22</sup>

### B. *Confusing Compromise and Human Rights*

Transitional justice mechanisms such as truth commissions are by definition established during times of political instability or, colloquially stated, when new rules for the political game are being forged. This is inevitably characterized by a push toward political and social stability, particularly if a regime change is happening by negotiation and coupled with a cessation of hostilities that have dragged on for many years. This can, and generally does, involve compromise by all parties concerned.

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19. See *Telling It Like It Is*, *supra* n.17, at 18-42. See also James L. Gibson & Amanda Gouws, *Truth and Reconciliation in South Africa: Attributions of Blame and the Struggle over Apartheid*, 93(3) AM. POLITICAL SCI. REV. 501 (1998) (finding in public opinion surveys that there was significant opposition to amnesty in South Africa).

20. DANIEL W. SHUMAN & ALEXANDER McCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL AND MORAL CONCERNS (2000); Debra Kaminer et al., *The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuse*, 178 BRIT. J. OF PSYCHIATRY 373, 377 (2001).

21. The reparations debate, and the proposals of the TRC Report are beyond the scope of the present paper. See Brandon Hamber, *Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past*, 5 ETHNICITY AND HEALTH 215, 226 (2000).

22. *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES, INT'L, Apr. 16, 2003, at A5.



In this context, it is legitimate to ask whether truth commissions are a fundamental part of peacemaking or peace-building, or perhaps something else altogether. Some argue that, under certain circumstances, they are the best way of ensuring accountability for past crime.<sup>23</sup> Such accountability would be achieved by investigating the past, acting on what is uncovered, and, through this, facilitating a break with the past. Others see them as potentially part of the machinery that ultimately legitimizes a new political order.<sup>24</sup> The ANC's aspirations at the beginning of the South African TRC was to undertake the process "as quickly as possible so that we can indeed let bygones be bygones and allow the [N]ation to forgive a past it nevertheless dare not forget."<sup>25</sup> This sentiment of addressing the past as quickly as possible while maintaining some historical memory is not uncommon among successor regimes and political parties moving through a political negotiation process.

From a critical perspective, reconciliation — with the TRC as its champion — has become a euphemism for the so-called compromises made during the political negotiations, i.e., the maintenance of white control over the economy with some black elite economic advancement at the expense of radical structural change. From this perspective, racialized structural violence as the bedrock of apartheid oppression was sidelined in favor of an individualized violation-driven analysis.<sup>26</sup> Those who suffered from the socio-economic depredations of the system as a whole were not defined "victims" as such. Further, a more cynical view is that the rapprochement between the old and new governments was primarily about consolidating a new black elite under the banner of reconciliation. In reality, however, the "truth" probably lies somewhere between (and about) the polemics. It is deeply embedded in an intricate web of relationships and in-

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23. ALEX BORAINÉ, *A COUNTRY UNMASKED: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2000); DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999).

24. RICHARD WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001).

25. African National Congress ("ANC") Department of Information and Publicity, African National Congress: Statement to the Truth and Reconciliation Commission 20 (1997).

26. James M. Statman, *Exorcising the Ghosts of Apartheid: Memory, Identity and Trauma in the "New" South Africa* (paper presented at the 18th Annual Meeting of International Society of Political Psychology July 8, 1995); Mahmood Mamdani, *Reconciliation Without Justice*, 46 S.A. REV. OF BOOKS 3, 5 (1996).

ter-dependencies more nuanced than the reductionist views expressed above.<sup>27</sup>

Although the TRC can be theoretically criticized for not taking on the entire system in its mandate (a process which was practically impossible anyway), it is interesting to note that within a rapidly liberalizing South Africa, dominated by a new authority seeking hegemony, the TRC did attempt — at least in its report — to push the boundaries of what was acceptable. Examples include: arguing for an extended wealth tax to redress the imbalances created by apartheid; labeling beneficiaries of the system as responsible through acts of omission; and finding members of the ANC (the current party of government) responsible for some human rights violations.

