

THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION: A SUITABLE MODEL TO ENHANCE THE ROLE AND RIGHTS OF THE VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS?

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[The South African Truth and Reconciliation Commission is one of the most talked about, innovative, but also highly controversial mechanisms used by a state ‘in transition’ to provide a form of accountability for its past perpetrators of human rights abuses. This article will, from the perspective of the victims of repression, critically analyse the benefits and drawbacks of the TRC’s three primary processes — the amnesty hearings, the victims’ hearings and the formulation of its policies on rehabilitation and reparation. This analysis provides some important lessons and recommendations for how the establishment and implementation of future truth commissions can maximise the benefits to those who have so often been forgotten in past attempts to establish accountability mechanisms — namely, the victims and survivors of gross violations of human rights.]

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I INTRODUCTION

In modern times, two main accountability mechanisms have been the dominant means by which states ‘in transition’¹ and the international community have dealt with perpetrators of gross violations of human rights associated with a former repressive regime. These are the use of criminal trials — which may be international, foreign or national — and truth commissions.² This article will focus on the latter mechanism and, in particular, on the most well-known and prominent truth commission to date — the South African Truth and Reconciliation Commission (‘TRC’). While many factors could be used to assess the success or otherwise of a truth commission,³ this article will concentrate specifically on the perspective of the victims of repression. This is because no accountability mechanism can be described as valid and just unless it gains a reasonable level of approval and acceptance from such victims. Thus, victim perspectives are critical and should be a primary consideration in the establishment of any future truth commissions or other accountability mechanisms.⁴ This emphasis on victim perspectives also accords with trends in modern criminal justice towards greater awareness of, and support for, the plight of victims of crime.⁵

¹ This is a common expression now found in the literature to denote states that have changed regimes from one that regularly violated human rights to one that has at least attempted to institute the rule of law and respect for human rights. The expression also relates to the term ‘transitional justice’, which refers to the manner in which states in transition deal with their past, particularly with the perpetrators of human rights violations. There is a large amount of literature on these issues, and many now consider transitional justice to be an academic discipline in its own right.

² Although alternative terminology has often been used to describe similar bodies to ‘truth commissions’, including ‘investigatory commissions’ and ‘commissions of inquiry’, the term ‘truth commission’ will be used throughout this article for the sake of brevity. Priscilla Hayner sees the four defining characteristics of truth commissions as being that: they ‘focus on the past’; ‘they investigate a pattern of abuses over a period of time, rather than a specific event’; they are temporary bodies operating for a defined period; and they are sanctioned, empowered or authorised by the state and sometimes the opposition: Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001) 14. Note that individual states have also adopted other types of accountability mechanisms, such as purges and ‘lustration’ measures (used mainly in Eastern Europe), immigration measures (such as denaturalisation and deportation proceedings, used mainly in the USA), and allowing civil suits by victims against perpetrators and those who aid them.

³ These include whether the commission uncovered the ‘truth’ and thus produced an accurate historical record, whether it achieved reconciliation between previously warring factions within the particular society, whether ‘justice’ resulted from the commission’s work, and whether other communities in society were satisfied with its work.

⁴ This is not to suggest that accountability mechanisms should only consider the perspective of victims; in particular, they must, at the very least, ensure that the rights of alleged perpetrators to due process are respected, and that the mechanism will not seriously threaten the future stability of the society.

⁵ In national criminal justice systems in most Western countries (particularly those states with adversarial common law legal systems), there has been increasing attention to, and awareness of, the plight of crime victims, leading to moves to enhance their role and rights during the criminal justice process. The large body of literature that has developed around these issues has led to what many regard as a new academic discipline — ‘victimology’ — which had previously been

The article will endeavour to answer two key, interrelated questions: ‘from the perspective of victims, what lessons can be learnt for future truth commissions from the formation, processes and implementation of the TRC?’; and ‘to what extent are truth commissions in general beneficial for victims of gross human rights violations?’ These are important questions for a number of reasons. First, the use of truth commissions as an accountability mechanism is increasing around the world.⁶ Secondly, because the TRC received a large amount of international attention and was perceived as highly innovative, many people have come to see it as a model for future truth commissions.⁷ Thirdly, with the increasing awareness of, and attention paid to, victims of crime and victims in general,⁸ it is commonly recognised that any mechanism established to deal with perpetrators must have the confidence of victims if the society is to be able to heal and move towards a peaceful future. Finally, the answer to these key questions might also throw some light on the frequently asked wider question of whether the optimal accountability mechanism for perpetrators of mass human rights violations involves criminal trials or non-prosecutorial options such as truth commissions.⁹

Until recent years, victims and survivors of gross violations of human rights have been given little consideration in the formation of mechanisms dealing with

seen as a sub-discipline of criminology: see Sam Garkawe, ‘Modern Victimology: Its Importance, Scope and Relationship with Criminology’ (2001) 14(2) *Acta Criminologica* 90.

⁶ See Hayner, *Unspeakable Truths*, above n 2, 249–54. Graeme Simpson writes:

The growing global enthusiasm for truth commissions represents a reassertion of not merely the possibility, but also the profound political importance, of the idea of objective historical truth as a route to conflict resolution or restorative justice in societies emerging from authoritarian and violent pasts.

Graeme Simpson, *Uncivil Society: Challenges for Reconciliation and Justice in South Africa after the Truth and Reconciliation Commission* (2002) Centre for the Study of Violence and Reconciliation <<http://www.csvr.org.za/papers/papsim16.htm>>.

⁷ See Priscilla Hayner, ‘Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide’ in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 32.

⁸ In relation to ‘victims of crime’, see Garkawe, ‘Modern Victimology’, above n 5. The word ‘victim’ used throughout this article is utilised in the same sense as it was used by the TRC. Under the legislation establishing the TRC, the *Promotion of National Unity and Reconciliation Act 1995* (South Africa) (*‘Reconciliation Act’*), a ‘victim’ was defined as a person who suffered various types of harm ‘as a result of a gross violation of human rights’, or was a relative or dependant of such persons: *Reconciliation Act* s 1(xix). For an analysis of this term, see below nn 189–94 and accompanying text. The word ‘survivor’ used throughout this article is specifically meant to encompass only the close family members and loved ones of victims who were killed during the mandate period of the TRC. This is not intended to undermine the fact that many of those victimised but not killed during the apartheid era were in fact *resilient* survivors, but is rather an attempt to be consistent with the use of the word ‘victim’ by the TRC.

⁹ See below Parts II and VII for further discussion of this issue. Of course, it is possible for these mechanisms to work simultaneously, and in some situations this might be the best solution. For example, Méndez has argued that

a truth commission could gather evidence and hear the victims while the judiciary is under reconstruction as an independent and impartial body; when the task of the [truth commission] is done, the material thus gathered can be used by courts and prosecutors to conduct trials under conditions of fairness, and with the benefit of having the evidence sorted out beforehand.

Juan Méndez, ‘Latin American Experiences of Accountability’ in Ifi Amadiume and Abdullahi An-Na’im (eds), *The Politics of Memory: Truth, Healing and Social Justice* (2000) 127, 139.

perpetrators. For example, on the few occasions when international¹⁰ or national¹¹ criminal courts were established to bring perpetrators of international crimes¹² to justice, the role and rights of victims were generally a secondary consideration.¹³ However, with the greater awareness of the rights of victims of domestic crime within developed countries since the 1970s¹⁴ and a greater attentiveness to the rights of victims of gross human rights violations,¹⁵ this situation has changed significantly. In the early 1990s, when the United Nations Security Council formed the two ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, their respective Statutes and Rules of Procedure and Evidence contained a number of provisions that specifically catered for victims' interests.¹⁶ The *Rome Statute of the International Criminal Court*,¹⁷ adopted in July 1998, further improves the status of victims.¹⁸

¹⁰ Prior to the 1990s and the formation of the ad hoc International Criminal Tribunals (see below n 16 and accompanying text), the only international criminal courts were the Nuremberg and Tokyo International Military Tribunals established by the Allies shortly after World War II. Special Allied courts were also created in the various occupation zones of Germany utilising *Control Council Law No 10* (1945), but these could be categorised as domestic courts applying international law.

¹¹ Countries such as Germany, France, Israel, Great Britain, Australia, Italy, Croatia and Canada have enacted domestic legislation that utilised international law principles to bring war crimes, crimes against humanity and genocide charges against former Nazi or pro-Nazi officials and armed forces personnel.

¹² 'International crime' has been defined by the International Law Commission in art 19(2) of the Draft Articles on State Responsibility (*Report of the International Law Commission on the Work of its Forty-Eighth Session: 6 May–26 July*, UN GAOR, 51st sess, Supp No 10, 131, UN Doc A/51/10 (1996)) as 'the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole'. The practical implication of this is that perpetrators may be subject to individual criminal liability under international law. Some of the most prominent and well-accepted international crimes are genocide, crimes against humanity, war crimes, torture and slavery.

¹³ Sam Garkawe, 'The Victim-Related Provisions of the *Statute of the International Criminal Court* — A Victimological Analysis' (2001) 8 *International Review of Victimology* 269, 275.

¹⁴ See above n 5 and accompanying text.

¹⁵ This is best illustrated by recent moves to provide such victims with an entitlement to restitution and compensation: see United Nations Commission on Human Rights, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc E/CN.4/Sub.2/1993/8 (1993); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, contained in the annex to the Report of the United Nations Special Rapporteur, M Cherif Bassiouni, UN Doc E/CN.4/2000/62 (2000). See also Dinah Shelton, *Remedies in International Human Rights Law* (1999).

¹⁶ These included the establishment of Victim Witness Units or Sections to assist victims and witnesses in their dealings with the Tribunals and special provisions regarding the protection of vulnerable witnesses. In relation to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia ('ICTY'), see *Statute of the International Tribunal for the Former Yugoslavia* art 22 (Protection of Victims and Witnesses) in *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808* (1993), annex, UN Doc S/25704 (1993); ICTY, *Rules of Procedure and Evidence 1994* r 75 (Measures for the Protection of Victims and Witnesses). In relation to the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States ('ICTR'), see art 21 (Protection of Victims and Witnesses) of the *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/Res/955 (1994); ICTR, *Rules of Procedure and Evidence 1995* r 69 (Protection of Victims and Witnesses). Furthermore, in respect of the ICTY, there is also a provision that attempts to

The formation of truth commissions from the 1980s onwards¹⁹ was seen as an alternative means of dealing with a nation's past, and one which, it was argued, had a great deal more potential for victims. Some argued that truth commissions were able to provide a more sympathetic and supportive environment for victims to tell their 'stories' than that provided by the more formal proceedings normally associated with criminal trials, and that they had the potential to be more responsive to victims' psychological, financial and symbolic needs.²⁰

However, one major problem with truth commissions is that they are perceived, particularly by many international human rights advocates, as being primarily aimed at avoiding or weakening the prospects of bringing perpetrators to 'justice'.²¹ This perception can be attributed mainly to the wide amnesty provisions for perpetrators that were, in the past, predominantly either granted as part of the truth commission's establishment or provided subsequently.²² It was argued that this lack of justice and accountability could not meet victims' needs. The TRC, on the other hand, was intended to be a different form of truth commission. Rather than the 'blanket' amnesty for perpetrators provided by previous truth commissions, for the first time in the history of truth commissions perpetrators would be granted amnesty only if they could satisfy certain conditions laid down in the legislation establishing the Commission.²³ Advocates of

assist victims in receiving compensation from their national court system: ICTY, *Rules of Procedure and Evidence 1994* r 106.

¹⁷ Opened for signature 17 July 1998, [2002] ATS 15 (entered into force 1 July 2002) ('*Rome Statute*').

¹⁸ For the first time in any international criminal court victims will, subject to the discretion of the Court, be able to have their own legal representation: *Rome Statute*, opened for signature 17 July 1998, [2002] ATS 15, art 68(3) (entered into force 1 July 2002). Also for the first time, an international court will be empowered to make a compensation order directly in favour of victims: arts 75, 79. See Theo van Boven, 'The Position of the Victim in the *Statute of the International Criminal Court*' in Herman von Hebel, Johan Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999) 77; Christopher Muttukumaru, 'Reparation to Victims' in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute — Issues, Negotiations, Results* (1999) 262; Garkawe, 'The Victim-Related Provisions of the *Statute of the International Criminal Court*', above n 13, 284–5.

¹⁹ Although the first truth commission was established in Uganda in 1974, it was widely acknowledged to have been a failure. In a comprehensive book about truth commissions, Hayner asserts that between 1980 and February 2000 there have been 20 truth commissions, most of which have been formed in Latin America and Africa: see Hayner, *Unspeakable Truths*, above n 2, 9, 291–7.

²⁰ These views are not uncontroversial. See below Part V for an analysis of these arguments.

²¹ See especially the views of well-known human rights lawyer, Geoffrey Robertson QC, who is particularly critical of the amnesties that seem to result from truth commissions. In Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2000) 263, he argues that [t]he real purpose of an amnesty statute is not to promote 'national reconciliation' or to diminish in a new democratic society the debilitating desire for revenge, it is to enable government officials, and military and police officers, to escape responsibility for the crimes against humanity which they ordered or committed.

²² See below Part II for a more detailed consideration of amnesty laws, particularly the issue of whether the granting of amnesty violates a state's international legal obligations.

²³ See below Part IV for an analysis of these criteria for amnesty. According to Hayner, '[n]o other country has combined this quasi-judicial power [to grant amnesty to individual perpetrators] with the investigative tasks of an administrative truth-seeking body': Hayner, 'Same Species, Different Animal', above n 7, 36.

the TRC argued that these conditions would ensure perpetrator accountability while at the same time being beneficial for victims.²⁴

This article proceeds as follows. Part II consists of a general discussion of what might constitute 'justice' for the victims of repression in situations of transitional justice. Differences of opinion are examined between those who argue that most victims desire retribution or punishment via criminal proceedings, and those who assert that victims have a variety of needs that might, therefore, render alternatives to criminal justice processes more desirable — these alternatives are often referred to as 'restorative justice' mechanisms. The complexity of assessing what victims might desire is also discussed. Some comments are made on the issue of whether the TRC's provisions for amnesty violated South Africa's international legal obligations, which for many international lawyers is an essential criterion in considering the 'justice' of the TRC. Part III provides a historical introduction to the TRC and describes and examines the elements of the TRC's formation and operation that led its proponents to assert that it was a 'pro-victim' or 'victim-friendly' accountability mechanism. The next three parts critically examine the alleged benefits and the problems of the TRC process from a victim perspective with respect to the work of the three Committees that primarily constituted the TRC.²⁵ These were the Committee on Amnesty, the Committee on Human Rights Violations and the Committee on Reparation and Rehabilitation. Specific suggestions are made as to how such a complex exercise as the TRC could be improved from a victim perspective for future truth commission-type bodies. In making these suggestions the author emphasises that there is no 'one size fits all' model for future truth commissions. The political, social and cultural circumstances surrounding each state 'in transition' vary considerably, and so the context of each transition must be considered in devising a particular truth commission appropriate to local circumstances. Nevertheless, it is suggested that some common ideas and points of improvement amenable to suitable local adaptations could be adopted by future truth commissions in appropriate circumstances. The conclusion of the article summarises the author's thoughts, in light of the detailed examination of the TRC, on the overall issues of whether the TRC was a suitable mechanism for the victims of repression during the apartheid era and, more generally, whether or not truth commissions are an appropriate accountability instrument from the perspective of victims. While both these issues defy simple answers, the author is of the view that with suitable adaptations to both local circumstances and to

²⁴ See below Part IV for an analysis of these arguments. The TRC itself referred to its amnesty as an 'accountable amnesty': Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (1998) vol 1, 118 ('TRC Report').

²⁵ Other components of the TRC were the Investigations Unit and an even smaller Research Unit responsible for the drafting of the report. For a description and critical analysis of the work of these units, see respectively Piers Pigou, 'False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission' in Deborah Posel and Graeme Simpson (eds), *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* 37, and Janet Cherry, John Daniel and Madeline Fullard, 'Researching the "Truth": A View from Inside the Truth and Reconciliation Commission' in Deborah Posel and Graeme Simpson (eds), *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (2002) 17.

the lessons learned from the mistakes of the TRC, truth commissions can be a very useful mechanism for victims of repression.

II VICTIM PERSPECTIVES ON WHAT MIGHT CONSTITUTE ‘JUSTICE’ WHERE STATES ARE ‘IN TRANSITION’

One of the most obvious determinants of whether victims of repression will look positively or negatively on truth commissions is whether they perceive the process as having delivered ‘justice’. Of course, what exactly constitutes ‘justice’ is a multifaceted and problematic question to answer.²⁶ Despite these complexities, in situations of transitional justice many international human rights advocates measure justice according to whether the new government or the international community had carried out what these advocates see as the state’s international obligations — namely, holding accountable individuals who were suspected of committing international crimes. The question of what action should be taken against past perpetrators of human rights violations has thus become intertwined with the issue of what transitional states’ international obligations are under such circumstances.

