

TRUTH COMMISSIONS AND THE LIMITS OF RESTORATIVE JUSTICE: LESSONS LEARNED IN SOUTH AFRICA'S CRADOCK FOUR CASE

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INTRODUCTION

On July 27, 1985, four African National Congress leaders and anti-apartheid activists—Matthew Goniwe, Fort Calata, Sparrow Mkonto, and Sicelo Mhlauli—left a meeting of the anti-apartheid group United Democratic Front (UDF) in Port Elizabeth for a return trip to their hometown of Cradock.² They never made it. Instead, the four activists were murdered in brutal fashion by the South African Defense Force. Their charred and mutilated bodies were found several days later in overgrown

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2. JILLIAN EDELSTEIN, TRUTH AND LIES: STORIES FROM THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA 79 (2001).

sand dunes near Port Elizabeth.³ The tremendous outcry over the murders of the Cradock Four is regularly cited by scholars as the first salvo in the final push to end apartheid.⁴

This article examines the investigation into the Cradock Four murders that occurred after the end of apartheid. Within that context, this article particularly examines the goals—and limitations—of reconciliation coming from South Africa's Truth and Reconciliation Commission (TRC). This article shows that the TRC regularly pushed for reconciliation, but in the case of the Cradock Four, the family members of the deceased victims were less interested in reconciliation and apt to favor traditional criminal prosecution.

TRC was one of the political compromises following the end of South Africa's apartheid era.⁵ Following an act of the South African Parliament in 1995, the TRC was given the task of "promoting national unity and reconciliation," and also investigated crimes committed during legalized apartheid between March 1, 1960 and December 5, 1993.⁶ Within the provision, the TRC had the power to grant amnesty to those who made full disclosures about his or her role in apartheid-era crimes.⁷ The TRC could assign accountability, but ideally not in such a way that further divided the country and rendered a collective national future impossible.⁸ In addition to the Amnesty Committee, the TRC had two additional committees: the

3. See CHRISTOPHER NICHOLSON, PERMANENT REMOVAL: WHO KILLED THE CRADOCK FOUR? 1-19 (2004).

4. See ANTJIE KROG, COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA 58 (1998); see also Michael Tetelman, *The Burial of Canon J.A. Calata and the Revival of Mass-Based Opposition in Cradock South Africa, 1983*, 58 AFR. STUD. 5, 27 (1998) (noting that on the night of the funerals the South African government announced a state of emergency, "[beginning] a reign of terror that would not abate for over five years").

5. Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 860 (2006); see also Richard Goldstone, Justice of the Constitutional Court of South Africa, 1998 Otto L. Walters Lecture (Winter 1999), in 15 N.Y.L. SCH. J. HUM. RTS. 241, 258 (1999) (calling amnesty "the price for a peaceful transition from apartheid to democracy"); see also Emily H. McCarthy, Note, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation*, 3 MICH. J. RACE & L. 183, 183 n.1, 184-85 (1997).

6. See Promotion of National Unity and Reconciliation Act, no. 34, 1995, vol. 361, no. 16579 (GG) (S. Afr.) [hereinafter National Unity and Reconciliation Act]. A history of the period leading up to the Act is available in the Report's history of the TRC mandate. See 1 TRUTH AND RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, 48-57 (1998), available at <http://www.justice.gov.za/trc/report/finalreport/TRC%20VOLUME%201.pdf>; see also Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 761 (1998).

7. KENNETH CHRISTIE, THE SOUTH AFRICAN TRUTH COMMISSION 77 (2000); Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 396 (1999).

8. Lansing & King, *supra* note 6, at 761.

Human Rights Violations Committee responsible for hearing victims and preparing a report on all those who told stories of human rights abuses; and the Reparation and Rehabilitation Committee, which made recommendations regarding reparations and rehabilitation.⁹

Walking a fine line between assigning accountability and promoting national unity, the TRC and its leader, Desmond Tutu, offered a justice model different from the more traditional retributive justice model of criminal prosecution. Instead, the TRC utilized a justice method commonly known as “restorative justice.”¹⁰ The emphasis of restorative justice is healing the community and restoring the imbalance between victims and perpetrators.¹¹

Like other high profile South African amnesty cases,¹² the Cradock Four amnesty hearings garnered considerable international attention, making it an excellent example to reflect on the value of truth commissions and the particular challenges of the restorative justice model. As other nations begin the process of reconciling their collective pasts through truth commissions, the South African TRC and the Cradock Four case illustrates the successes and shortcomings of restorative justice.