A careful analysis of the TRC process reveals that from its inception it was plagued by competing visions of what the endeavor was all about. These two visions raise the question of whether the TRC was a quasi-legal process of truth recovery and rigorous investigation, or fundamentally a mechanism about the attainment of reconciliation and healing through emotional and moral catharsis.<sup>28</sup> From this perspective, the TRC cannot be dismissed as a simple linear expression of the negotiations, but should, in itself, be considered a contested space.

Intrinsic to the TRC and the Act that defined its operations was sufficient power to make serious incisions into past impunity if the will was there. Individuals could be subpoenaed and held to account publicly through hearings. A good working relationship with the Attorney General's Office could have ensured more detailed questioning of amnesty applicants appearing before the TRC.<sup>29</sup> By emphasizing the imperative of finding the truth and doing as much justice as possible in every case (even if beyond the TRC's life), the TRC could have laid a more solid

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27. See Brandon Hamber, *Irreconcilable Tensions: Transformation and Reconciliation in Post-apartheid South Africa*, in CONTEMPORARY PEACE MAKING (Roger MacGinty & John Darby eds., forthcoming, 2003); Brandon Hamber, *Ere Their Story Die: Truth, Justice, and Reconciliation in South Africa*, 44(1) RACE AND CLASS 61, 79 (2002) (both providing a more detailed discussion on these differing perspectives).

28. WILSON, *supra* n.24.

29. See Piers Pigou, *False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission*, in COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 54-56 (Deborah Posel & Graeme Simpson eds., 2002) (providing a more detailed discussion on the relationship between the Attorney General's Office and the TRC).

foundation for prosecution of those who did not apply for amnesty after the Commission. The degree to which the TRC did this, however, was ultimately as much about the contested internal and external visions of its purpose, as about opposing and competing ideologies of reconciliation.

For example, the Commission possessed extensive search, seizure, and subpoena powers, more so than other truth commissions.<sup>30</sup> Although there were no limits to the number of times a person could be subpoenaed, no efforts were made to solicit information in this regard until the end of the first year of the TRC's two-year life span.<sup>31</sup> This was most evident in the TRC's admission of an "incorrect decision" when they failed to subpoena Chief Buthelezi, leader of the Inkatha Freedom Party ("IFP"). The IFP was the party responsible for the highest percentage of non-State violations that came before the Commission. The TRC admits that it ultimately succumbed "to the fears of those who argued that Buthelezi's appearance would give him a platform from which to oppose the Commission and would stoke the flames of violence in KwaZulu-Natal."<sup>32</sup>

This is symptomatic of a larger issue that was present throughout the life of the TRC, namely the tension between those who favored the voluntary participation of people before the commission and those who preferred the use of subpoena powers to demand testimony from alleged perpetrators. Views on this were often determined by individuals' conceptualizations of reconciliation and the role of the legal process. Terry Bell captures this when he writes that certain obvious investigations were not followed up because of

. . . time constraints and a fundamentally religious attitude towards reconciliation. It was summed up in the phrase 'we will have no witch hunts.' What this meant was the acceptance that the process concerned individual perpetrators and victims, with the perpetrators being given the opportunity of confession to clear their consciences.<sup>33</sup>

For some, therefore, national unity was the priority and this

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30. 1 SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION ch. 4, at 26 (1998).

31. Pigou, *supra* n.29, at 52.

32. 5 SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION ch. 6, at 26 (1998).

33. BELL & NTSEBEZA, *supra* n.13, at 205.

could only be achieved through a voluntary admission of guilt, and hopefully remorse. This was in contrast to those influenced by a more human rights (or perhaps legalistic) ideology of reconciliation, which saw labeling those responsible and calling them to account as paramount to ending impunity.