One of the most influential articles concerning this issue is by Diane Orentlicher, entitled ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’.²⁷ Her primary argument is that under international law states have a duty to investigate allegations of human rights violations, and if the evidence warrants it, to place alleged perpetrators on trial. In particular, international treaties on genocide,²⁸ torture²⁹ and war crimes³⁰ seem to place an obligation on state parties to take this course of action.³¹ Orentlicher argues that

²⁶ See, eg. Tom Campbell, *Justice* (1988) which sets out in a reasonably summarised form the main contending theories of justice by writers such as John Rawls, Richard Posner and Ronald Dworkin. See also the different layers of justice referred to in Charles Villa-Vicencio, ‘Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet’ (2000) 49 *Emory Law Journal* 205, 215.

²⁷ Diane Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 *Yale Law Journal* 2537.

²⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

²⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

³⁰ These would include the four Geneva Conventions of 1949 and the two additional Optional Protocols of 1977: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

³¹ Clearly, a state will be under a treaty obligation to prosecute only where it had ratified one of these treaties at the time of the alleged abuses. However, many states responsible for human

criminal prosecution is justified because it is in accordance with one of the principal aims of sentencing in criminal matters, namely that of general deterrence, which is intended to stop future repression.³² She also asserts that criminal prosecution affirms the rule of law, and refers to the dangers of failing to punish perpetrators.³³ Such a failure, she alleges, creates an atmosphere of impunity that undermines the new government and institutions connected with the rule of law.³⁴ Finally, Orentlicher contends that criminal prosecution advances the transition to democracy by strengthening fragile democracies and affirming the supremacy of civilian institutions in these democracies.³⁵ Underlying this perspective is the notion that only a criminal trial, conducted in accordance with formal rules of evidence and procedure, and providing guarantees of due process for accused persons, will be acceptable. According to this view, states 'in transition' or the international community should respond to gross violations of human rights through criminal trials. A formal finding of guilt after a fair trial conducted in accordance with international legal norms, followed by appropriate punishment, is the main conception of 'justice' adhered to by most international lawyers.

However, the author argues that Orentlicher's views do not take into account a considerable number of counterarguments and, in particular, do not allow for the complexities of victims' perspectives. The author asserts that Orentlicher's view represents a very Western model of transitional justice that may be appropriate for many advanced democracies or where there has been a complete defeat of a state, allowing the victor state(s) to impose their own means of transitional justice.³⁶ However, many situations of transitional justice, particularly in the modern era, do not fit these patterns. Most nations 'in transition' come from the developing world³⁷ and, more importantly, there are two critical points of difference that make the criminal trial model of transitional justice inappropriate in many situations. These factors also directly relate to whether the international legal obligations of states include the prosecution of international crimes where there is sufficient evidence against alleged perpetrators. A number of commentators assert that a state's international duty to prosecute — if, in fact, there is one³⁸ — can be overridden or derogated from in two circumstances.³⁹

rights violations (such as South Africa during the apartheid era) are unlikely to have ratified these types of treaties at the time of the abuses, with the possible exception of those relating to war crimes. For this reason, the state of customary international law, discussed below in this part, becomes important.

³² Orentlicher, above n 27, 2542.

³³ *Ibid.*

³⁴ *Ibid.* 2543.

³⁵ *Ibid.*

³⁶ This was the case with respect to the Nuremberg and Tokyo International Military Tribunals established by the Allies shortly after World War II.

³⁷ This is not to suggest, however, that a form of transitional justice is not necessary with respect to the manner in which some of the most developed nations have treated minorities within their own borders.

³⁸ See below nn 47–55 and accompanying text.

³⁹ See, eg, José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43 *Hastings Law Journal* 1425; Paul van Zyl, 'Justice without Punishment: Guaranteeing Human Rights in Tran-

The first of these circumstances is where the stability of a state would be threatened by the conduct of criminal trials. While this criterion is, like many international legal doctrines, clearly open to abuse by states that are looking for an excuse not to prosecute, it is clear that international law allows a state to derogate from its international obligations where these circumstances are clearly present.⁴⁰ For example, in *Lawless v Ireland (Merits)*,⁴¹ the European Court of Human Rights stated that if ‘an exceptional situation of crisis or emergency [exists] which affects the whole population and constitutes a threat to the organised life of the community’,⁴² then that state’s international legal obligations may be derogated from. While it is certainly arguable whether South Africa’s circumstances satisfied these criteria, to some extent at least, right wing security and other forces still represented a threat at the time of the transition, and could have caused much damage and disruption to the relatively smooth changeover to democracy. What is clear is that this situation was completely different from the majority of situations in which criminal trials have been used in transitional justice circumstances — where there has been a total defeat of the forces that represent the perpetrators of gross abuses of human rights or where these forces have little remaining power. Even Orentlicher concedes that ‘[i]nternational law does not, of course, require states to take action that poses a serious threat to vital national interests.’⁴³

The second circumstance in which an alleged international legal duty to prosecute may be derogated from is where, owing to the condition of its criminal justice system, the state is ‘objectively unable to prosecute those responsible for human rights violations.’⁴⁴ This is based on the well-established rule of international law that treaties should not be interpreted to impose impossible obligations on states. At the time of transition, the South African criminal justice system, although deeply rooted in both Roman-Dutch law and English common law traditions, was seen by many as not only dysfunctional but, more importantly, as being incapable of delivering justice due to its corruption under apartheid. The paucity of criminal prosecutions of perpetrators of gross human rights violations who did not apply for, or who were not successful in, their amnesty applications, and the difficulties that attended these prosecutions, is testimony to the truth of this perception.⁴⁵ Once again, these circumstances were very different from most transitional justice situations where criminal trials were used. In those situations, the victorious powers were either able to use an existing and functioning domestic criminal justice system, or to use or impose an international system such as the Nuremberg and Tokyo International Military Tribunals. Again,

sitional Societies’ in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 42, 43–4.

⁴⁰ See especially *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 4 (entered into force 23 March 1976).

⁴¹ (1961) 1 Eur Court HR (ser A) 27.

⁴² *Ibid* 56 (Cassin P, Maridakis, Rodenbourg, McGonigal, Balladore Pallien, Arnalds and Arik JJ).

⁴³ Orentlicher, above n 27, 2595.

⁴⁴ Van Zyl, above n 39, 51.

⁴⁵ See below n 115 and accompanying text.

Orentlicher concedes that ‘a prerequisite of any law requiring prosecution of particular offenses [sic] is that the national judiciary must be capable of handling the burden imposed by that law.’⁴⁶

The above arguments also assume that states are under an international legal duty to prosecute perpetrators where there is sufficient evidence that they have committed an international crime. Clearly, a detailed discussion of this complex issue is beyond the scope of this article.⁴⁷ However, one can point to a number of pronouncements, particularly within the inter-American system for the protection of human rights⁴⁸ and other authoritative pronouncements, such as that emerging from the 1993 United Nations World Conference on Human Rights,⁴⁹ that might tend to show that there is a duty to prosecute in appropriate circumstances. Conversely, given the number of states that have provided for amnesties in such situations,⁵⁰ and the general lack of international condemnation when this has occurred,⁵¹ one may well question whether there is sufficient and consistent state practice for a rule of customary international law to have developed in favour of prosecution. In examining this issue, one authoritative text on international criminal law states that ‘the practice of states and international organizations suggests any general duty to prosecute human rights abusers ... has not yet solidified’.⁵² Furthermore, it is worth considering the decision of the South African Constitutional Court in the important case of *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*.⁵³ This case was brought by the AZAPO party and the families of a number of prominent survivors, and directly challenged the constitutionality of the TRC’s amnesty provisions. In upholding the constitutionality of the impugned provisions, the Court did not base its decision on the issue of whether South Africa had an international legal duty to prosecute human rights abusers during the apartheid era.⁵⁴

⁴⁶ Orentlicher, above n 27, 2596 fn 264.

⁴⁷ For a good overview of many of the issues, see Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995); Naomi Roht-Arriaza and Lauren Gibson, ‘The Developing Jurisprudence on Amnesty’ (1998) 20 *Human Rights Quarterly* 843; Orentlicher, above n 27.

⁴⁸ See *Vélásquez Rodríguez Case (Judgment)* [1988] Inter-Am Court HR (ser C) No 4, [174] (Nieto-Navia P, Gros Espiell VP, Piza, Buergenthal, Nikken, Fix-Zamudio and Espinal Iras JJ); *Espinoza v Chile* [1999] Inter-Am Comm HR 494, [63]–[107] (Chairman Goldman, First Vice-Chairman Bicudo, Members Ayala, Exumé and Mejía). For a more detailed account of the views of the inter-American system, including its change of approach over the years, see van Zyl, above n 39, 47–50.

⁴⁹ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, [60], UN Doc A/CONF.157/23 (1993).

⁵⁰ Steven Ratner and Jason Abrams refer to amnesties enacted in Argentina, Uruguay, Chile, Brazil, Peru, Guatemala, El Salvador, Honduras, Nicaragua, Haiti, Ivory Coast, Angola and Togo: Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd ed, 2001) 153.

⁵¹ ‘With the exception of [some] human rights monitoring bodies ... governments and international organizations have generally tolerated this practice, especially if the state is otherwise making a transition to civil peace or democratic rule and an improved human rights record’: *ibid* 154. However, there have been some exceptions, such as the United Nations in relation to Sierra Leone: see below n 124 and accompanying text.

⁵² *Ibid* 153.

⁵³ (1996) 8 BCLR 1015 (*‘AZAPO Case’*).

⁵⁴ Mahomed DP (with whom the majority of the Constitutional Court agreed) found that the Epilogue to the *Constitution of the Republic of South Africa 1993* (South Africa) (*‘Interim Con-*

However, well-known former South African legal academic Professor John Dugard commented on the judgment of Mahomed DP (with whom the majority of the Constitutional Court agreed) in the following manner:

I do not believe that the conclusion reached by Mahomed DP was wrong in law or in policy. ... However I believe that at the outset Mahomed DP should have enquired more thoroughly into the compatibility of the epilogue with both conventional and customary international law. The latter enquiry would probably have revealed that state practice is too unsettled to support a rule obliging states to prosecute those alleged to have committed crimes against humanity in all circumstances and that the present state of international law does not bar the granting of amnesty in circumstances of the kind prevailing in South Africa.⁵⁵

In summary, a significant number of writers and commentators reject the notion that transitional states must prosecute those who commit international crimes. They assert either that there is no international duty to do so or, if there is, that the duty can be derogated from either when the stability of the society might be threatened or when it is impossible to conduct criminal trials. However, this is not to suggest that these views reject the notion of 'justice' altogether; rather, they are generally in favour of a different kind of justice to the predominantly Western retributive or punitive criminal trial-based version. In particular, it is asserted that there are other forms of justice, specifically the concept of restorative justice, which the TRC argued was the main basis of its work.⁵⁶ The TRC provides an excellent four-pronged definition of the process of restorative justice. According to the *TRC Report*, restorative justice:

- a seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings, as injury or wrong done to another person;
- b is based on reparation: it aims at the healing and the restoration of all concerned — of victims in the first place, but also of offenders, their families and the larger community;
- c encourages victims, offenders and the community to be directly involved in resolving conflict, with the state and legal professionals acting as facilitators;
- d supports a criminal justice system that aims at offender accountability, full participation of both the victims and offenders and making good or putting right what is wrong.⁵⁷

The restorative justice nature of the transition in South Africa was fortified by the constitutional commitment to the 'need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not

stitution') justified the South African government's decision to introduce amnesty laws in conjunction with a truth commission. The Court held that these laws in effect 'trumped' s 22 of the *Interim Constitution* that allowed people access to courts to redress any violation: *AZAPO Case* (1996) 8 BCLR 1015, [50].

⁵⁵ John Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) 13 *South African Journal on Human Rights* 258, 267.

⁵⁶ See below n 61 and accompanying text.

⁵⁷ *TRC Report*, above n 24, vol 1, 126.

for victimisation' found in the Epilogue of the *Interim Constitution*.⁵⁸ Restorative justice is, of course, a complex set of practices and mechanisms mainly used to date in domestic criminal justice,⁵⁹ and is regarded by its advocates as benefiting victims of crime more than the traditional criminal justice system. It is asserted that victims will have greater involvement in a restorative justice system, that they will be more likely to receive reparations and that such a restorative system is generally better for victims psychologically, socially and financially.⁶⁰ Similar arguments are made in respect of restorative mechanisms used in the international criminal justice system. In fact, the TRC was the first truth commission to declare in its report that it was a restorative mechanism of accountability that was victim-centric.⁶¹ Paul Roberts, in a chapter describing the possibilities of restorative justice in the context of international criminal justice, describes the TRC as the 'paradigmatic alternative to criminal prosecution for serious and systematic human rights violations'.⁶²

What, then, might be the international obligations of states where a restorative justice approach prevails, and prosecution is thus not an essential element of the state's response to abusers of human rights? Many commentators have argued that certain steps would still be expected of states in these circumstances.⁶³ One such step would be the gathering of the truth behind past human rights violations, including the identity, fate and whereabouts of victims, as well as the identity of the perpetrators where possible. A truth commission-type process would be an obvious method of achieving this aim. It would also be preferable if perpetrators faced some sort of sanction — perhaps, at the very minimum, the exposure of their names to the public. Another essential response would be for states to ensure that there would be no repetition of human rights violations, perhaps by establishing institutions to prevent future gross human rights violations and to promote a culture of respect for human rights. Another important duty of states would be to provide some form of reparation to victims, including adequate counselling and support, health care, housing and education, where

⁵⁸ According to Simpson:

Ubuntu is the mainspring of the African humanist world-view, an attitude of tolerance and empathy grounded in the interdependence of the individual and the collective. It is conveyed in the expression: '*Motho ke motho ka batho babang*' — 'A person is a person through other people'.

Graeme Simpson, "Tell No Lies, Claim No Easy Victories": A Brief Evaluation of South Africa's Truth and Reconciliation Commission' in Deborah Posel and Graeme Simpson (eds), *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (2002) 220, 248 fn 3.

⁵⁹ Its most prominent forms are victim-offender mediation, family conferencing and circle sentencing.

⁶⁰ For a further explanation and critical analysis of these arguments, see Sam Garkawe, 'Restorative Justice from the Perspective of Crime Victims' (1999) 15 *Queensland University of Technology Law Journal* 40.

⁶¹ See *TRC Report*, above n 24, vol 1, 125–31 for a detailed discussion of how the TRC viewed its relationship to restorative justice.

⁶² Paul Roberts, 'Restoration and Retribution in International Criminal Justice: An Exploratory Analysis' in Andrew von Hirsch, Julian Roberts and Anthony Bottoms (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) 115, 123.

⁶³ See, eg, Ratner and Abrams, above n 50, 154–5. See also van Zyl's four requirements for states in transition: van Zyl, above n 39, 51–4.

appropriate. If these steps were taken by states, many would view this as a valid form of justice, perhaps based more on notions of restorative justice. This would especially be the case where the population was able to give its overall approval to such steps — for example, by means of a democratic endorsement of the arrangements. It will be shown throughout this article that South Africa's response to perpetrators of human rights violations, mainly via the establishment of the TRC, satisfied most, if not all, of the above criteria.

However, the above discussion has perhaps moved away somewhat from the central question raised at the beginning of this part: what do victims actually want? Do they want retribution via a criminal trial, possibly leading to punishment of the perpetrators, or do they want a more restorative approach, where they can perhaps gain a better chance of receiving reparations, telling their stories and finding out the truth of what happened? The main problem here, as in domestic criminal justice, is the ascertainment of victims' views. It must be remembered that the experience of victims is always very individual and it is wise to be wary of assumptions about victims' best interests. As Graeme Simpson says:

By generalising and conveniently summarising the expectations of victims, their complex, inconsistent human identities are diminished, and the extent to which needs vary from victim to victim and change over time is ignored. Generalised claims that victims are willing to forgive perpetrators who confess, or that they are merely seeking acknowledgement and symbolic reparation, are no more reliable than similarly broad claims that victims demand or are in need of punitive justice. ... The needs of individual victims also changed over time. When they first testified, many sought no more than acknowledgement and symbolic reparation, but once a perpetrator had confessed to killing their loved ones, or sometimes merely through the passage of time, some of these needs understandably changed.⁶⁴

However, despite these difficulties and complexities, obtaining the views of victims must constitute an important goal of any future truth commission aiming at a victim-centred approach. One of the ways this can be achieved is by the state and/or the commission properly providing for genuine victims' organisations and support structures so that victims are able to have a significant voice before, during and after the life of the commission. This support must be provided in a way that does not compromise the independence of these organisations. Both the commission and the victims' support organisations themselves must also acknowledge and accept that there is no one thing that all victims might want from the process, and that victims' needs will not necessarily stay fixed over time. It must be kept in mind that one of the advantages of truth commission-type processes compared with, say, the criminal trial approach, is their flexibility and capacity to adjust to the needs of victims as the process unfolds.