This article proceeds with four parts. Section II examines the history of truth commissions, and the creation of the TRC and its goals of fostering reconciliation. Section III explores the TRC’s utilization of restorative rather than retributive justice. Section IV provides an in-depth examination of the Cradock Four hearings and the successes and limitations of restorative justice. Finally, Section V offers lessons learned from the Cradock Four for future truth commissions and the role of restorative justice therein.

I. TRUTH COMMISSIONS IN CONTEXT

The creation of the Universal Declaration of Human Rights, a declaration adopted by the United Nations General Assembly in 1948 following World War II, established the first international standard of human rights norms.¹³ Though the Universal Declaration of Human Rights existed for more than fifty years, excepting the Nuremberg and Tokyo Tribunals immediately following World War II, there existed no international mechanism to create

9. The Report of the Reconciliation Commission summarizes the National Unity and Reconciliation Act. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 6, at 55-57.

10. See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 6, at 125-26.

11. See DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* 54-55 (1999).

12. See Nkosinathi Biko, *Amnesty and Denial*, in *LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION* 193-98 (Charles Villa-Vicencio & Wilhelm Verwoeld eds., 2000).

13. See generally Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUM. RTS. Q.* 573 (2002).

accountability following human rights abuses until the United Nations-sanctioned tribunals for the former Yugoslavia and Rwanda.¹⁴ Consequently, different governments took divergent tracks to restore a nation following civil strife.¹⁵

As a means of nation-building and achieving some measure of justice, truth commissions have become an increasingly popular option for societies emerging from a conflict or authoritarian rule.¹⁶ Generally, these bodies are established to investigate a party's history of human rights violations in a particular country, including violations by the military or government.¹⁷ National truth commissions may be sponsored by the United Nations or by a nation's executive or legislative branch.¹⁸ The main characteristics of truth commissions include: (1) a focus on the past, (2) an investigation of a pattern of abuse, (3) a temporary body, and (4) sanctioned or empowered status granted by the state.¹⁹ In addition to South Africa, notable truth and reconciliation commissions have been created in Chile, El Salvador, Guatemala, and Argentina.²⁰ Uruguay, the Philippines, Chad, Bolivia, Zimbabwe, Ethiopia, Germany, and Uganda also created some of the earliest truth commissions.²¹

In many cases, truth commissions have achieved significant success in documenting past human rights abuses. For example, Argentina's truth commission following the 1983 conclusion of the Dirty War and the fall of that nation's military junta represented one well-known early commission²² and resulted in the publication of *Nunca Mas* (Never Again), a document recounting victims' stories and describing military torture and killings.²³ The book remains one of the top selling works of all time in Argentina.²⁴

14. *Id.* at 577.

15. Hassan B. Jallow, *Justice and the Rule of Law: A Global Perspective*, 43 INT'L LAW. 77, 78 (2009). *See also* PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 303-11 (2001).

16. *See* HAYNER, UNSPEAKABLE TRUTHS, *supra* note 15, at 303-11; *see generally* Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361 (2005).

17. Priscilla Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600 (1994).

18. *Id.* at 600, 604.

19. Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 304 (2009). *See also* HAYNER, UNSPEAKABLE TRUTHS, *supra* note 15, at 14.

20. Thomas Buergenthal, *Truth Commissions: Between Impunity and Prosecution*, 38 CASE W. RES. J. INT'L L. 217, 221 (2006).

21. Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, *supra* note 17, at 600.

22. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 78 (2003).

23. TINA ROSENBERG, *Afterword to MARTIN MEREDITH, COMING TO TERMS: SOUTH AFRICA'S SEARCH FOR TRUTH* 325, 334 (1999).

24. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 15, at 34.