To this end, the South African TRC demonstrates how the social and political context can define the way in which the law (in this case the Promotion of National Unity and Reconciliation Act) will ultimately be implemented or interpreted. Although this is not unique to the South African experience, or the Act in question, this situation is important because it can have significant consequences, particularly when dealing with a society in transition, where new norms are attempting to be established, impunity crushed, and a human rights culture ushered in.

Amnesty was ostensibly a political necessity for underpinning a new social order founded on human rights principles, or so the dominant South African political argument went. The linking of amnesty into the South African TRC process, however, has meant that human rights as a concept has become associated with the language of pragmatic political compromise. The language of principle and accountability were undermined, and this association remains one of the obstacles to the popular acceptance of human rights as a new ideology in South Africa.<sup>34</sup>

By placing amnesty with reconciliation, its bedfellow, at the core of the South African TRC, the real benefits of the truth commission have been sidelined in South Africa, and in much subsequent international debate. Arguably, truth commissions are best at telling the story of the past from the perspective of victims, allowing victims to tell their stories in an uninhibited fashion, explaining conflicts in broad causal terms, and assigning responsibility and accountability while leaving justice to the courts.

### C. *Victims' Rights: What Agenda?*

Although the South African TRC process was billed as a "victim-centered" Commission (and it was to a degree), victims' rights, like human rights, were primarily dealt with through the prism of political compromise. Even in traditional legal think-

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34. WILSON, *supra* n.24, at 228.

ing, the phrase “victims’ rights” hardly features.<sup>35</sup> Nonetheless, it is as interesting to note the degree to which the criminal justice system as a whole has advanced the issue of victims’ rights compared to its scant mention in the field of transitional justice.

Most texts on transitional justice seem to begin with a discussion of how to deal with the past from the question of constraint (e.g., does the society have the resources to prosecute past crime, or what would prosecutions mean for lasting stability), rather than moving from a rights-based position. There is a well-known legal debate about the right to truth and justice,<sup>36</sup> but victims’ rights remain to be “centered” in the transitional justice debate. In fact, victims’ rights (particularly at the political level) are often seen as a stumbling block in the way of achieving pragmatic political change, rather than the other way around.

The South African case in which the Azanian Peoples Organization (“AZAPO”) and the survivors’ families of high-profile murder cases (Biko, Mxenge, and Ribeiro) challenged Section 20(7) of the National Unity, and Reconciliation Act provides an example in this regard.<sup>37</sup> The families argued that the TRC’s ability to grant amnesty denied the victims’ right of access to courts and as such, was inconsistent with the Constitution. Their challenge, however, was unsuccessful. The court held that to ensure democracy in South Africa, amnesty was a pragmatic necessity. It was part of the foundation for the new Constitution in the first place. Furthermore, it found that domestic constitutional law is of greater significance than international law,<sup>38</sup> and that large-scale prosecutions were not possible given the inefficiencies of the court system. The TRC, it is argued, could deliver peace and stability, and offer the potential for some truth and reparations to a greater number of survivors than could the

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35. Brice Dickson, *The Role of Victims’ Rights* (2002) (unpublished paper presented to the Democratic Dialogue Round Table on Victim Issues).

36. See Paul Seils, *Reconciliation in Guatemala: the role of intelligent justice*, 44(1) *RACE AND CLASS* 33, 59 (2002) (arguing in favor of “intelligent justice” that is based on victims’ moral and legal right to justice).

37. See Azanian Peoples Organization (“AZAPO”) and others v. President of the Republic of South Africa, 1996 CCT 17/96 (CC).

38. See Jonathan Klaaren, *A Second Organisational Amnesty* (1999) (unpublished paper presented at the History Workshop/CSV TRC Conference, “The TRC: Commissioning the Past”) (discussing the opinion of legal scholar John Dugard that the judgment was brief and incomplete, though not necessarily incorrect).

courts. To put it bluntly, some of the rights of victims were thereby forfeited for the so-called "greater good."