In conclusion to this part, it is asserted that there is no one notion of 'justice' from a victim perspective. For example, there are strong counterarguments to the proposition that the criminal trial approach to the perpetrators of violations of human rights is necessarily optimal for victims. The notion that there is an

⁶⁴ Simpson, 'Tell No Lies, Claim No Easy Victories', above n 58, 239–40.

international obligation to prosecute is also rejected, particularly where this might threaten the future stability of the particular state or where the state's criminal justice system is dysfunctional. In such situations, mechanisms of restorative justice, such as truth commissions, may be better able to satisfy victims' needs than other accountability mechanisms, and may also be best placed to fulfil the other non-prosecutorial international duties of transitional states.

III THE ESTABLISHMENT AND OPERATION OF THE TRUTH AND RECONCILIATION COMMISSION AS A 'VICTIM-FRIENDLY' MECHANISM

One of the matters settled during the negotiations between the former apartheid National Party government and the predominantly black majority African National Congress ('ANC')⁶⁵ was that perpetrators of human rights violations during the apartheid era would receive an amnesty. This was just one element⁶⁶ of the historic political compromise between these key rival parties.⁶⁷ The National Party government thus agreed to relinquish power on the basis of the negotiated 1993 *Interim Constitution*,⁶⁸ which included an epilogue that stated, *inter alia*:

In order to advance ... reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament ... shall adopt a law determining a firm cut-off date ... and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

While one of the most important conditions for the amnesty is broadly laid out in the above clause — that the acts, omissions and offences must have been associated with a 'political objective' — many details were to be provided for at a later date following the election of a democratic Parliament.⁶⁹ These details

⁶⁵ Although there were other parties to the negotiations, the parties that had the key political power were the National Party and the ANC.

⁶⁶ Other important elements were a power-sharing arrangement for the first five years and a provision that allowed senior public servants to retain their positions for this period. Also significant was the creation of a strong Bill of Rights (which would include a guarantee that there would be no appropriation of property without just and equitable compensation) that was to be interpreted by a new and separate Constitutional Court, and a number of other measures that *inter alia* would ensure the protection of minority group rights.

⁶⁷ For a brief political history of the establishment of the TRC, see Colin Bundy, 'The Beast of the Past: History and the TRC' in Wilmot James and Linda van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2001) 9. A comprehensive history of the negotiations leading to the handover of power and the establishment of a democratic government is found in Allister Sparks, *Tomorrow is Another Country* (1996).

⁶⁸ This was later replaced by a final Constitution — the *Constitution of the Republic of South Africa 1996* (South Africa).

⁶⁹ It was not entirely clear at the time when the Epilogue was agreed to that the amnesty would not be a 'blanket' one as it had been in previous truth commissions. Simpson has said that

[t]he newly elected government's only constitutional obligation was to grant amnesty. Instead of settling for this, it arguably transformed a process geared to the interests of perpetrators into

included the precise definition of 'political objective', the exact nature and scope of the amnesty, and the mechanisms, criteria, procedures and type of body that would decide whether the conditions for amnesty had been satisfied. The absence of agreement on these issues meant that the legislation establishing a truth commission could have caused much concern amongst the security forces of the former apartheid regime, given that the new democratically elected Parliament was obviously going to be dominated by the ANC. At the time, however, there appeared to be broad support for a truth commission-type body, with many people seeing this as a fair and logical compromise between two possible alternatives.⁷⁰ One alternative, endorsed mainly by proponents of the former apartheid government, was to grant blanket amnesties to perpetrators of gross violations of human rights. They argued that this approach would be the most likely to ensure future stability.⁷¹ The other approach, advocated by many within the ANC as well as other members of the liberation struggle, was the conduct of Nuremberg-type criminal trials against perpetrators of crimes committed during the apartheid era.⁷²

Following the 1994 elections, the new democratic ANC-dominated government decided to consult widely in establishing a truth commission and in setting the terms and procedures of the Commission. This consultation process was unprecedented in terms of previous truth commissions.⁷³ It included a whole year of debate regarding the legislation establishing the TRC, which followed the release of drafts to the public and incorporated hundreds of hours of public hearings conducted in Parliament. Two major international conferences were also held, analysing the steps taken by other countries during their transitions, and there was much input from civil society, some of which was incorporated into the final legislation. Finally, there was a very public process for the selection of Commissioners.⁷⁴ However, despite this level of consultation, one must question how much input the victims of repression actually had into the terms of the TRC. While it is commonly acknowledged that there was much input from groups in civil society, did these groups represent the victims of repression? Few organisations of victims existed prior to the establishment of the TRC, although some organisations assumed the role of articulating the needs and desires of

one that aimed to restore the dignity of those who had suffered, thereby demonstrating its commitment to fundamental rights and accountability.

Simpson, 'Tell No Lies, Claim No Easy Victories', above n 58, 223.

⁷⁰ For highly influential arguments that set out the case for the TRC, see Kader Asmal, Louise Asmal and Ronald Roberts, *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance* (2nd ed, 1997) 18–21.

⁷¹ This can be seen to be an approach that is similar to that of many Latin American countries where, with or without a truth commission, blanket amnesties were often granted to perpetrators of human rights violations committed mainly by members and agents of former repressive regimes. Hayner associates this approach with one of 'forgetting' the past: see Hayner, *Unspeakable Truths*, above n 2, 1–9.

⁷² For a detailed discussion of the merits of the criminal trial approach, see above Part II.

⁷³ See Hayner, 'Same Species, Different Animal', above n 7, 38–9.

⁷⁴ A broadly representative selection panel was established to consider about 300 nominations from different stakeholders. This panel conducted interviews and submitted a short list of 25 people to the South African President, who appointed 17 of these on 29 November 1995: see Hayner, *Unspeakable Truths*, above n 2, 216; Dorothy Shea, *The South African Truth Commission: The Politics of Reconciliation* (2000) 25.

victims throughout the TRC process.⁷⁵ One such organisation, ‘Khulumani’,⁷⁶ clearly grew stronger during the TRC process, and then took on a life of its own after the TRC ended its victim hearings by becoming a strong focal point for victims. Nonetheless, particularly in view of the discussion in Part II, one may still genuinely ask how much evidence there was that the majority of victims favoured the TRC approach, which included the possibility that even killers could be granted amnesty for their crimes. One major problem was that the ANC was widely perceived as representing all victims of the apartheid regime, a view shared by the ANC itself. That this was not necessarily true was perhaps most obviously shown by the actions of another political party that, together with the families of some prominent victims, took legal action in the *AZAPO Case* that amounted to a constitutional attack on the amnesty provisions of the TRC.⁷⁷ Furthermore, it is conceivable that many victims conscientiously decided not to engage with the TRC processes.⁷⁸

The ANC defended the amnesty agreement on the basis that its main preoccupation at the time was to guarantee that democratic elections would proceed, thereby ensuring a transfer of power to the African majority. If provision for amnesty would secure the support, or at least the toleration, of those in the security forces that still held much power and could thus threaten the whole process, then this was the price to be paid for a nonviolent transfer of power. The ANC clearly thought that this, rather than the continual uncertainty that would have resulted had the security forces not been placated by the agreement for amnesty, best served the interests of victims.⁷⁹

Despite the above concerns from victim supporters, many observers agreed that the legislation establishing the TRC, the *Promotion of National Unity and Reconciliation Act 1995* (South Africa) (*‘Reconciliation Act’*), seemed to be very ‘victim-friendly’ for the following interrelated reasons:

- 1 Two out of the three Committees created by the *Reconciliation Act* were specifically designed to benefit victims. The first was the Committee on Human Rights Violations, which was mandated to conduct victim hearings that would provide victims with a sympathetic and supportive forum in which to

⁷⁵ See Simpson, ‘Tell No Lies, Claim No Easy Victories’, above n 58, 240–1.

⁷⁶ This means ‘speak out’ in Zulu. Khulumani was formed to represent victims’ voices during the TRC’s development. Hayner argues that the group’s most important legacy is the support it offered to victims during and after the TRC process: Hayner, *Unspeakable Truths*, above n 2, 147–8.

⁷⁷ This constitutional attack on the TRC failed: see above nn 53–4 and accompanying text for a discussion of the reasons for this failure. The motivations behind this legal challenge are explained in Nkosinathi Biko, ‘Amnesty and Denial’ in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 193, 194.

⁷⁸ Piers Pigou asserts that ‘[t]he extent to which activists and others boycotted the TRC because they did not support it or did not feel the need to participate remains unclear’: Pigou, above n 25, 46.

⁷⁹ However, this argument assumes that provision for amnesty was critical to the handover of power by the former regime, and not the other matters that were part of the negotiated settlement (see above n 66 for a consideration of these other matters). This is a contested and interesting historical question, a discussion of which is beyond the scope of this article.

tell the world of their suffering.⁸⁰ The second was the Committee on Reparation and Rehabilitation, which was charged with making recommendations to the government in relation to policies or measures that should be taken with respect to the rehabilitation of victims and to the granting of reparations to victims.⁸¹

- 2 One of the objectives of the TRC under the *Reconciliation Act* focused exclusively on victims. This was:

establishing and making known the fate or whereabouts of victims and ... 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 ... recommending reparation measures in respect of them ...⁸²

- 3 Section 11 of the *Reconciliation Act* set out the principles governing the treatment of victims in their dealings with the TRC. This included treating all victims with ‘compassion and respect for their dignity’ and ‘without discrimination’ of any kind. Furthermore, the TRC was required to ensure that all of its procedures would be ‘expeditious, fair, inexpensive and accessible’, in the victim’s language of choice and of minimum inconvenience to victims. The TRC was also obliged to inform victims of their rights, and where necessary, to protect their privacy and safety.
- 4 The *Reconciliation Act* and the TRC itself focused on ‘restorative justice’, which is directly relevant to the TRC being a ‘victim-friendly’ mechanism. The restorative justice nature of the TRC was acknowledged in the Epilogue to the *Interim Constitution*,⁸³ which was vital in terms of the establishment and legal validation⁸⁴ of the TRC. As mentioned above,⁸⁵ the *TRC Report* also expressly referred to the restorative justice focus of the TRC.⁸⁶
- 5 Finally, although at first glance the provisions for the granting of amnesty to perpetrators might seem to be directly opposed to the probable desires of victims, and to be the TRC’s main problem from a victim perspective, there are strong counterarguments to this view. For example, some commentators argue that the inducement of amnesty based on the requirement of full disclo-

⁸⁰ *Reconciliation Act* ch 3.

⁸¹ *Reconciliation Act* ch 5.

⁸² *Reconciliation Act* s 3(c).

⁸³ This included the oft-quoted clause: ‘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 victimization’, which was repeated in the Preamble to the *Reconciliation Act*. For a definition of *ubuntu*, see above n 58.

⁸⁴ See above n 54 for an explanation of why the Epilogue was vital to the constitutional validity of the TRC’s amnesty provisions. For a detailed analysis of this case from the perspective of reparations to victims, see Catherine Jenkins, ‘After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa’ (2000) 16 *South African Journal on Human Rights* 415, 471–5.

⁸⁵ See above nn 56–61 and accompanying text.

⁸⁶ However, for a critique of the TRC’s use of restorative justice terminology, see Stuart Wilson, ‘The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty’ (2001) 17 *South African Journal on Human Rights* 531. Compare these views to the strong defence of restorative justice in relation to the TRC found in Elizabeth Kiss, ‘Moral Ambition within and beyond Political Constraints: Reflections on Restorative Justice’ in Robert Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (2000) 68.

sure was a restorative approach to justice aimed at benefiting victims.⁸⁷ The next part of this article will assess these arguments and the process of amnesty from the perspective of victims.

However, despite this seemingly impressive list of reasons to suggest that the TRC was a 'victim-friendly' mechanism, it is clear that many victims were left unsatisfied and disillusioned with the TRC and its processes.⁸⁸ These problems were in part due to raised expectations of victims that were invariably difficult to meet in practice. Perhaps one overall lesson to be learnt from the TRC from a victim perspective is the importance of being realistic and clear from the beginning about possible achievements for victims, and ensuring that victims are made aware of the limitations of what a truth commission can accomplish.

The remainder of the article will attempt to answer the following questions from a victim perspective: 'what were the benefits and the problems of the TRC?', and thus, 'what can we learn from the TRC?' The article will focus in turn on the workings and structure of the three main Committees that constituted the TRC, namely the Committee on Amnesty, the Committee on Human Rights Violations and the Committee on Reparation and Rehabilitation. Recommendations for future truth commissions will be referred to throughout, although it should be borne in mind that there is no 'one size fits all' model for a truth commission.

IV VICTIMS AND THE COMMITTEE ON AMNESTY (THE 'PERPETRATOR' HEARINGS)

The most highly contested and controversial aspect of the TRC process was probably the power of its Committee on Amnesty ('AC')⁸⁹ to grant amnesty to perpetrators of gross violations of human rights. While it is beyond the scope of this article to discuss the many moral, ethical and legal arguments for and against granting amnesty to perpetrators,⁹⁰ any examination of the TRC from a victim perspective must make reference to at least some of these considerations.

⁸⁷ Simpson asserts that 'truth recovery was viewed not so much as a trade for justice, but as an alternative restorative (rather than punitive) approach to justice': Simpson, 'Tell No Lies, Claim No Easy Victories', above n 58, 223.

⁸⁸ See Brandon Hamber et al, Centre for the Study of Violence and Reconciliation and the Khulumani Support Group, *Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Report* (1998) Centre for the Study of Violence and Reconciliation <<http://www.csvr.org.za/papers/papkhul.htm>>. This paper was also submitted to the TRC.

⁸⁹ Established pursuant to ch 4 of the *Reconciliation Act*.

⁹⁰ For a comprehensive discussion of the moral and ethical issues, see Robert Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (2000). In respect of the legal questions, such as whether international law casts a duty on states to prosecute people accused of committing international crimes, see the detailed discussion of these issues in above Part II.

A *The Amnesty Process*

Members of the AC were selected using a far less public process than the very public procedure that preceded the selection of the TRC Commissioners.⁹¹ It was thought, given the quasi-judicial⁹² nature of AC proceedings, that such a selection procedure would ensure that their decisions were seen to be made objectively and free of the political pressures facing the rest of the TRC. While there is no doubt that these arguments had some merit, this selection process also meant that the AC was largely independent of the larger TRC, which thus lacked a degree of control over decisions of the AC,⁹³ despite the AC being in theory an arm of the TRC. As a consequence, the TRC and the AC were, at times, at odds over the interpretation of the amnesty provisions, and so disagreed over particular amnesty decisions.⁹⁴ As will appear later in this part, the main control that the larger TRC had over the AC was that it was possible for the TRC to appeal to a court of law (on errors of law only) in order to reverse an AC decision.⁹⁵ This had serious implications for those victims who disagreed with decisions of the AC. While victims, and perpetrators for that matter, could also appeal to a court of law, this was a slow, expensive and limited process in which most victims were understandably reluctant to engage or which they simply could not afford.⁹⁶ How might a reasonable solution to these problems be found for future truth commissions, particularly if we are to assume that it is beneficial for amnesty decision-makers to retain a degree of independence from the main commission? One idea worth exploring is the establishment of an internal right of appeal from

⁹¹ As to the selection of the TRC Commissioners, see above n 74. Under s 17 of the *Reconciliation Act*, the South African President was to appoint both the Chairperson and the Vice-Chairperson of the AC, as well as one of the remaining three members. The other two members were also to be appointed by the President, although in consultation with the Commissioners of the TRC. Note that due to the large backlog of cases with which the AC had to deal, the government at various stages decided to increase its size from 5 to 7 members, then to 12, and finally to 19. It also added administrative staff, evidence analysts and leaders in order to speed up its work. Despite this, the work of the AC lasted right up until 2001, well after the publication of the first five volumes of the *TRC Report* in 1998 and the end of the Committee on Human Rights Violations hearings.