One of the most significant issues surrounding truth commissions is whether participants will be entitled to amnesty.²⁵ The notion of amnesty comes in multiple forms (such as blanket amnesty or self-amnesties), but conditional amnesty has achieved the most widespread support in the international community.²⁶ As opposed to blanket amnesty, conditional amnesty generally requires that an individual meets a predetermined standard to receive amnesty for his past human rights offenses. Conditional amnesty is typically granted following a determination by a quasi-judicial body that an individual or organization has met a threshold for amnesty as established by a legislative body.²⁷ The standard criteria include that the individual has disclosed the full truth about the crime and that the individual in question had a political (rather than personal) motive for committing the act.²⁸

A. Truth Commissions as a Vehicle for Justice

Rather than merely establishing guilt or innocence of individual perpetrators, truth and reconciliation commissions can focus on broad patterns of violence and their causes and, in the process, establish a more comprehensive record of past injustices.²⁹ Though commissions may hope for the full truth, rapid reconciliation, accountability to perpetrators, resolution for individual cases, and reparations to the victims, few of these expectations are ever fully realized.³⁰

Moreover, in recent years, there has been a push to expand the right to truth for victims in the context of transitional justice.³¹ For example, in 2009, the United Nations Human Rights Council (HRC) adopted a resolution for such a right, thereby calling on states to better facilitate fact-finding related to gross human rights violations.³² Additionally, several

25. For a general discussion of the use and approval of amnesty in international law, see generally Charles P. Trumbull, *Giving Amnesties a Second Chance*, 25 *BERKELEY J. INT'L L.* 283, 283-345 (2007).

26. Kate Allan, *Prosecution and Peace: A Role for Amnesty Before the ICC?* 39 *DENV. J. INT'L L. & POL'Y* 239, 242 (2011).

27. *Id.*; see also Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 *NOTRE DAME L. REV.* 955, 1027-28, n. 343 (2006).

28. Allan, *supra* note 26, at 242.

29. See Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 *AM. J. INT'L L.* 952, 954 (2001).

30. See generally Janet Cherry et. al., *Researching the 'Truth': A View from Inside the Truth and Reconciliation Commission*, in *COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* 17-36 (Deborah Posel & Graeme Simpson eds., 2002).

31. See Dermot Groome, *The Right to Truth in the Fight against Impunity*, 29 *BERKELEY J. INT'L L.* 175 (2011) (tracing the evolution of the "right to truth" as a concept in international law).

32. Human Rights Council Res. 12/12, *Right to the Truth*, 12th Sess., Oct. 12, 2009, U.N. GOAR, A/HRC/RES/12/12, at 3 (Oct. 12, 2009).

international conventions have also affirmed a right to truth, such as Article 32 of the First Additional Protocol to the Geneva Convention, which sets principles governing a state party's obligations related to the missing and the dead. Article 32 notes the parties "shall be prompted mainly by the right of families to know the fate of their relatives."³³ Additionally, the Preamble of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the United Nations General Assembly, affirms "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person."³⁴

B. The South African Truth and Reconciliation Commission

With an extensive budget and a staff of over 200, the TRC was one of the most comprehensive truth commissions ever assembled.³⁵ Most notably, the commission focused on reconciliation throughout the hearings. The TRC was composed of three different subcommittees: the Committee on Human Rights Violations where victims could tell their stories, an Amnesty Committee where perpetrators could receive criminal amnesty in exchange for the truth,³⁶ and the Reparation and Rehabilitation Committee where committee members recommended reparations to policy makers.³⁷ Unlike

33. Article 32 of Protocol 1 states: "In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Protocol Additional to the Geneva Conventions].

34. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/HRS/RES/2006/1 (Dec. 20, 2006) [hereinafter Enforced Disappearance Convention]; The United Nations Human Rights Committee in applying the International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR], has determined that the next of kin of detained and disappeared family members should be considered victims of ill treatment with a right to learn of their family members' fate. Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 107/1981, U.N. Doc. A/38/40/Supp.40, at 216 (1983) (submitted by: Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf); *Maria del Carmen Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 (1990) [hereinafter *Quinteros v. Uruguay*].

35. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 15, at 335 (2002).

36. See Mary Burton, Making Moral Judgments, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 77-85 (Charles Villa-Vicencio and Wilhelm Verwoerd eds., 2000).