The details of the judgment are beyond the scope of this Essay,<sup>39</sup> yet it is interesting to consider political reactions to the process. At the time, members of the African National Congress Youth League, a rival political party to AZAPO who brought the case, supported the families' call.<sup>40</sup> Nationally, however, the ANC came out with a very different view to its Youth League. They essentially labeled the families "anti-reconciliation," "unconsciously working against the national interest," and largely colluding (albeit unconsciously) with the apartheid State. The TRC (a body that liked to portray itself as victim-centered) also reacted angrily. It deemed the families to be opposed to reconciliation. Archbishop Tutu himself said that he was "annoyed and very hurt for the many people I know who want to tell their stories" and hoped the group bringing the case would "get their come-uppance."<sup>41</sup>

These reactions are interesting as they highlight the degree to which the TRC process was tied into the notion of reconciliation. Individuals participating in the process were subject to far greater forces than simply exercising their rights to truth, justice, or reparation. The demands of the transitional context took priority. In essence, attempts by victims to achieve what they saw as justice through the courts were seen as a hindrance to peace. They had to forego rights, such as the right to access courts, which are generally afforded to victims of "ordinary" crimes. In this sense, the debate should focus on how victims of political violence can receive a parity of rights to other victims, rather than whether they should be treated as a special case compared to, say, victims of domestic violence or car crashes.

That said, the TRC also mirrored one of the core weaknesses present in many criminal justice systems, i.e., there was not a clear understanding of the relationship between the TRC

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39. The intricacies of this debate are beyond this present scope. See John Dugard, *Dealing with Crime of a Past Regime: Is Amnesty Still an Option?*, 12 LEIDEN J. OF INT'L L. 1002, 1015 (2000); Klaaren, *supra* n.38; Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20(4) HUM. RTS. Q. 843, 885 (1998).

40. *Victims of apartheid need justice before reconciliation*, SOUTH AFRICAN PRESS ASS'N, Apr. 10, 1996.

41. *Truth Commission not losing credibility, says Tutu*, SOUTH AFRICAN PRESS ASS'N, Apr. 11, 1996.

and victims. It was always unclear what the outcomes would be for victims. They might get truth, potentially justice (if the perpetrator did not apply for amnesty, of course), and potentially reparation. Of course, it was also hoped that some healing might come from engaging in the process. In a word, outcomes for the amnesty applicants were much clearer — either they received amnesty or they did not.

To state the point polemically, just as the relationship between the offender and the State dominates most developments in the criminal justice system, in terms of prosecution, punishment, and rehabilitation, so too did the legal relationship between amnesty-applicant and the State largely drive the South African TRC process. Granted, some victims found truths they would not have known without the TRC, and for some, the process of testifying could have been personally psychologically beneficial;<sup>42</sup> however, their relationship to the TRC was not as clearly defined in terms of outcome. In this sense, ambivalence around the outcome for victims could have fed into feelings of low levels of subjective procedural justice.<sup>43</sup>

The relationship between the victim and the State in the transitional justice debate remains underdeveloped morally, ethically, legally, and more critically, in practice. A relationship between any body such as a truth commission (dealing with transitional justice issues) and the victims participating in it needs to be articulated and explored in greater detail than is currently the case. Such discussions could find expression in the form of a Charter of Victim Rights in truth commission processes. The U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides a good starting point for the discussion on victims' rights. This declaration, however, is seldom referred to, especially in the transitional justice literature.<sup>44</sup>

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42. *Does the Truth Heal?*, *supra* n.12.

43. "Subjective procedural justice" is a term used in psychological literature. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE: CRITICAL ISSUES IN SOCIAL JUSTICE* (1988). In the psychological literature, compared to the legal literature, when reference is made to procedural justice being high or low, it is meant that those involved feel the process was fair or unfair. This is different from assessing, based on some normative understanding, whether the process was objectively fair or not.