⁹² Clearly, the AC was charged with making very important legal decisions from both perpetrators' and victims' perspectives (see below nn 106–9 and accompanying text) and thus it was structured so that it allowed for legal representation and cross-examination of those giving evidence. Under s 17(3) of the *Reconciliation Act*, the Chairperson was required to be a judge or former judge.

⁹³ Except for the first few years when some TRC Commissioners were also members of the AC. Mary Burton, a former TRC Commissioner, wrote that '[t]he considerable autonomy bestowed on the [AC] by the legislation, in retrospect, is a significant weakness in the legislation': Mary Burton, 'Making Moral Judgments' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 77, 78.

⁹⁴ The clearest example was the heavily criticised decision of the AC to grant a general amnesty to 37 leaders of the ANC who had made one joint application: see below n 104.

⁹⁵ This is a standard and limited right of appeal that is found in most common law legal systems (such as that of South Africa). The basis for this right of appeal from a decision of a non-judicial body (such as the AC) to a court is that the non-judicial body made an error of law in making its decision.

⁹⁶ A small number of victims and perpetrators did apply to the courts to have amnesty decisions overturned, but to the author's knowledge none of these appeals were successful. One can only speculate that the South African courts were (perhaps understandably) reluctant to interfere with AC rulings.

amnesty decisions on both the facts and the law to a carefully constituted 'Appeal Chamber' of the truth commission. Given the critical significance of decisions of the amnesty process for perpetrators and victims,⁹⁷ it is suggested that this right of appeal be available to perpetrators, victims and the larger truth commission, with these parties still being able to appeal from this Appeal Chamber to a court of law on errors of law only.⁹⁸

Unlike previous truth commissions, the TRC established a unique process with regard to the granting of amnesty to perpetrators. Pursuant to s 18 of the *Reconciliation Act*, each applicant for amnesty in respect of any act, omission or offence was required to apply individually to the AC within a prescribed time period.⁹⁹ The AC was to consider each application and, in doing so, was empowered under s 19(4) of the *Reconciliation Act* to require applicants to attend a public hearing, which occurred in nearly all cases where applicants admitted to having committed serious offences.

The two main criteria for amnesty were that the applicant had made a 'full disclosure' of his or her actions and that his or her act, omission or offence could be associated with a 'political objective'.¹⁰⁰ In relation to the former criterion, the *Reconciliation Act* gave no guidance as to the meaning of 'full disclosure', leaving the AC to determine whether this prerequisite was fulfilled in each individual case, based on the ordinary meaning of the term.¹⁰¹ With regard to the 'political objective' requirement, however, the *Reconciliation Act* provided certain factors that the AC was required to take into account in its determination.¹⁰² These factors were based on the Norgaard Principles for Extradition.¹⁰³ They included the motive of the applicant, the context and object of his or her act (or omission), the legal and factual nature and the gravity of the act, whether the act was executed in response to an order from, or with the approval of, a political organisation, and the relationship between the act and the political objective

⁹⁷ See below nn 106–8 and accompanying text.

⁹⁸ Although, as they would have to bear the costs of this appeal and their chances of succeeding would be likely to remain low, it is probable that few court appeals would be instituted.

⁹⁹ This was from the time of the promulgation of the *Reconciliation Act* (December 1995) until 10 May 1997: see Alex Boraine, 'Truth and Reconciliation in South Africa: The Third Way' in Robert Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (2000) 141, 148.

¹⁰⁰ The other criteria were that the applicant had complied with the technical requirements of the *Reconciliation Act*. These included that they had applied within the prescribed time period, in the prescribed manner, and that the act, omission or offence that was the subject of their application was in fact a 'gross violation of human rights' as defined in the *Reconciliation Act*: see below nn 189–90 and accompanying text.

¹⁰¹ An example of a case where amnesty was denied because the AC found that there had not been a 'full disclosure' was Gerhardus Nieuwoudt: see *Gerhardus Nieuwoudt, AC/97/068* (Unreported, South African Truth and Reconciliation Commission, Committee on Amnesty, Judge Mall, 20 November 1997) <<http://www.doj.gov.za/trc/decisions/1997/971120Nieuwoudt.htm>>. On the other hand, there were many instances of victims being dissatisfied with amnesty decisions because they did not believe that the applicant had satisfied the requirement of 'full disclosure'. In such cases, there was little victims could do as they did not have direct appeal rights: see above n 96 and accompanying text.

¹⁰² Section 20(3).

¹⁰³ These were drafted by Carl Norgaard, a former President of the European Human Rights Commission, and were founded upon a survey of state practice in defining and applying the 'political offence' exception to extradition law.

pursued. The only decision open to the AC was whether or not to grant amnesty; there was no provision for the AC to attach any conditions to a finding of amnesty. As stated above, there was no express right of appeal by victims or perpetrators from an amnesty decision, although they, or the TRC itself, could apply to a court to overturn a decision of the AC.¹⁰⁴ Furthermore, proceedings of the AC could not be used as evidence in later criminal trials of applicants who had failed in their amnesty applications.¹⁰⁵

The legal consequences of amnesty were set out in ss 20(7), (8) and (9) of the *Reconciliation Act*. A finding of amnesty meant not only that the applicant could not be prosecuted for their crimes (and would be released from custody if already convicted or awaiting trial),¹⁰⁶ but also that victims were precluded from suing the successful applicant in a civil court in relation to the acts or omissions for which they had been granted amnesty. Furthermore, victims could not sue the state or any other organisation for any crime that was the subject of an amnesty.¹⁰⁷ On the other hand, refusal of amnesty left applicants open to prosecution as well as being sued in civil courts.¹⁰⁸ For this reason, the amnesty process was often described as a ‘carrot’ (the allure of amnesty) and ‘stick’ (the threat of prosecutions) approach to inducing perpetrators to come forward.¹⁰⁹ A finding of amnesty thus had very powerful legal consequences for victims, applicants and the state. Not surprisingly, given what was at stake, under s 19(4) of the *Reconciliation Act* both applicants and victims were entitled to prior notification of an amnesty hearing. They also had the right to be present at the hearing, to testify and to adduce evidence.

¹⁰⁴ See above nn 95–6 and accompanying text. The TRC did exercise this power on at least one well-known occasion. It successfully applied to the High Court to overturn a controversial and much criticised decision of the AC to grant a general amnesty to 37 leaders of the ANC who had made one joint application: see *Truth and Reconciliation Commission v Coleman*, No 3729/98 (Unreported, Cape Town High Court). The AC granted the amnesty ‘in chambers’, without asking the applicants to specify the acts or offences they had committed for which they wanted amnesty. This seemed to be in violation of the *Reconciliation Act* that required individual applications with respect to specific acts. For a critical analysis of the decision of the AC, see Lorna McGregor, ‘Individual Accountability in South Africa: Cultural Optimum or Political Facade?’ (2001) 95 *American Journal of International Law* 32, 39–44.

¹⁰⁵ *Reconciliation Act* s 31(3). However, the fact that the applicant had applied for amnesty clearly would have the effect of alerting the prosecution authorities to the wrongdoing of the applicant, perhaps making it more likely that he or she would eventually be prosecuted.

¹⁰⁶ Perpetrators granted amnesty were also entitled to have any criminal or civil trial in which they were the defendant aborted if the trial was already in progress.

¹⁰⁷ Interestingly, however, where a victim had already obtained a civil judgment — and so was not in the middle of proceedings — the judgment would not be annulled due to the subsequent amnesty: *Reconciliation Act* s 20(9). It is difficult to imagine why this provision was included; perhaps there had been very few such judgments and the Parliament decided to protect the interests of those (probably very influential) victims who were able to obtain a civil judgment.

¹⁰⁸ If any civil or criminal proceedings had been suspended owing to an amnesty application, the court in question was required to be notified if the amnesty application was refused: *Reconciliation Act* s 21(2)(a). It appears that the case could be resumed at the discretion of the relevant court, but no adverse inference could be drawn by the court from the failure of the amnesty application: *Reconciliation Act* s 21(2)(b).

¹⁰⁹ The ‘carrot and stick’ terminology was used by the then Minister of Justice, Dullah Omar, who was responsible for the establishment of the TRC: see Hayner, *Unspeakable Truths*, above n 2, 99.

B *Benefits of the Amnesty Process from the Perspective of Victims*

Proponents of the TRC asserted that there were two main interrelated benefits of the amnesty process for victims. First, the condition for amnesty that perpetrators had made a ‘full disclosure’ of their actions recognised the significance of truth-seeking for victims’ processes of healing,¹¹⁰ and also directly benefited victims by making it more likely that they would receive information concerning the relevant criminal offence. In some instances where victims had been killed, perpetrators’ testimony revealed to survivors what had happened to their loved ones, thereby sometimes clearing their loved ones’ names¹¹¹ and/or allowing for the recovery of their remains. This in turn allowed their loved ones to finally receive a proper funeral. More controversially, the *TRC Report* asserted that the discovery of the truth was essential for victims to ‘move on’ and recover from the traumatic events of the past, and was, in fact, important to the process of fostering reconciliation.¹¹²

Furthermore, it should be noted that had South Africa adopted a criminal trial approach, most perpetrators would never have been subject to any form of accountability as they would have had little incentive to come forward. This is because security forces were often the only people present at the scene apart from the deceased victim(s) and this, coupled with the culture of deceit and avoidance pervading the system, which included the destruction of documents,¹¹³ would have resulted in much of the wrongdoing of the security forces remaining hidden. In such circumstances, it is clear that a criminal trial approach provides no incentive for perpetrators to come forward, as the onus of proof lies with the prosecution to prove its case beyond reasonable doubt. This can be compared to the amnesty process, where it is in the interests of the perpetrator to make as complete a disclosure as possible, since this will increase their chances of gaining amnesty. Even in cases where there would have been sufficient evidence

¹¹⁰ This led some writers to assert that this aspect of the TRC’s work was a ‘restorative’ measure designed to aid victims: see above n 87 and accompanying text.

¹¹¹ The security forces, in order to cover up their own crimes, had in some cases claimed that the victim was a collaborator who had been killed by the liberation forces.

¹¹² *TRC Report*, above n 24, vol 1, 112–13. A number of writers have warned, however, that such assumptions are simplistic. For example, Simpson states that

there is a trite and convenient truth proffered by many observers of the TRC about the relationship between victim testimony and healing, which also demands greater critical scrutiny. It should be acknowledged that simply testifying or telling the story does not necessarily entail psychological healing or reconciliation ...

Simpson, ‘Tell No Lies, Claim No Easy Victories’, above n 58, 241. Even the TRC admitted that ‘[t]ruth may, in fact, cause further alienation’: *TRC Report*, above n 24, vol 1, 107. In relation to the assertion that there is a direct relationship between truth and reconciliation, the TRC argues that ‘[a]lthough truth does not necessarily lead to healing, it is often the first step towards reconciliation’: at 107. However, this is particularly controversial and problematic. Many argue that the ‘truth’, at least initially, might be a barrier to recovery and reconciliation, particularly when victims and survivors are confronted with the reality of what actually happened. This is especially true where victims felt that the perpetrator at an amnesty hearing had not told the full truth: see Pigou, above n 25, 39. For a critical analysis of the relationship between truth and reconciliation, see Frederick van zyl Slabbert, ‘Truth without Reconciliation, Reconciliation without Truth’ in Wilmot James and Linda van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2001) 62.

¹¹³ An entire chapter of the *TRC Report* is devoted to the destruction of documents: *TRC Report*, above n 24, vol 1, ch 8.

to launch a criminal prosecution, a number of factors rendered actual convictions unlikely. These included the lack of prosecution resources and the poor state of the South African criminal justice system, the likelihood of defendants having access to high quality legal representation, and the high burden of proof required for a criminal conviction.¹¹⁴ The acquittal of the former Minister of Defence, Magnus Malan, together with 19 other defendants in a high profile criminal trial in 1996 is testimony to these realities.¹¹⁵

The second alleged benefit of the amnesty process for victims was its intention to represent a form of perpetrator accountability, and thereby deliver a form of justice for victims. This also attempted to counter the common criticism that amnesty fostered a climate of impunity. Such accountability took the form of a number of the requirements for the granting of amnesty. Firstly, perpetrators were required to make an individual application to the AC within a given time frame, involving the completion of a form detailing their human rights violation(s). Secondly, if the application revealed the commission of a serious offence, the applicant was normally required to appear in person in a public hearing of the AC,¹¹⁶ which was likely to involve the presence of the media, with some hearings being broadcast on television or radio.¹¹⁷ Thirdly, public fulfilment of the amnesty requirement of 'full disclosure' resulted in applicants being forced to admit to their wrongdoing in the full glare of the public, media and their own families and friends.¹¹⁸ Fourthly, at that public hearing perpetrators would also be subject to cross-examination from members of the AC and sometimes legal representatives of victims. Finally, even where an applicant was successful in their application for amnesty, their names would, in a form of 'social shaming', be published in both the *Government Gazette* and in the *TRC Report*. Lorna McGregor asserts that

[t]hrough these processes, the TRC still guarantees a kind of retribution, albeit in weaker form than court proceedings. Although such retribution may not be as legally satisfactory as a prison term, it still amounts to a form of punishment

¹¹⁴ See *TRC Report*, above n 24, vol 1, 122–3. Simpson asserts that '[t]he harsh reality is that the vast majority of apartheid's victims probably stood to gain more from the opportunity to tell their stories (coupled with the meagre reparations promised by the TRC) than from the criminal justice system': Simpson, 'Tell No Lies, Claim No Easy Victories', above n 58, 233.

¹¹⁵ The trial concerned the alleged murder in 1987 of 13 friends and relatives of United Democratic Front activist Victor Ntuli in what was known as the 'KwaMakutha massacre'. Another prominent trial that ended in a 'not guilty' verdict concerned the controversial head of the chemical weapons program during the apartheid era, Dr Wouter Basson: *S v Basson* [2003] All SA 54. At the date of writing, the only significant successful prosecution to the author's knowledge was that of Colonel Eugene de Kock, the former commander of the infamous 'Vlakplaas' police death squad: *S v De Kock* [1997] 2 SACR 171.

¹¹⁶ Generally all processes of the TRC were public, although under s 33 of the *Reconciliation Act* it did have the discretion to close its proceedings to the public if the interests of justice required this or if harm to any person may have resulted from a public hearing.

¹¹⁷ 'Four hours of hearings were broadcast live over national radio each day, and a *Truth Commission Special Report* television show on Sunday evenings quickly became the most-watched news show in the country': Hayner, *Unspeakable Truths*, above n 2, 42. There is some anecdotal evidence to suggest that some perpetrators did not apply for amnesty due to the embarrassment of having to front up in this very public process.

¹¹⁸ Anecdotal evidence suggests that in some instances perpetrators' families learnt for the first time of the types of activities their loved ones had been engaged in during the apartheid era.

whose moral consequences will undoubtedly tarnish and humiliate the perpetrator.¹¹⁹

This second benefit clearly created some form of accountability for perpetrators. The TRC made this clear when it referred to the amnesty arrangement as being one of an ‘accountable amnesty’,¹²⁰ thus distinguishing it from the ‘blanket’ amnesties provided by Latin American governments. However, the key issue was whether this was a *sufficient* form of accountability to satisfy the demands of justice and the international human rights community. This is clearly a debatable point.¹²¹ However, it is worth noting that not only did South Africa’s Constitutional Court approve the validity of the amnesty provisions of the *Reconciliation Act*,¹²² but also that there has been no official condemnation of the amnesty process by the United Nations or any of its constituent bodies. This latter point is highly significant given the substantial involvement of the United Nations in the struggle against apartheid¹²³ and the fact that in other situations the United Nations has cast doubts over the appropriateness of domestic laws providing for amnesty.¹²⁴

C Drawbacks of the Amnesty Process from the Perspective of Victims

Despite the above benefits of the amnesty process for victims, there were also many criticisms and problems for victims. These can be classified into four distinct (but related) groups of criticisms. First, the amnesty process removed from victims a number of rights to which they should have been entitled. The second group of criticisms concerned the structure of the AC’s processes and the conditions and criteria for amnesty. The third group of criticisms centred around the lack of resources available to the AC to help and support victims. The final group of criticisms revolved around the contention that AC processes limited its ability to discover the ‘truth’ of what happened to victims and survivors. Each of these groups of criticisms will now be analysed in turn, and some suggestions regarding each particular criticism will be made so that the problems of the TRC could be avoided or minimised in future truth commissions. It is the contention of this article that the majority of these criticisms and problems were either unjustified or were not the result of the concept or structure of the TRC, but were related more to implementation issues, such as the TRC’s limited resources and restrictive time lines. It is thus asserted that most of these issues can be resolved in any future truth commission, and therefore do not detract from the overall conclusion of this article that truth commissions can be beneficial for victims in many situations where states are ‘in transition’.

¹¹⁹ McGregor, above n 104, 38.

¹²⁰ *TRC Report*, above n 24, vol 1, 118.

¹²¹ See, eg, the fine collection of essays in Rotberg and Thompson, above n 90.

¹²² *AZAPO Case* (1996) 8 BCLR 1015.

¹²³ See, eg, Department of Public Information, United Nations, *The United Nations and Apartheid 1948–1994* (1994) vol 1.

¹²⁴ For example, the Special Representative of the Secretary-General of the United Nations in Sierra Leone ‘expressly rejected the validity of any amnesties to international crimes’: Ilias Banketas, Susan Nash and Mark Mackarel, *International Criminal Law* (2001) 115.

1 Removal of Victims' Rights

The first set of criticisms concerned the allegation that amnesty violated victims' rights. Essentially, there are three rights that victims were arguably denied by the amnesty. The most obvious of these was the victims' 'right' to retributive justice against those who had committed the violations against them or their loved ones. This is a common critique of restorative justice in general, most convincingly put by Stuart Wilson:

Some victims of human rights abuse may be satisfied with confession and acknowledgement of the wrongs done to them by their violator(s); others may properly demand reparation; still others may require retribution before they can forgive. By forgoing retribution, restorative justice denies victims an important right to determine and engage in morally condonable processes aimed at restoring their dignity. The amnesty on offer from the TRC actually denied victims just this kind of right, and such a denial will inevitably, in an indeterminate but significant number of cases, preclude the restoration of dignity to victims who participated in the Commission's process.¹²⁵

This criticism makes two major questionable assumptions. The first is that victims actually have a choice of 'retribution' under a criminal justice approach. In adversarial criminal justice systems, such as those found in Australia, the United Kingdom and South Africa, it is up to the prosecution, as the representative of the state,¹²⁶ to decide whether to prosecute a particular perpetrator. This decision is generally guided by a multitude of factors — including whether the public interest requires a prosecution — of which the opinion of the victim is only one amongst many.¹²⁷ Thus, it is quite possible for prosecutors to decide not to prosecute where victims desire such a prosecution¹²⁸ or, on the other hand, to decide to proceed with a prosecution where a victim has reconciled with the perpetrator and thus strongly opposes their prosecution. Furthermore, even if the authorities decide to proceed with a prosecution, the success of their case often depends on factors outside the control of victims. In addition, even if a guilty

¹²⁵ Wilson, above n 86, 547.

¹²⁶ Since about the middle of the 19th century in most common law jurisdictions, the state has taken over the prosecution of accused persons from individual victims: see George Rudé, *Criminal and Victim: Crime and Society in Early Nineteenth-Century England* (1985) 89–90; Clive Emsley, *Crime and Society in England 1750–1900* (1987) 162.

¹²⁷ For example, in Australia see Attorney-General's Department, *The Prosecution Policy of the Commonwealth*, Commonwealth Director of Public Prosecutions [2.10] <<http://www.cdpp.gov.au/Prosecutions/Policy>>. Given that the South African criminal justice system is very similar in structure to that of other common law systems, including that of Australia, the author believes that the state of the law would be very similar in the South African context.

¹²⁸ In such cases, many jurisdictions allow victims to launch a private prosecution of 'their' alleged perpetrator: see Richard Fox, *Victorian Criminal Procedure: State and Federal Law* (11th ed, 2002) 51. However, this possibility in Australia (and in other common law systems such as South Africa) is generally a limited one. For indictable (or more serious) offences, victims are generally only able to initiate the process and carry it through to the preliminary examination or committal hearing, and the Director of Public Prosecutions (or equivalent prosecution authority) may take over a private prosecution at any time: at 52–3. Furthermore, '[v]ictims are deterred from private prosecutions by reasons of cost, as legal aid is not available, inconvenience, the skill required to present a case in Court, the stringent burden of proof required for a conviction and the risk of having costs awarded against them': Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) 17 *University of New South Wales Law Journal* 595, 598.

verdict is obtained, the amount — if any — of ‘retribution’ is dependent on a decision of the judiciary, in which the opinions of victims are generally not a relevant factor.¹²⁹ Thus, the statement that victims have the ‘option’ of retribution in the criminal justice system is highly problematic.

The other questionable assumption upon which Wilson’s criticism rests is that it would have been possible for the South African criminal justice system to provide retribution via a criminal process that would be applied fairly and consistently in relation to alleged perpetrators during the apartheid era. It is submitted that the criminal justice system and institutions in South Africa had been so discredited during the apartheid era and had become so dysfunctional¹³⁰ that neither fairness nor consistency was likely within the system. The lack of criminal prosecutions and convictions, including the high profile acquittals of the former Minister of Defence, Magnus Malan, and the former head of the chemical weapons program, Dr Wouter Basson,¹³¹ suggests that few South African victims, if any, would have found satisfaction under the prosecution option. While it is true to say that the TRC amnesty process removed the possibility of retribution against applicants in those cases where an applicant was successful, in practice this was not a viable option for the overwhelming majority of victims in any event.

The second right of victims allegedly removed by the amnesty was the right to access reparations via criminal or civil processes against the offender or the state with respect to the acts, omissions or offences for which offenders received amnesty.¹³² However, this assumes that victims could have received reparation from offenders in the absence of the amnesty. A number of counterarguments contradict this assertion. Firstly, with respect to the possibility of victims receiving reparations as a result of the criminal process, it must be recognised that the number of criminal trials of perpetrators would have been small. The number of convictions that would have resulted would have been even smaller. Even where a conviction could be obtained, given the unlikelihood of perpetrators being able to satisfy restitution orders made in favour of the victim as part of the offender’s sentence, it is clear that few victims would have received reparations as a result of the criminal process. Secondly, with respect to the possibility

¹²⁹ The crucial factors are the nature of the crime, the nature of the offender and their response to the charges, and the effects of the proposed sanction, taking into account the various purposes and justifications for punishment and the principle of proportionality: see Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) ch 3. In most common law jurisdictions, victims are able to present a written (and sometimes an oral) ‘victim impact statement’ (‘VIS’) to the court, which describes the effects of the crime upon them. However, with the exception of a minority of states in the USA, these statements do not generally allow victims to include their opinion on what the offender’s sentence should be.

¹³⁰ As the author has written elsewhere, increased levels of crime, particularly violent and organised crime have ‘overburdened the criminal justice system to the verge of collapse’. There are many large problems throughout the system’s constituent components, as well as many other social, technological and environmental factors impacting on the criminal justice system.

Sam Garkawe, ‘Enhancing the Role and Rights of Crime Victims in the South African Justice System — An Australian Perspective’ (2001) 14 *South African Journal of Criminal Justice* 131, 132–3 (citations omitted).

¹³¹ See above n 115 and accompanying text.

¹³² *Reconciliation Act* s 20(7)(a).

of victims receiving reparations via the civil courts, only a relatively small number of educated and resourceful victims would have been able to mount successful civil suits against perpetrators or the state. Many commentators¹³³ and the South African Constitutional Court¹³⁴ conceded that the likelihood of victims being able to successfully bring a civil suit was remote. For these reasons, it is asserted that it was fairer to award smaller amounts of reparation through a non-adversarial process, which characterised the TRC's approach to reparations, than a system where only educated and resourceful victims could successfully sue and obtain relatively large awards.

The third right to which victims were arguably entitled was a full right to appeal an amnesty decision.¹³⁵ The particular importance of this right lay in the loss of rights for victims that a finding of amnesty would involve, and was accentuated by the common impression among victims that a significant number of perpetrators had not complied with the criteria under the *Reconciliation Act*. This was also a problem at times for the TRC,¹³⁶ which did not have the power to overturn a decision of the AC, but could only make an application to the courts for a reversal of the decision. A possible solution to these problems for future truth commissions, involving the establishment of an appeal body within the commission itself, was suggested earlier in this part.¹³⁷

2 *Inappropriate Structure and Criteria*

The second group of criticisms of the amnesty process concerned the structure of the AC's processes and the conditions and criteria for amnesty. One such criticism concerned the lack of any 'middle path' for the AC — it could only decide to grant or deny amnesty, and had no power to grant conditional amnesties. If the AC could have approved amnesty with certain conditions, such as payment of reparation by perpetrators directly to victims¹³⁸ or loss of employment and/or benefits by the perpetrator,¹³⁹ then victims might have felt the

¹³³ See, eg, Simpson, 'Tell No Lies, Claim No Easy Victories', above n 58, 233.

¹³⁴ Jenkins characterises Mahomed DP's view in the *AZAPO Case* as being that the reparation scheme contemplated under the *Reconciliation Act* 'would allow the state's funds to be distributed more widely, bringing effective relief to a larger number of victims based on their present needs, rather than limiting relief to a smaller number who had the good fortune to be able to prove delictual claims': Jenkins, above n 84, 474.

¹³⁵ Victims did have a limited right to appeal to a court on the basis that the amnesty decision involved an error of law: see above n 96 and accompanying text. However, this potentially expensive and time-consuming option was rarely invoked by victims.

¹³⁶ This was a particular problem in relation to the joint application for amnesty by 37 ANC leaders: see above n 104 and accompanying text. Note that the courts were only able to overturn amnesty decisions on the limited grounds of an error in law.

¹³⁷ See above nn 97–8 and accompanying text.

¹³⁸ This also would have been more in line with the alleged 'restorative justice' dimensions of the TRC. Restorative justice generally encourages perpetrators of criminal offences to 'make amends' to their victims directly, or perhaps indirectly. However, under the TRC amnesty process, once a perpetrator had been granted amnesty, the only form of monetary reparations victims could obtain was from the South African government: see generally below Part VI(A), (C).

¹³⁹ This would have allowed for the approach commonly used in the transition of many Eastern European states — namely that of purges or 'lustration'. For a detailed critical analysis of this form of accountability, see 'Symposium: Law and Lustration: Righting the Wrongs of the Past' (1995) 20 *Law & Social Inquiry* 1.

process was fairer.¹⁴⁰ Bearing in mind that most victims were poor, the spectacle of seeing perpetrators keep their jobs, pensions and other benefits, and then not being able to civilly sue them or the state afterwards, reinforced victims' perceptions that the TRC was more of a perpetrator-friendly process.¹⁴¹

Two comments could be made in relation to this criticism of the amnesty process. First, allowing for the possibility of conditional amnesty would not only have complicated the enabling legislation of the TRC, but would also have decreased the incentive for perpetrators to come forward and apply for amnesty. Awareness amongst perpetrators of the possibility that the AC could order them to pay reparation to victims or lose their jobs or benefits may well have resulted in more deciding to take their chances and not get involved in the TRC process. Secondly, the concept of 'amnesty for truth' was at the time already a novel idea, and to have expected the legislators to have added the further innovation of the AC being given the power to make amnesty subject to conditions may, in hindsight, have been overly ambitious.

Nevertheless, such an innovation undoubtedly warrants serious consideration by future truth commissions as a means of enhancing their fairness and credibility in the eyes of victims. Careful consideration should be given to providing any amnesty committee or body with the power to order conditional amnesty. Examples of such conditions may include requiring the applicant to make reparations to victims or forcing the applicant to agree to retire from their current employment either immediately or at some later time. Providing such a committee or body with this capacity is bound to be a difficult drafting exercise, as the process must allow for the rights of applicants to due process to be protected,¹⁴² and not remove too much of the incentive for perpetrators to apply for amnesty.¹⁴³

Another criticism relating to the structure of the amnesty process was that perpetrator remorse and/or apology were not part of the conditions for amnesty. However, this critique is unjustified as it would have been problematic to include this as a condition of amnesty because of the difficulties involved in assessing whether the remorse or apology was sincere. Many victims may have been even more traumatised by a false or insincere apology or gesture of remorse. A related general criticism of the TRC was that some victims may have felt that the Christian-dominated ideology of the TRC,¹⁴⁴ which emphasised forgiveness, placed an unfair onus on them individually to absolve and reconcile with 'their'

¹⁴⁰ In fact, one South African human rights organisation, 'Lawyers for Human Rights', unsuccessfully suggested this possibility during the public debate regarding the legislation that established the TRC: see N Kollapen, 'Accountability: The Debate in South Africa' (1993) *Journal of African Law* 1, 7–8.

¹⁴¹ Another very important factor that added to victims' sense of unfairness was that perpetrators had the benefit of amnesty as soon as the AC found in their favour, whereas victims have had to wait a long time for their reparations: see below Part VI.

¹⁴² Alleged violations of due process caused much criticism of the Eastern European approaches to transitional justice: see generally 'Symposium', above n 139.

¹⁴³ This could be achieved through legislation allowing an amnesty committee or body the right to order that the applicant only pay the victim up to a specified percentage (such as 5 or 10 per cent) of the applicant's total assets.

¹⁴⁴ A high percentage of Commissioners, including both the Chairperson (Archbishop Desmond Tutu) and its Vice-Chairperson (Alex Boraine), were from Christian backgrounds.

perpetrator. This problem was particularly evident in the earlier days of the TRC. Although it became less pronounced as the Chairperson, Archbishop Desmond Tutu, realised that the TRC's ability to achieve reconciliation was limited,¹⁴⁵ any form of pressure on victims to forgive or to reconcile with 'their' perpetrator is unfair and without justification. Future truth commissions should be very wary of adopting symbols or approaches dominated by any particular religion, or ethnic or cultural group, that may alienate victims who do not agree with the approach.

The criteria for amnesty could also be criticised on the basis that they made no mention of the views of victims (or, in cases of unlawful killings, survivors of the victims) as being at least relevant to decisions of the AC. In domestic criminal justice, it is common for decision-makers, such as judges during sentencing or prosecutors deciding whether to proceed with charges, to consider the views of victims as one factor amongst many in the exercise of their discretion.¹⁴⁶ Although victims' views were not mentioned in any of the criteria for amnesty, a consideration of these views might explain some of the apparently inconsistent rulings of the AC.¹⁴⁷ Future truth commissions should, therefore, consider including the views of victims and survivors as a discretionary factor in the criteria for amnesty. This would be a powerful recognition that victims' views are important, and would also give victims and survivors greater visibility in the process. Of course, because this would be one factor amongst many, victims' and survivors' views would not be decisive, and decision-makers would not lose any of their discretion.

Another criticism included in this second group was that the AC, when assessing if a perpetrator acted for a 'political objective', did not seem to take sufficient account of the discretionary factor of the 'relationship between the act, omission or offence and the political objective pursued, and in particular the ... *proportionality* of the act, omission or offence to the objective pursued'.¹⁴⁸ Had this proportionality requirement been utilised by the AC more extensively, then this would have meant that perpetrators involved in the more outrageous violations of human rights, such as 'extrajudicial' killings, would almost never have been granted amnesty for these offences. It should first be noted that this criticism relates more to the AC's application of the criteria than to the criteria

¹⁴⁵ He thus began emphasising that the TRC's task was only to *promote* reconciliation, as the title of the *Reconciliation Act* suggested.

¹⁴⁶ See above n 127 and accompanying text.

¹⁴⁷ One controversial ruling that has frequently been commented upon is the granting of amnesty to the killers of Amy Biehl, a white American: *Vusumzi Ntamo*, AC/98/0030 (Unreported, South African Truth and Reconciliation Commission, Committee on Amnesty, Judges Mall, Wilson and Ngoepe, 28 July 1998) <<http://www.doj.gov.za/trc/decisions/1998/980728NtamoPenietc.htm>>. Another controversial ruling was the refusal of amnesty to the killers of popular liberation hero Chris Hani: *Janusz Walus*, AC/99/0172 (Unreported, South African Truth and Reconciliation Commission, Committee on Amnesty, 7 April 1999) <<http://doj.gov.za/trc/decisions/1999/990307WalusDerby-Lewis.html>>. Some have argued a racial bias; others have pointed to the technical legal ground that the actions of the killers of Chris Hani were against the policy of all political parties and thus they could not be said to have acted for a 'political motive'. However, another highly plausible explanation is that, whereas the family of Amy Biehl supported her killers' amnesty, the family of Chris Hani was adamant that his killers should not be granted amnesty.

¹⁴⁸ *Reconciliation Act* s 20(3)(f) (emphasis added).

themselves. Furthermore, as discussed above,¹⁴⁹ the TRC did not control the AC, which was an independent ‘quasi-judicial’ body. Finally, a more rigorous application of this factor by the AC would almost certainly have acted as a disincentive for perpetrators to come forward, thus defeating one of the primary purposes of the amnesty process. It is highly likely that many AC members were aware of this possibility during their deliberations. However, this is not to suggest that the process could not have been improved by more accountable procedures. Although the decisions of the AC were generally published, their reasons were often not very well articulated and were, in some cases, quite sparse. An obvious improvement that should be made for future truth commissions would be to oblige any person or committee making amnesty decisions to set out their findings in detail, which should then be widely published and made widely accessible. This would make the person or committee more accountable to victims and the public, and would also be in accordance with the quasi-judicial role of the entity.