44. This declaration is not without its flaws. For example, victims are only defined as those directly affected and not their relatives or associates. The definitions also do not really take into account the potential long-term impacts of extreme violence.

New charters are of course not sufficient; rather, it is the process around their development, the positioning of victims' rights at the core of the transitional justice debate, and enforcing rights through law, that are critical. This is particularly important if transitional justice mechanisms continue to be so heavily tied to the transitional context that individual participation in them is understood to have a larger social meaning (e.g., reconciliation), rather than simple individual participation.

Currently, and certainly in the South African case, victims' rights are often a yardstick of *post-hoc* rationalization once certain rights had been negotiated away. When truth commissions are said to be victim-centered, this often means that victims are psychologically and socially supported, given adequate space to voice their opinions, and have their experiences validated and acknowledged. Being truly victim-centered, however, requires a paradigm shift in which victims' rights start to influence the transitional justice agenda to a far greater degree. In many societies, victims' rights are understood as an obstacle to compromised pragmatic political change, rather than the questions raised by pragmatic political change being seen as a real threat to entrenching the rights of victims.

## II. TRUTH RECOVERY: SOME THOUGHTS ON NORTHERN IRELAND

In 1998, I undertook some research on whether or not Northern Ireland should have a truth commission. I came to the conclusion that, at that time, an official truth recovery process seemed unlikely.<sup>45</sup> Others made similar arguments, namely, that no moral or political authority existed to support an entity such as a truth commission.<sup>46</sup> I further argued that the balance of power between forces during transition generally determined government policy on issues,<sup>47</sup> and in Northern Ireland, at that stage, the forces were too evenly weighed and all sides were opting to leave their truths hidden for the time being. As such:

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45. BRANDON HAMBER, *PAST IMPERFECT: DEALING WITH THE PAST IN NORTHERN IRELAND AND SOCIETIES IN TRANSITIONS* [hereinafter *PAST IMPERFECT*] (1998).

46. NIACRO AND VICTIM SUPPORT NORTHERN IRELAND, *ALL TRUTH IS BITTER: A REPORT OF THE VISIT OF DOCTOR ALEX BORAINÉ* (1999).

47. Jamal Benomar, *Confronting the Past: Justice in Transitions*, 4(1) *J. OF DEMOCRACY* 13 (1993).



Most political players demand truth from those they perceive as the other side or sides, but seem unwilling to offer the truth from their side, or acknowledge and take responsibility for their actions. This is mostly due to fear that such acknowledgement (public or otherwise) will weaken in the new dispensation and that the truth may be used against them within the context of the delicate peace that prevails. There are also those in Northern Ireland who refuse to accept that they did anything wrong or that their action (or inaction) was complicit in perpetuating the conflict.<sup>48</sup>

Several years on, the endpoint has not shifted significantly, but the debate and the intricacies of dealing with the past have certainly gained political and public momentum. In addition, various mechanisms that one could call truth-recovery processes are underway. For example, the Bloody Sunday Inquiry was announced on January 29, 1998, a commission to investigate disappearances was also set up, and a number of ongoing legal matters have come before the European Court of Human Rights.<sup>49</sup> There are also many ongoing community initiative working with memorials, oral history and commemoration. Ongoing projects have also documented the extent of the conflict in Northern Ireland in great detail.<sup>50</sup>

The Healing Through Remembering consultation process heralded probably the most thorough public and civil society investigation to date of strategies for dealing with the past.<sup>51</sup> The Project recommended that there be a network of commemoration projects, a Day of Reflection, a collective storytelling process, a permanent memorial museum concerning the conflict in and about Northern Ireland, and that

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48. PAST IMPERFECT, *supra* n.45, at 80,81.

49. *See, e.g.*, Jordan, Kelly, McKerr & Shanaghan v. UK, Application Nos. 24746/94, 30054/96; 28883/95; and 37715/97 (2001). *See also* Fionnuala Ní Aoláin *Truth Telling Accountability and the Right to Life in Northern Ireland Issue*, 5 E.H.R.L.R. (2002).