3 *Inadequate resources*

The third group of criticisms of the amnesty process centred around the lack of resources for adequately assisting victims in their dealings with the AC. One specific complaint was that legal representation for victims during amnesty hearings was often inadequate. If victims were able to obtain representation at all,¹⁵⁰ the standard of this representation was considerably lower than that of the highly paid government-funded representation for perpetrators.¹⁵¹ This was particularly important given that a grant of amnesty by the AC would have serious legal consequences for victims, and that accountability of applicants would be increased if competent lawyers were available to cross-examine them on their testimony. This problem could be resolved in future truth commissions by devoting sufficient resources to the provision of high-quality legal representation to victims.

Another criticism relating to resources was that the provision of psychological support for victims during amnesty hearings was often either nonexistent or inadequate. This was significant given the formality of AC hearings, and the fact that the revelations made during the testimony before the AC, such as the manner in which a victim died, would be likely to have devastating effects on many victims and survivors. Support and counselling after the amnesty hearing was also inadequate, especially where there was a need for ongoing and long-term follow-up and support following the revelations made at the AC. Again, these problems could be overcome in future truth commissions by ensuring the availability of sufficient resources for the counselling and psychological support of victims.

¹⁴⁹ See above nn 92–5 and accompanying text.

¹⁵⁰ The AC interpreted s 11(d)(ii) of the *Reconciliation Act* to mean that victims would have the right to be legally represented during amnesty hearings. Anecdotal evidence suggests that during the initial stages of the AC, the TRC did not inform many victims of this right. However, this was said to have improved later in the life of the AC.

¹⁵¹ See *TRC Report*, above n 24, vol 5, 117–18.

A further related criticism was that the TRC did not devote sufficient resources to instituting a comprehensive program for those victims who wished to meet ‘their’ perpetrator. Although some such meetings did take place, often during or after amnesty hearings, these came about mainly due to the initiative of the individuals involved rather than through TRC facilitation. Moreover, the TRC failed to provide the necessary psychological support for victims during and after these emotionally difficult meetings with ‘their’ perpetrator. This was particularly ironic given the reconciliation goals of the TRC, the rhetoric of restorative justice¹⁵² and the principles of *ubuntu*¹⁵³ that underlined the TRC’s ideology. Again, this could be solved in future truth commissions by some allocation of resources to a properly coordinated program of victim–offender meetings for those victims who wish to pursue this potentially important option.

4 *Limited Uncovering of the Truth*

The fourth and final group of criticisms of the amnesty process centred around the proposition that much more could have been done to discover as much ‘truth’¹⁵⁴ as possible, one of the primary benefits of the amnesty process for victims.¹⁵⁵ One major criticism was that there did not seem to be a credible possibility of criminal prosecution where perpetrators refused to apply for amnesty or had their applications denied.¹⁵⁶ Thus the ‘carrot’ of amnesty was never going to be as effective without the ‘stick’ of criminal prosecution. Apparently, many perpetrators did not come forward to apply for amnesty for this reason, and the TRC was reluctant to use its substantial powers of search, seizure and subpoena.¹⁵⁷ These problems were perhaps only partially of the TRC’s making, and could only have been resolved by reforms and more resources being allocated to the prosecution services in South Africa. Thus, should a future truth commission decide to adopt a similar ‘carrot and stick’ approach, there must be adequate follow-up of cases where amnesty has been refused or not applied for, including the institution of criminal proceedings where appropriate. However, a related problem was that there was also some evidence of poor cooperation and coordination between the TRC and prosecution services in

¹⁵² One of the main principles of restorative justice is to ‘encourage victims [and] offenders ... to be directly involved in resolving conflict’: *TRC Report*, above n 24, vol 1, 126.

¹⁵³ For a definition of *ubuntu*, see above n 58.

¹⁵⁴ Of course, the notion of ‘truth’ is itself a complex issue, as there are various kinds of ‘truth’ — for example, factual or forensic truth, personal and narrative truth, social truth, and healing and restorative truth: *TRC Report*, above n 24, vol 1, 110–14. It is beyond the scope of this article to discuss these different concepts.

¹⁵⁵ See Benison Makele, ‘Suffer the Victims’, *Sowetan Sunday World* (Johannesburg, South Africa), 8 April 2000, 18.

¹⁵⁶ See above n 114 and accompanying text. In a sense, the truth of this statement was proven by the spate of amnesty applications quickly following the one prominent successful criminal prosecution of Colonel Eugene de Kock (see above n 115). Many perpetrators were obviously concerned that de Kock’s damaging testimony would implicate them and thus leave them open to prosecution. Simpson states that ‘[t]his suggests that the threat of prosecution, far from being incompatible with a truth-recovery process linked to a conditional amnesty, in fact contributed significantly to its eventual partial success’: Simpson, ‘Tell No Lies, Claim No Easy Victories’, above n 58, 228.

¹⁵⁷ *Reconciliation Act* ss 29, 31, 32.

South Africa,¹⁵⁸ and this is something for which the TRC must accept some blame. Any future truth commission should thus ensure that there is proper coordination between itself and the prosecution authorities, which may also involve greater resources being allocated to the prosecution services.

Where perpetrators were prepared to come forward, it seemed to many victims that a significant number of applicants for amnesty adopted a very minimalist and formal approach to their testimony — they would say and divulge just enough to be successful in their amnesty application, but no more. Piers Pigou, who worked in the TRC's Investigation Unit, has stated:

Often applicants revealed the bare minimum required to secure amnesty, effectively preventing the TRC from establishing 'as complete a picture as possible'. A handful of attorneys and advocates represented most of the security force members and politicians. Tightly interlocking submissions and testimonies reinforced the perception that their versions of events were contrived, and designed to minimise fallout. On several occasions, leaders of evidence raised concerns about collusion between witnesses ...¹⁵⁹

Often victims felt that such perpetrators were not acting within the legislative requirements under the *Reconciliation Act*, let alone within the spirit of the reconciliation ideals of the TRC. The problem here was the AC's narrow interpretation of the 'full disclosure' requirement. In light of the 'victim-centred' aims of the TRC, it is at least arguable that the AC should have taken a much more interventionist stance.¹⁶⁰

Another very worrying impediment to the 'truth' emerging at AC proceedings was that the Investigations Unit of the TRC did not have sufficient resources to reasonably investigate the truthfulness of much of the perpetrators' testimony, which consequently often went unchallenged. Pigou comments:

Even where victims were competently represented, carefully crafted amnesty applications that neatly dovetailed with one another were effectively immune from contradiction, as alternative hypotheses were simply denied and held no weight in the absence of additional evidence. ... preliminary research indicates that a number of [amnesty] decisions are contradictory and that there is a lack of consistency in the emphasis given to particular criteria. Many victims and survivors can feel justifiably aggrieved by this situation, which is a direct consequence of the Amnesty Committee's limited investigative and analytical capacity.¹⁶¹

Clearly, greater resources devoted to the principles and analytical capacity of any future truth commission would help resolve these problems.

¹⁵⁸ See Pigou, above n 25, 54–6.

¹⁵⁹ *Ibid* 49.

¹⁶⁰ See the earlier comments in this part regarding the issue of the larger TRC not being able to control the AC: see above nn 93–5 and accompanying text. Interestingly, the state seems to have a conflict of interest in selecting members of the AC. This is because s 20(7)(a) of the *Reconciliation Act* absolves the state from civil liability where amnesty is granted, meaning that selection of members who were more willing to agree to amnesty would decrease the state's civil liability.

¹⁶¹ Pigou, above n 25, 50.

The final criticism surrounding the notion that more could have been done to discover the ‘truth’ was the perception of victims that the TRC was only interested in information which focused narrowly on the political context of the violation. This was to enable it to establish ‘as complete a picture as possible of the causes, nature and extent of the [relevant] gross violations of human rights’.¹⁶² In order to enable itself to attribute political responsibility for the violation, the TRC was thus particularly interested in the issue of who gave the orders to commit the violation. To many victims, the answer to this question was either obvious or of no interest, but they did want to know who in their community had collaborated with those perpetrators. As Hugo van der Merwe points out, victims’ experiences of their suffering could be said to possibly relate to four different layers — the personal, the community, the political and systemic abuse.¹⁶³ He asserts:

The TRC’s formula for uncovering the truth and making sense of a victim’s experience was to contextualise the abuse within the national political conflict. ... For many victims this made perfect sense. ... But [other] victims ... prioritised other levels of meaning. Some victims, who were intent on clarifying local patterns of abuse, and exposing local perpetrators and collaborators, saw the TRC’s emphasis on the bigger picture as suspicious.¹⁶⁴

Perhaps the lesson to be learnt from this criticism is that future truth commissions should take the time to truly listen to what victims want out of the process, without having any rigid preset notions of what needs uncovering.

V VICTIMS AND THE COMMITTEE ON HUMAN RIGHTS VIOLATIONS (THE ‘VICTIM’ HEARINGS)

A *The Victim Hearing Process*

The main role of the Committee on Human Rights Violations (‘HRVC’)¹⁶⁵ was to provide victims with the opportunity to talk about the gross human rights violations they had endured and to describe the effects of this abuse on themselves, their families and their communities, thereby restoring their ‘human and civil dignity’.¹⁶⁶ Using this information, the HRVC was to record the extent of the gross human rights violations and furnish a list of victims to the Committee on Reparation and Rehabilitation.

¹⁶² *Reconciliation Act* s 3(1)(a).

¹⁶³ Hugo van der Merwe, ‘National Narrative versus Local Truths: The Truth and Reconciliation Commission’s Engagement with Duduza’ in Deborah Posel and Graeme Simpson (eds), *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission* (2002) 204, 209–12.

¹⁶⁴ *Ibid* 211.

¹⁶⁵ Established pursuant to ch 3 of the *Reconciliation Act*. Unlike the AC, most members of the HRVC were also members of the larger TRC.

¹⁶⁶ The functions of the HRVC are set out in ss 14 and 15 of the *Reconciliation Act*. The reference to the restoration of the ‘human and civil dignity’ of victims is one of the objectives of the TRC in s 3(1)(c) of the *Reconciliation Act*, and adopted as a purpose of the HRVC in s 14(1) of the *Reconciliation Act*.

The first task of the HRVC was to gather statements from people around South Africa who claimed to be victims. Over 21 000 ‘victims’¹⁶⁷ gave statements to the TRC, which employed special ‘statement-takers’, and later utilised non-governmental and community-based organisations¹⁶⁸ to help carry out this important task.¹⁶⁹ Of these victims, about 2000 were invited to appear in a public hearing before the HRVC.¹⁷⁰ As they were broadcast on radio and filmed for television, these hearings became highly public media events, and many victims were interviewed and photographed by the media. In contrast to the quasi-judicial, formal AC hearings, HRVC hearings were intended to be more informal and to allow victims to speak in a culturally appropriate and supportive atmosphere, without the threat of cross-examination. However, while the *Reconciliation Act* appeared to give the TRC and its Committees a wide discretion to decide upon its own rules of procedure, s 30 of the *Reconciliation Act* provided for some due process rights for alleged perpetrators. It specified that ‘during any investigation by or any hearing before the Commission’ the TRC was required to provide ‘any person ... implicated in a manner which may be to his detriment ... an opportunity to submit representations to the Commission within a specified time’. A series of cases concerning the interpretation of this provision culminated in an important ruling of the Supreme Court, Cape Provincial Division in *Du Preez v Truth and Reconciliation Commission*.¹⁷¹ The reasoning of the Court was that the principles of natural justice obliged the TRC, when it received information that implicated a person in a gross human rights violation, to provide prior notice to the alleged perpetrator before the evidence could be heard publicly.¹⁷² This impacted on the HRVC’s public hearings because in such cases alleged perpetrators were not only entitled to notice,¹⁷³ but were also allowed to be present during victim testimony, and in some cases did intervene and have their

¹⁶⁷ See above n 8 and below nn 189–94 and accompanying text for how a ‘victim’ was defined under the *Reconciliation Act*. Working with this definition, the HRVC took a number of steps in order to establish whether a person was a ‘victim’ under the *Reconciliation Act*. According to Ntsebeza:

The process ... began with statement-taking and involved, among other processes, registration of statements, data processing, data capturing, verification and corroboration, an information management process that led to pre-findings on a regional basis ... and eventually findings on a national level.

Dumisa Ntsebeza, ‘The Struggle for Human Rights: From the UN Declaration to the Present’ in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 2, 6.

¹⁶⁸ The TRC decided to fund these other organisations to carry out this work as it had fallen behind in the statement-taking process: Desmond Tutu, ‘Launch of the TRC’s Designated Statement-Taking Programme’ (Press Release, 1 April 1997) <<http://www.doj.gov.za/trc/media/prindex.htm>>.

¹⁶⁹ See Pigou, above n 25, 45.

¹⁷⁰ The TRC chose those victims ‘whose experiences represented the various forms of human rights abuse that had occurred in the area’ where the hearing was to take place; who represented ‘all sides of the conflict’; and who would be representative ‘in relation to gender, race, age and geographical location’: *TRC Report*, above n 24, vol 1, 145–6. For criticism of this approach, see below n 198 and accompanying text.

¹⁷¹ (1997) 4 BCLR 531 (‘*Du Preez*’).

¹⁷² *TRC Report*, above n 24, vol 1, 184–5.

¹⁷³ The TRC decided, in order to comply with the ruling, to provide 21 calendar days’ notice to alleged perpetrators before all HRVC hearings, AC hearings and ‘s 29 investigation’ hearings: *TRC Report*, above n 24, vol 1, 185.

representatives cross-examine victims. In these cases, this meant that hearings had to be conducted with greater formality and this may have ‘had a traumatising effect on many victims who had finally found the courage to testify’.¹⁷⁴

B *Benefits of the Victim Hearing Process from the Perspective of Victims*

The main benefit of the HRVC’s work was to provide the opportunity for victims to tell the world in their own language,¹⁷⁵ and often for the first time, of what had happened to them and how the gross human rights violations had caused hardship and suffering to themselves, their families and their communities.¹⁷⁶ One person asserted:

The TRC process was intended to provide a space within which people were able to speak and to tell their stories of abuse and violation. For varying reasons this did not and does not exist elsewhere in our society. For me this was the most positive aspect of the TRC.¹⁷⁷

Many have argued that, in particular, the public hearings of the HRCV were often a ‘cathartic’ experience for victims.¹⁷⁸ This was because they were conducted in an informal, sympathetic and reassuring atmosphere, without formal rules of evidence applying, and in the main without the ‘threat’ of cross-examination. Often supporters of victims turned out en masse at the hearings in order to sustain the victims. Despite some counterarguments,¹⁷⁹ many, including psychologists, assert that there is therapeutic value for victims of traumatic events in being able to tell their story in such a supportive atmosphere and as part of a publicly-recognised process. For example, Brandon Hamber, a psychologist who did a lot of work with the TRC and who was critical of certain aspects of its work, stated: ‘[p]roviding space for victims to tell their stories, particularly in public forums, has been of use to many. It is indisputable that

¹⁷⁴ Ibid.

¹⁷⁵ The TRC employed enough translators so that all victims were able to testify in their own language.

¹⁷⁶ The TRC asserted that ‘[i]n many respects, the victim hearings constituted the core of the Commission’s work’: *TRC Report*, above n 24, vol 1, 147. Simpson argues that ‘[t]he operations of [the HRVC] ... proved to be the great strength of the TRC. ... The social impact of this public testimony was one of the greatest achievements of the TRC’: Simpson, ‘Tell No Lies, Claim No Easy Victories’, above n 58, 229.

¹⁷⁷ Yazir Henry, ‘Where Healing Begins’ in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 166, 168.

¹⁷⁸ Hayner states that:

There is a multitude of studies showing that repressing intense emotional pain leads to psychological trouble. ... one of the cornerstones of modern-day psychology is the belief that expressing one’s feelings, and especially talking out traumatic experiences, is necessary for recovery and for psychological health.

Hayner, *Unspeakable Truths*, above n 2, 134.

¹⁷⁹ Some argue, for example, that there is a strong danger of retraumatisation and, unless there are adequate support services available at the time and in the aftermath, finding out the ‘truth’ about what happened to their loved ones can be counter-therapeutic. See Hayner’s detailed discussion: *ibid* 141–4.

many survivors and relatives of victims have found the public hearing process psychologically beneficial.¹⁸⁰

It should be noted that the approach of the TRC had a number of benefits for victims over and above the criminal trial approach. First, victims during criminal trials are limited in their testimony by formal rules of evidence and procedure, and may be subject to rigorous and often traumatic cross-examination by defence lawyers.¹⁸¹ Secondly, while the families of deceased victims often play a very peripheral role in criminal trials,¹⁸² the HRVC process not only allowed, but actually encouraged, survivors to tell their stories to the same extent as any other victim. Finally, until the intervention of the South African courts, cross-examination of victims was not a feature of the HRVC hearings and, even after the ruling which granted certain rights to alleged perpetrators,¹⁸³ alleged perpetrators were not present in the majority of cases and so cross-examination of victims or survivors did not occur. In the small number of cases where such cross-examination did occur, it is submitted that there was still a vast difference between the level of support received by victims during the HRVC hearings and that available in the formal atmosphere of criminal courts.

Another significant and often underrated benefit of the victim hearings was the ability of the HRVC to conduct institutional and special hearings on sectors of South African society and with respect to certain categories of victims.¹⁸⁴ Thus, institutional hearings were conducted on the business and labour, legal, prison, health, faith and media sections of South African society during the apartheid era. Special hearings were also carried out on compulsory military service, children and youth, and women.¹⁸⁵ These hearings enabled the TRC to make extensive recommendations for reform of these sectors of society and to provide special help for particular categories of victims.

¹⁸⁰ Brandon Hamber, 'The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African Truth and Reconciliation Commission' (1998) 55 *American Imago* 9, 18.

¹⁸¹ See Julie Mertus, 'Truth in a Box: The Limits of Justice through Judicial Mechanisms' in Ifi Amadiume and Abdullahi An-Na'im (eds), *The Politics of Memory: Truth, Healing and Social Justice* (2000) 142; Terese Henning and Simon Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in Patricia Eastale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 76.

¹⁸² In most cases where family members do not witness the homicide and have no information additional to that already possessed by the criminal court, their evidence is not sufficiently necessary or relevant to the trial. While in many jurisdictions they have a right to submit a VIS (see above n 129), some American courts have ruled that these violate constitutional standards of due process in death penalty cases: *Booth v Maryland*, 482 US 496 (1987); *South Carolina v Gathers*, 490 US 805 (1989). However, these cases were subsequently overruled in *Payne v Tennessee*, 501 US 808 (1991). In the Australian context some courts have ruled that VISs are not relevant to sentencing decisions: *R v De Souza* (Unreported, Supreme Court of New South Wales, Dunford J, 10 November 1995); *R v Previterra* (1997) 94 A Crim R 76 (where the NSW Supreme Court received the family's VIS but regarded it as irrelevant to sentencing). See generally Tracey Booth, 'The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales' (2000) 11 *Current Issues in Criminal Justice* 292.

¹⁸³ *Du Preez* (1997) 4 BCLR 531 (A).

¹⁸⁴ See *TRC Report*, above n 24, vol 4.

¹⁸⁵ The TRC also conducted some 'event' hearings (*TRC Report*, above n 24, vol 1, 147–8), political party hearings (*TRC Report*, above n 24, vol 1, 149) and some special investigations (*TRC Report*, above n 24, vol 1, 151).

Again, the HRVC approach had a number of advantages over the criminal trial model. It is not the task of criminal courts to criticise other courts or institutions in general, but the HRVC was able to do this in its hearings and recommendations regarding the legal profession.¹⁸⁶ Nor is it generally the role of the criminal courts to make recommendations to the government for the future,¹⁸⁷ which the TRC was able to do as a result of the institutional hearings. Criminal courts are specifically concerned with the particular case before them, rather than in determining systematic problems or breaches of the criminal law, their causes and any preventative steps needed for the future. This is precisely what is allowed for by the broader mandate of the HRVC process.

C Drawbacks of the Victim Hearing Process from the Perspective of Victims

One of the fundamental criticisms of the TRC's work concerned its definition of 'victim'. Many people who might have considered themselves 'victims' were not defined as such under the TRC's interpretation of the definition of a victim under the *Reconciliation Act*. A 'victim' was defined as a person who 'suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights as a result of a gross violation of human rights'.¹⁸⁸ A victim of a 'gross violation of human rights' was then defined as a person who had been subject to 'killing, abduction, torture or severe ill-treatment'.¹⁸⁹ The TRC limited the meaning of 'severe ill-treatment' to the violation of 'bodily integrity' rights,¹⁹⁰ thus excluding, for example, the victims of the policies of forced removal, deliberate inferior education, pass laws and the other 'legalised' policies of systematic racial discrimination and oppression utilised by the former apartheid government.¹⁹¹ Since these people were not

¹⁸⁶ *TRC Report*, above n 24, vol 4, ch 4.

¹⁸⁷ One notable exception to this is formed by coroners courts, which are generally charged with making recommendations that will prevent deaths from occurring in the future: see, eg, *Coroners Act 1980* (NSW) s 22A.

¹⁸⁸ *Reconciliation Act* s 1(xix)(a).

¹⁸⁹ *Reconciliation Act* s 1(ix). These include any attempt, conspiracy, incitement, instigation, command or procurement to commit such an act.

¹⁹⁰ The first of two primary reasons for this interpretation was that the *ejustem generis* rule applied — that is, where general words follow particular words, the general words will be construed as being limited to the same kind as the particular words. This restricted the meaning of 'severe ill-treatment' to the types of violations that precede this phrase. As 'killing, abduction and torture' were violations of bodily integrity rights, 'severe ill-treatment' was also to be interpreted in the same manner and thus given this limited meaning. Secondly, from a practical perspective, the time and resources of the TRC would have been overwhelmed by the inclusion of this vast array of victims. See Burton, above n 93, 79–82 for a good brief analysis of these issues that confronted the TRC. For a strong criticism of the TRC's approach, see Mahmood Mamdani, 'A Diminished Truth' in Wilmot James and Linda van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2001) 58.

¹⁹¹ Pass laws had a long history in South Africa as a means of controlling vagrancy and the flow of labour into urban areas. In 1952, these laws were consolidated when the apartheid government enacted the *Black (Native) Laws Amendment Act 1952 (No 54)* (South Africa) and the misnamed *Blacks (Abolition of Passes and Coordination of Documents) Act 1952 (No 67)* (South Africa). These Acts made it a criminal offence for any black person (but neither whites, nor coloured people, nor Asians) over 16 years of age not to have in their possession a 'pass' book or reference book that contained details of their identity, employment particulars and other information. See Christopher Weeramantry, *Apartheid — The Closing Phases?* (1980) 166–9.

regarded as ‘victims’ under the *Reconciliation Act*, they were ineligible to utilise the TRC’s resources, including the ability to make statements to the statement-takers employed by the HRVC. While there was considerable justification for the TRC’s views on this issue,¹⁹² it may have been appropriate for the HRVC to have conducted special hearings on these types of violations¹⁹³ or perhaps to have adopted a contextual approach to the definition of a ‘victim’.¹⁹⁴ What, then, are the lessons to be learned for future truth commissions where a category of victims falls outside the mandate of the commission for technical or practical reasons, but has clearly suffered significantly under the previous regime? In such circumstances, arrangements should be put in place to allow these victims some limited access to the commission’s resources. Their situation and suffering should also be acknowledged in the report of the commission.

A second criticism of the HRVC was that it might have done more to actively seek and obtain victim submissions. One might imagine that there were many eligible victims who were too traumatised to make statements or lacked the education levels and/or confidence to become involved with the process.¹⁹⁵ It is highly likely that these were the very people who most needed the support of the process, but such support was only forthcoming to those who contacted the TRC. This was perhaps a question of TRC devoting more of its resources to this crucial task. In terms of the work of future truth commissions, it is vital that adequate resources be provided (in the form of publicity and trained statement-takers) to ensure that all potential victims know of the commission’s existence. All victims need to be given every encouragement to become involved in the commission’s work, which in turn would enable all victims to access their rights under the commission’s mandate should they choose to do so.

Only about 10 per cent of those people who came within the definition of a ‘victim’ and were prepared to provide a written statement to the TRC were selected to provide testimony at the public hearings of the HRVC. Although the *TRC Report* claimed that ‘the interactions of the vast majority of victims with the commission was a positive and affirming experience’,¹⁹⁶ there is little evidence to support this.¹⁹⁷ One can speculate that many of the 90 per cent of victims who were not selected to provide public testimony might have felt that the TRC

¹⁹² Clearly, from a practical point of view, the TRC would have been overwhelmed if its mandate was expanded to include all victims of racial discrimination during apartheid and, given its relatively limited resources and time limits, its approach was understandable. It would have also made its reparation policies too expensive and particularly problematic for the government. The other important argument was that the TRC was not established to cover and make amends for such issues. It was pointed out that there were other bodies — such as the Land Grants, Gender, Youth and Human Rights Commissions and the Reconstruction and Development policy of the government — that carried the primary responsibility for these crucial issues.

¹⁹³ This has also been suggested by Hayner: Hayner, *Unspeakable Truths*, above n 2, 74.

¹⁹⁴ For example, for the purposes of monetary compensation, a narrow definition of ‘victim’ could have been utilised; for the purposes of access to counselling and psychological services, a less narrow definition could have been used; and for the purposes of general acknowledgment, a far broader definition could have been used. This kind of contextual approach to the definition of ‘victim’ is often utilised in domestic criminal law.

¹⁹⁵ According to Pigou, ‘it is clear that many thousands of violations were not reported to the TRC’: Pigou, above n 25, 45.

¹⁹⁶ *TRC Report*, above n 24, vol 1, 144.

¹⁹⁷ See Jenkins, above n 84, 463.

regarded their cases as less important than those selected, and this could well have had a negative psychological effect on the ‘overlooked’ victims. To the author’s knowledge, little psychological support and help was made available for victims after they had made their statements. It has also been asserted that those selected to give evidence at the public hearings were not representative of the victims of gross human rights violations.¹⁹⁸

While the TRC made a considerable effort to provide psychological support and counselling to those victims who did testify before the HRVC,¹⁹⁹ another criticism was that such support was uneven. Again, greater resources should have been allocated to this task, particularly given the psychological damage that can ensue if victims are left to their own devices. Another related criticism was that follow-up support and counselling after victims had testified before the HRVC was often inadequate.²⁰⁰ It was not surprising that many victims found the act of testifying to the TRC a positive experience, given that the focus of the media, the community and the TRC was upon them during the public hearing process. Afterwards, however, when that focus had shifted, many of these victims became disillusioned due to the lack of support and information subsequently provided by the TRC, and the realisation that despite all the previous support, they were now left to continue to live with the reality of the violations. The lack of implementation of the reparations recommendations probably exacerbated these feelings.²⁰¹ Thus, in future truth commissions, sufficient follow-up help and psychological support and counselling should be made available to all victims who are prepared to come forward, regardless of whether they became involved in the public processes of the commission. This should apply to all stages — before, during and after the hearing in which they are able to testify.

Particularly in the early days of the TRC, the HRVC made various promises to victims that were not kept — for example, that they would soon obtain reparations, that follow-up information would be provided to them regarding relevant amnesty applications, and that there would be further meetings of the HRVC in their area. Non-fulfilment of these added to victims’ frustration and bitterness concerning the process.²⁰² The obvious lesson to be learned from this is that care needs to be taken when members of a truth commission interact with victims so that false expectations are not created as to what victims might hope for during or at the end of the process.

¹⁹⁸ See above n 170 for the criteria that the TRC relied upon in order to determine who was to be invited to give evidence at a public hearing. Pigou has said that ‘[i]ronically, indigent black victims were under-represented and white victims over-represented in the name of impartiality’: Pigou, above n 25, 45.

¹⁹⁹ The TRC ‘went further than any other commission in incorporating psychological support into its operational structures’: Hayner, *Unspeakable Truths*, above n 2, 145.

²⁰⁰ The TRC itself acknowledged it could have done more in this respect: *TRC Report*, above n 24, vol 1, 146.

²⁰¹ As to this lack of implementation, see below Part VI(A), (C).

²⁰² One victim, Yazir Henry, stated: ‘for a year and a half after my testimony, during which I had broken down physically, I had almost no contact with the Commission’: Henry, above n 177, 168–9.

Another type of criticism centred around perpetrator interventions in some HRVC hearings following the ruling in *Du Preez*,²⁰³ which required any alleged perpetrator likely to be named in a HRVC hearing to receive notice and to be allowed to bring his or her own lawyers, who could then cross-examine victims. Clearly this detracted from the informality of these hearings and added to victims' stress, and may have caused some victims to reconsider their willingness to provide testimony at all.²⁰⁴ However, this problem only applied to a minority of HRVC hearings and was not directly caused by the TRC. The fault lay with the interpretation of the *Reconciliation Act* by the South African courts that confirmed that the principles of natural justice would apply to the HRVC hearings. Future legislation establishing truth commissions should specify that the rights of alleged perpetrators would include neither the right to prior notice nor the right to intervene in victim hearings. However, reasonable safeguards for alleged perpetrators need to be included, both in the interests of justice and to minimise the chance of such legislation violating any constitutional protections of due process found in a state's legal system.²⁰⁵ Thus, any future legislation must at least provide perpetrators with the right to make a public statement to the commission directly after the victim hearing in which they have been named. It should also afford them an entitlement to refute any allegations of their wrongdoing before any adverse findings are made against them in the truth commission's report.²⁰⁶

Perhaps one concluding overall criticism is that given the financial limitations of the TRC, too much time and money was spent on the high profile public hearings, such as those of Winnie Mandela and the political parties. While not denying the significance of these hearings, in the context of finite time lines and costs, there was a case for the TRC devoting less resources to these hearings. It may be asserted that partially because of these high profile hearings, the TRC did not do enough for the countless 'ordinary' victims of apartheid who were in need of encouragement, counselling, support and legal representation.

VI VICTIMS AND THE COMMITTEE ON REPARATION AND REHABILITATION

A *The Reparation and Rehabilitation Process*

The main role of the third TRC Committee, the Committee on Reparation and Rehabilitation ('CRR'),²⁰⁷ was to decide on policies and make recommendations

²⁰³ (1997) 4 BCLR 531. See above n 171 and accompanying text.

²⁰⁴ See above nn 173–4 and accompanying text.

²⁰⁵ Note that the decision of the Appellate Division of the Cape of Good Hope Division of the Supreme Court in *Du Preez* was based upon s 30 of the *Reconciliation Act*, and not on any constitutional requirements.

²⁰⁶ Given that adverse 'naming' of alleged perpetrators in victim hearings may only result in a loss of reputation rather than any loss of liberty or direct monetary loss, it is asserted that constitutional requirements of due process will not generally be violated by implementation of this suggestion.

²⁰⁷ Established pursuant to ch 5 of the *Reconciliation Act*. Again, like the HRVC, members of this Committee were also mainly members of the larger TRC.

to the government in relation to the reparation and rehabilitation of victims. It was also required to determine which people were genuine victims and thus entitled to these benefits. In order to determine its list of victims, the CRR relied upon the findings of both the HRVC²⁰⁸ and the AC.²⁰⁹ However, in practice, the CRR had neither the resources nor the mandate to properly investigate the lists of victims provided by the two Committees and the claims by those wishing to be declared victims.²¹⁰ Furthermore, cross-examination of victims, particularly in the HRVC, or other methods of corroboration of victims' claims, were not carried out in any consistent or rigorous manner. Thus, Parliament, as the guardian of taxpayers' money, was unsurprisingly reluctant to give the CRR, or the TRC generally, the power to actually distribute money to individual victims or to commit the state to expenditures on other reparative or rehabilitative measures. Rather, the procedure under the *Reconciliation Act* allowed for the CRR to make recommendations to the South African President who, after taking these into account, was required to make his or her own recommendations to Parliament. Parliament would then — via a special joint committee — consider those recommendations in the light of the overall economic, political and social conditions of South Africa at the time, and thus decide whether to approve the President's recommendations. The final step in the process was for the President to make regulations enforcing the Parliament's decision.²¹¹

The CRR, following an examination of both the international literature on the concept of reparation and the views of victims themselves,²¹² put forward five principles for its reparations policies: redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition.²¹³ In terms of monetary compensation to individual victims, the CRR first recommended the making of 'urgent interim' payments to victims who could show an immediate need.²¹⁴ Since October 1998, 16 855 'urgent' interim reparations have been paid, totalling about 50 million rands.²¹⁵ The CRR also recommended in October 1997 that

²⁰⁸ *Reconciliation Act* s 15(1).

²⁰⁹ *Reconciliation Act* s 22(1).

²¹⁰ Under s 26 of the *Reconciliation Act* victims could apply directly to the CRR, but these applications were all immediately forwarded to the HRVC. Thus, in effect, the list of victims only came from the HRVC and the AC.