50. *See, e.g.*, ARDOYNE COMMEMORATION PROJECT, ARDOYNE: THE UNTOLD TRUTH (2002); DAVID MCKITTRICK, SEAMUS KELTERS, BRIAN FEENEY & CHRIS THORTON, LOST LIVES: THE STORIES OF THE MEN, WOMEN AND CHILDREN WHO DIED AS A RESULT OF THE NORTHERN IRELAND TROUBLES (1999); MARIE-THERESE FAY, MIKE MORRISSEY & MARIE SMYTH, MAPPING TROUBLES RELATED DEATHS IN NORTHERN IRELAND 1969-1998 (1998); FINAL REPORT BELFAST: THE COST OF THE TROUBLES STUDY (1999).

51. *See* HEALING THROUGH REMEMBERING, *supra* n.4. *See also* <http://www.healingthroughremembering.com> for more details. In sum, this project undertook an extensive national consultation process and published its findings on how the events concerning the conflict in and about Northern Ireland could be remembered. *See id.*

all organizations and institutions that have been engaged in the conflict, including the British and Irish States, the political parties and Loyalist and Republican paramilitaries, should honestly and publicly acknowledge responsibility for past political violence due to their acts of omission and commission. We see this as the first and necessary step having the potentiality of a larger process of truth recovery. When acknowledgement is forthcoming, we recommended that measured, inclusive and in-depth consideration be given to the establishment of an appropriate and unique truth recovery process.<sup>52</sup>

Clearly, the use of the phrase “truth recovery” was deliberate. It was broader than the idea of recommending a truth commission as such. In the broadest sense, truth recovery could imply mechanisms such as truth commissions run domestically or intentionally, commissions of enquiry, tribunals or special prosecutions, or perhaps historically-based truth recovery processes driven by victim narratives. Furthermore, the Report is at pains to point out that any such process should relate to, and not replace, other formal truth finding structures that exist, namely those within the existing criminal justice system and other associated mechanisms such as inquests, police investigations, prosecutions and inquiries. Much work remains to be done before an acceptable mechanism (that was also legally viable given other developments) could come into being.

By stressing multiple mechanisms, however (including those in its other recommendations), the Report perhaps draws its strongest distinction from the South African process. In South Africa, including amnesty in the TRC’s remit meant that successful amnesty applicants effectively bypassed the criminal justice system altogether. Perhaps, in this sense, the Healing Through Remembering Report’s stress on complementarity may overcome some of the problems of the South African process – namely, the confusing of human rights discourse and truth with compromise and amnesty, thus undermining the potential of an undiluted human rights discourse associated with accountability and principles,<sup>53</sup> as was elucidated earlier in the Essay. Or, as anthropologist Richard Wilson argues, the most successful truth commissions have been those that have abandoned the trap-

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52. *Id.* at 50.

53. WILSON, *supra* n.24.

pings of law and allowed courts to administer amnesty provisions or perhaps prosecutions (author's addition), and concentrated more on truth finding and documenting historical lessons.<sup>54</sup> In this sense, these suggestions and current developments in Northern Ireland start to paint a picture of a much more diffuse approach to truth-recovery.

In terms of the issue of victims' rights in Northern Ireland, it may be useful to note that there is, as in many countries, an ongoing battle over degrees of suffering. That is, many victims' groups qualify their victimhood. It has become common for some groups to refer to themselves as "real" or "innocent" victims.<sup>55</sup> Such qualifications indirectly imply, whether purposefully or not, that there must be "guilty" victims. Many victims of paramilitary violence feel that their suffering is seen as less important in light of the concessions to political (largely Republican) prisoners. Victims of State violence also feel they have always been secondary victims because the hegemony of British State remains, and only a handful of soldiers and police have been held to account for their actions. The phrase "hierarchy of victims" has become commonplace.

Brice Dickson of the Northern Ireland Human Rights Commission provides some useful pointers in this regard.<sup>56</sup> He notes that it needs to be realized that the nature of victimhood differs according to the nature of the wrong that has been committed against the victim. The wrong has two aspects to it: the act itself (e.g., the killing, the assault, the threat) and the consequences of the act (e.g., the death, the injury, the fear). If we are to decide what rights victims should have, he argues, we should have regard for both aspects. The former aspect calls for rights such as recognition, acknowledgement and apology. The latter aspect calls for rights such as compensation and access to services. The former is more politically contentious, and usually acknowledgement and recognition are dealt with by truth commissions and other official processes. It is interesting to note that Northern Ireland has at least to some degree, and at this stage, tried to incorporate some rights-based views of victims' rights in

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54. *Id.*

55. MIKE MORRISSEY & MARIE SMYTH, *NORTHERN IRELAND AFTER THE GOOD FRIDAY AGREEMENT: VICTIMS, GRIEVANCE AND BLAME* 12 (2002).

56. *See* Dickson, *supra* n.35.

the draft Bill of Rights. The draft Bill reads, under the heading of "Victims of the Conflict":

With a view to promoting the principles of truth and reconciliation in the aftermath of a lengthy period of conflict, the Government shall take legislative and other measures to ensure that the loss and suffering of all victims of that conflict and the responsibility of State and non-State participants are appropriately and independently established and/or acknowledged.<sup>57</sup>

Rights in relation to service delivery are more straightforward. It would appear that law could underpin rights to compensation and adequate services — the draft Bill of Rights supports this. The difficulty, however, when dealing with the needs of victims in transitional societies is that the complexity of truth, justice and acknowledgement is often avoided. These issues are inevitably political and the core of understandings of the conflict. This was evident in the recent Victims Strategy Document developed by the Office of the First and Deputy First Minister, which exclusively focused on services delivery to so-called "victims," choosing not at this stage to comment on truth and justice, pending the launch of the Healing Through Remembering Project's Report — the Report of an independent voluntary organization not related to government.

The dominant focus on the psychological distress of victims of violence at the expense of other needs is interesting to consider in this regard. It could be argued that in many countries an exclusive emphasis on the psychological needs of victims, although necessary, is often used in the expectation that it will meet other needs, such as victims' needs for truth, acknowledgement and justice. The practical and political challenge of making policy on matters concerning those who have suffered, means that the needs of victims are often relegated (or compartmentalized off) to the therapy room in the hope that victims' psychosocial needs and their desire for justice and truth can be counseled away. This is compounded by the fact that governmental knowledge about the impact of conflict on individuals and how to address it is generally scant, and in many countries, the government is also responsible for some of the violence.

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57. Human Rights Commission of Northern Ireland, Proposed Bill of Rights for Northern Ireland, Cl. 8(a)1 (Sept. 2001).

Trauma counseling<sup>58</sup> and community-based support work do not in themselves deal with the past. Healing, or attempts to assist victims of violence psychologically speaking, cannot be separated from the social and political process of dealing with the past, which by definition includes issues such as justice. Exactly how this process of acknowledgement could be operationalized is still unclear, but what is clear is that a more robust debate on truth, justice, and acknowledgement is needed, and will continue.

Victims' rights in criminal justice studies, albeit somewhat developed, remain the poor relative to many other aspects of criminal justice. In transitional justice studies, the concept is almost non-existent. This is the case not only in Northern Ireland, but in the transitional justice field more broadly. A more rigorous engagement with the issue of victims' rights still needs to be developed and articulated. The legal underpinnings of victims' participation in truth recovery mechanisms require regular attention, as does the realization of their rights.