²¹¹ This six-step process is explained in Brandon Hamber, 'Dealing with the Difficulties of Granting Reparations in South Africa' in Brandon Hamber and Tlhoki Mofokeng (eds), *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa* (2000) 60, 66–7.

²¹² This was achieved by analysing the answers given by victims during HRVC hearings and by examining the answers to questions concerning reparations on the forms that were completed by applicants claiming to be victims: Jenkins, above n 84, 465.

²¹³ *TRC Report*, above n 24, vol 5, 177a–8. For a good discussion of some of the major policy issues that faced the CRR, see Wendy Orr, 'Reparation Delayed is Healing Retarded' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 239.

²¹⁴ The urgent needs the CRR identified in the TRC's Interim Report to the President in June 1996 were the subsistence needs of survivors who had lost their breadwinner, counselling services, urgent medical needs, support for terminally ill victims and survivors, access to social welfare benefits, and the issuing of civil documents such as death certificates: Jenkins, above n 84, 466.

²¹⁵ See South African Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (2003) vol 6, 97. These varied between 2000 and 5705 rands and were criticised both for their late delivery and for their small quantum: Orr, above n 213, 247; Jenkins,

final reparation payments of between 17 000 and 23 000 rands per annum²¹⁶ be made to each victim for a period of six years, which was estimated to cost the government almost three billion rands in total.²¹⁷ However, the government's response to the final monetary reparations proposals has been slow and equivocal,²¹⁸ although it recently proposed that each of the final list of over 19 000 victims be allocated 30 000 rands in total as a 'one-off' lump sum payment.²¹⁹ Despite this announcement, at the time of writing, no final payments had been made to any victim, nor had any procedures been put in place to begin the process.

The CRR also emphasised that 'reparation' was a broad term and extended far beyond individual monetary payments for victims. Other types of reparations recommended by the CRR were, firstly, various interventions to help individuals in a legal or administrative manner, such as the issuing of death warrants, exhumations, reburials and ceremonies, provision of headstones and tombstones, declarations of death, expungement of criminal records and the expediting of outstanding legal matters. Secondly, 'community' interventions were included, possibly involving renaming streets and facilities, erecting memorials and monuments, and conducting culturally appropriate ceremonies to commemorate the victims of repression during the apartheid era. Thirdly, 'national' interventions similarly included the renaming of public facilities, the erection of memorials and monuments, and possibly the institution of a day of remembrance. Fourthly, there was reference to 'community rehabilitation' measures, such as the improvement of health and social services, skills training, the need for specialised trauma counselling services, family-based therapy, and help with education and housing provision. Finally, various institutional reforms were recommended that would guarantee non-repetition of the apartheid era abuses.²²⁰ This constitutes a very detailed list of different forms of reparations going well beyond individual monetary payments. While some of these recommendations have been acted upon, the South African government has generally been slow to respond to many of the recommendations.

above n 84, 467. At the time of publication, five rands were worth approximately one Australian dollar.

²¹⁶ Jenkins, above n 84, 467. The exact amount varied depending upon whether the victim lived in an urban or rural area and how many people lived in the victim's household: at 469.

²¹⁷ Ibid 470.

²¹⁸ For an analysis of the government's reactions until May 2000, see *ibid* 475–8. The South African government defended its slow progress on the basis that it had to wait until the final volumes of the *TRC Report* were released to the public. These had been delayed for legal reasons and were not released until late April 2003. However, at various times, government spokespersons and ministers hinted that the government did not intend to pay individual reparations. They argued *inter alia* that 'the struggle was not for money', that 'one cannot attach a monetary value to the suffering' and that symbolic reparations in favour of communities and the nation may have been more appropriate (see below n 227 and accompanying text for a discussion of this issue): at 475–8; National Strategy Workshop on Reparations, Centre for the Study of Violence and Reconciliation, 'Reparations: Three Years on and Victims Are Still Waiting' (Press Release, 30 October 2001).

²¹⁹ Gershwin Wanneberg and Wambui Chege, 'Apartheid Victims Will Get R30 000 Payment', *Independent Online* (Cape Town, South Africa), 15 April 2003 <<http://www.iol.co.za>>. Note that this amount falls well short of the TRC's recommendations.

²²⁰ TRC Report, above n 24, vol 5, 188–94.

B *Benefits of the CRR from the Perspective of Victims*

The work and recommendations of the CRR stand as a ‘blueprint’ for the many different aspects of reparations for victims and as a guide to what the response of society to the suffering of victims of an era of repression should be, such as that of apartheid. Even though the response of the South African government has been slow and to many an ‘immense disappointment’,²²¹ the comprehensive and broad nature of the CRR recommendations establishes a strong benchmark for future transitional governments. It should be noted that the main alternative approach to the TRC — criminal trials — is, for reasons already stated, not well suited to recommending the types of broad reparative measures alluded to by the CRR.²²² Additionally, owing to the small number of criminal prosecutions that would have resulted and the perpetrators’ difficulties in satisfying restitution orders, it is safe to say that few victims would have achieved reparations in terms of individual monetary compensation as a result of the criminal process. It also seems clear that not many victims would have been able to mount successful civil suits against perpetrators or the state — probably only those who were highly educated and/or had significant resources. Many commentators, as well as the South African Constitutional Court,²²³ seem to agree that the likelihood of a substantial number of victims being able to profitably use the civil courts is remote. These relative deficiencies of formal legal processes highlight the significant benefits that could accrue to victims through the operation of the CRR.

C *Drawbacks of the CRR from the Perspective of Victims*

By far the most obvious criticism of the CRR is the lack of progress in implementing many of its recommendations, which has angered many victims and victim support organisations. This is particularly the case with respect to the recommendations regarding final monetary reparations. However, for reasons suggested above, the CRR lacked the power to implement its own recommendations, and the blame for the slow progress on providing reparations to victims must lie with the South African government and not with the CRR or the TRC in general.²²⁴

What should be the approach of future truth commissions? It is true that a truth commission, or part of a commission (such as the CRR), that decides on reparation policies will often lack the resources to properly establish who is genuinely a ‘victim’. Thus any list of victims it produces must be read with a degree of scepticism. Furthermore, it is frequently inappropriate for that body to draw such conclusions. It is therefore proper that where the commission has not been given adequate resources to investigate claims properly, it should not be given direct authority to spend taxpayers’ funds on reparations. Any legislation or executive order establishing the commission’s power to grant reparations should contain

²²¹ Jenkins, above n 84, 477.

²²² See above nn 186–7 and accompanying text.

²²³ See above n 134.

²²⁴ See above Part VI(A).

clear time lines setting out when Parliament or the executive shall respond to reparation recommendations and the procedure to be followed thereafter. The author would advocate the establishment of a follow-up claims body, which would be independent of both the government and the former commission, and would be responsible for the administration of the reparations — financial and otherwise — to be awarded to victims and the affected communities.²²⁵ If this idea were to be accepted by the government, it would be preferable if the legislation or executive order setting up the truth commission also provided for a clear mechanism to establish the follow-up claims body. It is also important that the body be given clear guidelines as to the standard of proof required for it to accept claims as proven.²²⁶

The lower profile given to the CRR in comparison to the AC and the HRVC meant that its work did not have the same type of support and level of awareness from victims and the public in general. One important reason for this was that its deliberations were carried out in private — it was the only one of the three Committees that did not hold public hearings. Perhaps this allowed the government to ignore or delay responding to and implementing many of its recommendations. It is therefore suggested that in any future truth commission, the body that will be responsible for formulating rehabilitation and reparation policies should hold public hearings and generally go about its deliberations in a manner that is as public as possible.

One very significant argument, resorted to at times by South African government spokespersons and ministers when pressured on the lack of progress made on reparations, was that individual monetary reparations were inappropriate to South Africa's situation. Instead, they asserted that more general symbolic reparations to communities and to the nation as a whole would better suit victims' interests.²²⁷ In support of this viewpoint it was noted that many equally deserving victims did not come forward to provide statements to the TRC, thus making them ineligible for reparations under the individualised reparation scheme. Furthermore, individual reparations would favour those victims who had been defined as 'victims' by the legislation,²²⁸ leaving many victims of apartheid repression 'out in the cold'. However, while this self-serving assertion would obviously save the government money, it is submitted that it is a substantially flawed perspective. As a matter of principle it is possible to argue that those who suffered from violations of their 'bodily integrity' — in other words, those who, either willingly or unwillingly, risked their lives for the struggle — were more deserving of financial compensation than those who did not. It is possible to assert that their sacrifice was on a different *qualitative* level than those who, although heavily discriminated against, did not put their bodies on the line for the struggle. Furthermore, it is false to assert, as the South African government

²²⁵ A good example of such a body was the National Corporation for Reparation and Reconciliation of Chile, created as the follow-up body to the National Commission on Truth and Reconciliation in Chile.

²²⁶ The body could even include some sort of tribunal mechanism to determine doubtful claims.

²²⁷ See above n 218.

²²⁸ See above nn 8, 189–94 and accompanying text for a discussion of these issues.

did, that people not defined as victims under the *Reconciliation Act* were 'left out in the cold'. As stated already, the TRC was a temporary body with limited resources that was not established to find solutions for broader societal issues of poverty amongst the majority black population.²²⁹ There were, in fact, other more permanent bodies such as the Commission for Restitution of Land Rights and the Land Claims Court, as well as the Gender Equality, Youth and Human Rights Commissions, which carried the primary responsibility for these crucial issues.²³⁰ Furthermore, the reconstruction and development policy of the government, and not the TRC, was to be the primary means by which the black majority's poverty might be relieved.

Further strong arguments in favour of an individual reparation approach from a victim perspective are articulated by Hamber:

for most people in South Africa, the upgrading of their communities is considered a right and is expected anyway. The majority cast their vote for the new government in April 1994 with the expectation of social reconstruction in mind. ... for reparations to be psychologically restorative it has to be personalised. ... individuals experience violence through their own personal universe. Although socio-economic development is necessary, the physical and psychological impact of the violence has to be addressed directly and individually if we are ever to deal with the traumas of the past and prevent cycles of violence from emerging.²³¹

In summary, the CRR provided a very extensive and comprehensive list of suggested reparation and rehabilitation measures for victims, which most controversially included recommendations that those found to be victims by the CRR be paid certain monetary amounts. Despite the South African government's apparent reticence regarding some of these proposals (especially the concept of individual reparations), it is asserted that overall the work of the CRR was very positive from the point of view of victims.

VII CONCLUSIONS

At first glance, it appears that the above list of problems with the TRC from a victim perspective is a long one. It is thus reasonable to ask firstly whether the TRC was a suitable accountability mechanism for the victims of repression during the apartheid era and, more generally, whether truth commissions are beneficial for victims. In relation to the first question, the author would argue that far too much was expected of the TRC in the relatively short time during which it was able to operate, and that it was therefore not surprising that there were numerous criticisms of its work. Its very broad and multifaceted mandate,²³² the inclusion of the word 'reconciliation' in its title, and its promise of a

²²⁹ See above n 192 and accompanying text.

²³⁰ See Simpson, 'Tell No Lies, Claim No Easy Victories', above n 58, 225.

²³¹ Hamber, 'Dealing with the Difficulties of Granting Reparations in South Africa', above n 211, 66.

²³² As Cherry, Daniel and Fullard point out, this included historical scholarship, political analysis, police-type investigation, legal findings, judicial decisions, and other types of decisions on reparations for victims: Cherry, Daniel and Fullard, above n 25, 18.

'victim-centred' approach relying on restorative justice principles all meant that the TRC was inevitably going to disappoint some people. One must also assess the TRC's overall performance in the context of the centuries of oppression and violence that characterised South Africa, one of the most divided societies in the world, and of the TRC's relatively limited resources.²³³ The long list of problems detailed in this article must be weighed against the many positive aspects of the TRC's work, such as those mentioned above in relation to the three Committees of the TRC. More impressive from the author's point of view were the TRC's attempts at innovation, clumsy and unsuccessful as they were at times. These included the unique (at the time) amnesty arrangement that attempted to provide a form of offender accountability and restorative justice; its strong victim-centred rhetoric and approach; its very public and democratic establishment; its ability to hold institutional and sectorial hearings; and its acknowledgement of the need for, and importance of, psychological services for victims. Another significant achievement of the TRC was its comprehensive and detailed report. Although this was far from perfect,²³⁴ it serves as a valuable document for future historians, human rights advocates, social science scholars, lawyers and legal academics, and as a blueprint for reform.²³⁵ This will also be true for much of the documentation collected by the TRC, including its transcripts of hearings.

The second question — whether truth commissions are beneficial overall for victims — is also complex and similarly defies a simple answer. Perhaps it is trite to point out once more that each transitional situation is unique and that what might be suitable in one circumstance may not be in another. The complexity of ascertaining the views of victims, together with their diverse needs and desires, make this a particularly difficult question to answer. What is clear to the author is that the TRC, with its creative use of an 'accountable amnesty', has significantly increased the likelihood that in the future states in transition will, amidst the array of available accountability mechanisms, seriously consider using truth commissions as an important element in their 'transitional armoury'. The mechanisms for which states eventually opt will, of course, depend on many factors including, as Steven Ratner and Jason Abrams have suggested, 'the nature of the system that produced the abuses, the strength of the successor regime, and the extent and the type of abuses endured by the country'.²³⁶ Despite the recent introduction of the all-powerful²³⁷ International Criminal Court into

²³³ It is acknowledged, however, that the TRC did have far more resources than any previous truth commission, although it is worthwhile pointing out that the TRC's costs were not nearly as great as, for example, the costs of international criminal courts, such as the ICTY.

²³⁴ For a detailed description of many of the problems and limitations in writing the *TRC Report* see, Cherry, Daniel and Fullard, above n 25.

²³⁵ Some, however, have criticised the *TRC Report* as not being sufficiently based on the law and legal principles: see, eg, Anthea Jeffrey, *The Truth about the Truth Commission* (1999). Other writers have argued that it was too constrained by its legal framework and consequently paid insufficient attention to issues such as the identification of the structural causes of violence: see, eg, Richard Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001).

²³⁶ Ratner and Abrams, above n 50, 158.

²³⁷ The International Criminal Court ('ICC') will have the power to 'take over' a prosecution if it has jurisdiction and if it judges that a state is 'unwilling or unable genuinely to carry out the investigation or prosecution' to prosecute: *Rome Statute*, opened for signature 17 July 1998,

the range of available transitional mechanisms, it is submitted that the future is likely to see an increase in the number and use of truth commissions. In fact, it is highly likely that truth commissions will be used more in conjunction with criminal trials. Recent examples of accountability mechanisms in East Timor and Sierra Leone, where truth commissions and criminal prosecutions exist ‘side-by-side’, indicate that many states see a combination of approaches as the best way forward.²³⁸

In conclusion, it is submitted that truth commissions can be valuable mechanisms for victims, provided that they adopt and implement the ‘victim-centred’ ideals of the TRC and learn from the TRC’s mistakes. As a minimum, such truth commissions should aim to achieve the following. They must attempt to uncover the truth of what happened to victims and who was responsible for the victims’ suffering. They must also officially acknowledge victims’ suffering and give victims the opportunity to tell their personal stories in a culturally appropriate forum, whilst providing adequate and culturally appropriate support and, where necessary, counselling. Perpetrators should also be subject to some form of accountability, perhaps, at the very least, being officially named. Reparations to victims should also be considered — individual, community and national all have their place. Finally, guarantees of non-repetition must be made to victims. At all times, however, it is important for states to listen to victims and to ascertain what they want, and to this effect well-resourced, active and independent victim organisations are needed. With this in mind, national and international victims’ organisations must take the initiative to ensure that victims’ interests are respected in the formation and operation of any truth commission.

It is reasonable to assume that victims of gross violations of human rights can almost never be returned to the situation they occupied prior to the occurrence of the violations. However, it is hoped that this article has shown that a well thought-out truth commission, such as the TRC with appropriate modifications, can be responsive to victims’ needs and interests following such cataclysmic events in their lives. Truth commissions can thus be the preferred approach or, at the very least, a useful addition to the criminal trial method of accountability for past perpetrators of human rights abuses, which until recent times seems to have been favoured by the majority of international lawyers and human rights advocates.

[2002] ATS 15, art 17(1)(a) (entered into force 1 July 2002). See also Michael Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 *Cornell International Law Journal* 507. Whether the ICC would prosecute someone who was granted amnesty of the type provided by the TRC will be an interesting question.

²³⁸ In fact, it is possible to argue that the TRC worked best when the South African criminal courts made their most significant conviction, that of Colonel Eugene de Kock: see above n 156.