#### *CONCLUSION: LEARNING LESSONS IN REVERSE*

Despite the criticisms raised of the South African process in this Essay, it is important to acknowledge that the TRC was a bold and partially successful attempt to delve into a turbulent past created by decades of conflict. Some of the difficulties in the process — or so it has been argued in this Essay — concerned the confusion of human and victims' rights with "compromise," as well as the impact of concepts such as reconciliation on the TRC's final outcome. Oddly, however, perhaps it is these weaknesses in the South African context that may hold some lessons for Northern Ireland.

The mandate of the South African TRC compelled it to investigate the "causes, nature and extent" of the South African

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58. Trauma, the notion of post-traumatic stress disorder ("PTSD"), itself a contested term in psychological literature-critiques, and especially its role in post-conflict societies, are beyond the present scope. See David Becker, *The Deficiency of the Concept of Post-Traumatic Stress Disorder when Dealing with Victims of Human Rights Violations*, in *BEYOND TRAUMA: CULTURAL AND SOCIETAL DYNAMICS* 107 (R.J. Kelber, C.R. Figley & B.P.R. Gersons, eds., 1995); P. J. Bracken, *Hidden Agendas: Deconstructing Post-Traumatic Stress Disorder*, in *RETHINKING THE TRAUMA OF WAR* 55 (P.J. Bracken & C. Petty eds., 1998); ALAN YOUNG, *THE HARMONY OF ILLUSIONS: INVENTING POST-TRAUMATIC STRESS-DISORDERS* (1997).

conflict. The TRC elucidated the broad causal and historical picture fairly well—obviously made easier by the fact that a widely accepted truth already existed, i.e., apartheid was a morally abhorrent system that brutalized many. But, on assessment, the TRC did not simply highlight the fact that apartheid was a crime against humanity — uncomfortable truths that challenged many of the dominant narratives about the South African conflict emerged in one way or another. It could be said to have achieved a measure of success in highlighting “the causes” of the conflict and bringing a more unified understanding of the conflict to bear. That said, the TRC could have certainly ventured more boldly into the “nature and extent” of the conflict. This Essay has highlighted some of the problems with the TRC’s investigation process. In addition, the TRC could have fostered a greater recognition of the need for multiple and ongoing mechanisms over time, to continue truth finding and deliver justice in South Africa.

Contrary to this, the multitude of initiatives taking place in Northern Ireland, largely unofficial, mean that the “nature and extent” of the conflict is — and will certainly be — well documented over the next decade. Unlike South Africa, and simplifying very complex arguments, agreeing on or at least having a broadly accepted narrative of the “causes” of the Northern Ireland conflict, is one of the biggest challenges to building some form of reconciliation into the future. The fear — not to mention complexity — of exploring the “causes” in an open, honest and inclusive way is the principal obstacle to engaging in a macro truth finding process. Such a process, if designed correctly and impartially, would mean for all parties involved — including the governments and public at large — potentially compromising on long-held beliefs about the nature of the conflict, or at least being prepared to allow their own perspectives to be scrutinized, and perhaps proved mistaken or misguided.

Despite the difficulties this Essay has highlighted around too closely linking the reconciliation discourse to the amnesty process in South Africa, perhaps the notion of reconciliation (with all its multiple meanings) ironically holds the key for a more consensus-driven attempt to elucidate aspects of the past in Northern Ireland. Conceivably, a more significant official and national attempt to deal with the past in Northern Ireland will only take place — as optimistic or perhaps impossible as it

sounds — once the hard-nosed desire to score political points from the past is replaced by a more reconciliatory discourse across the board. This would need to be built on the recognition that at some point laying the past bare will be needed, and that this is the greatest, albeit difficult, guarantee of a stable future in the decades to come. A delicate balance needs to be struck. On one level, a degree of reconciliation is needed for all to agree to any official truth recovery process. Yet, at the same time, such reconciliation cannot compromise the truth that should emerge. This will require political courage and, dare I say, a level of grace and generosity seldom seen in Northern Ireland's conflicted history.