37. It is important to note that the Reparation and Rehabilitation Committee (RRC) only had the power to recommend policy and reparations to the President and Parliament. The Committee did not have the authority to actually create programs or policy. See WENDY

some truth commissions, the TRC also had fairly broad investigative powers and was able to investigate and subpoena witnesses.³⁸

Reconciliation played a central role—if not *the* central role—in the TRC. Though other truth commissions have included reconciliation as an aim,³⁹ the TRC incorporated reconciliation to such a degree that reconciliation was an often-stated goal of the proceedings.⁴⁰ According to Priscilla Hayner, a noted scholar on truth commissions and transitional justice, reconciliation efforts even extended to the amnesty proceedings, with one commissioner telling her that decisions were based in part on “what is likely to promote reconciliation.”⁴¹

Though the TRC made positive contributions to help South Africa recover from its history of apartheid, the hearings alone may not have been enough to heal the country.⁴² Under apartheid, South Africa was violent, with the fighting directed at all sides, at all levels.⁴³ Given the violence ingrained into South African culture during the apartheid years, some scholars have questioned if the TRC actually fostered reconciliation.⁴⁴

ORR, FROM BIKO TO BASSOON: WENDY ORR’S SEARCH FOR THE SOUL OF SOUTH AFRICA AS A COMMISSIONER OF THE TRC 225-31 (2000).

38. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 15, at 336.

39. In Chile, for example, the commission determined that divisive symbols should be eliminated and that space should be made for broad public debate on human rights through public forums and cultural activities. While many Chileans argued that reconciliation had been achieved in the years following its truth commission in the early 1990s, Hayner notes that Chileans must continue to navigate the thorny issues of living and working alongside others who either supported or opposed General Pinochet. *Id.* at 159, 324.

40. Cherry et al., *supra* note 30, at 17, 18.

41. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 15, at 156.

42. See generally Gavin Bradshaw, Truth, Reconciliation and Resolution in South Africa, 32 AFRICANUS 77 (2002).

43. See Jack M. Balkin, A Body of Inquiries, N.Y. TIMES, Jan. 11, 2009, at A11, available at <http://www.nytimes.com/2009/01/11/opinion/11balkin.html>; Carol Strickland, The White/Nonwhite Divide, CHRISTIAN SCI. MONITOR, Oct. 3, 2008, at 13, available at <http://www.csmonitor.com/The-Culture/Arts/2008/1003/p13s03-13n.html>; Chris Erasmus, South Africa: Feuds, Revenge Drive the Violence, USA TODAY, June 18, 1991, at 13A, available at <http://www.lexisnexis.com.proxy1.cl.msu.edu/hottopics/Inacademic/>.

44. Gavin Bradshaw questions whether a commission—even if the government is fully committed to the prospect and the entity—can transcend years of violence. Piers Pigou questions whether the TRC can promote reconciliation. He writes that the TRC only scratched the surface of the apartheid conflict and should be viewed simply as the first, formal step in the very long process of inquiry into South Africa’s past that might lead to some subsequent reconciliation in the future. See generally Bradshaw, *supra* note 42; Piers Pigou, False Promises and Wasted Opportunities?, in COMMISSIONING THE PAST 37 (Deborah Posel & Graeme Simpson eds., 2002).

II. RESTORATIVE JUSTICE

A. Divining Justice: Retributive vs. Restorative

In contrast to classic responses to gross human rights violations emphasizing prosecution,⁴⁵ the TRC operated with the purpose of bringing restorative justice.⁴⁶ Restorative justice is the theory of justice that advocates for repairing the harm caused by criminal behavior.⁴⁷ Unlike the more traditional retributive justice, restorative justice's emphasis is not punishment, but rather healing.⁴⁸ Also unlike traditional criminal trials, the TRC was very much a proceeding that focused on the victims under apartheid.⁴⁹ The goal was to foster social harmony by healing the victim while returning the perpetrator to standing in the community.⁵⁰ TRC Co-Chair, Nobel Laureate and South African Arch Bishop Desmond Tutu explained the TRC's belief in restorative justice:

We contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment. In the spirit of *ubuntu*, the central concern is the healing of breaches, the redressing of imbalances, the restoration of broken relationships, a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he [or she] has injured by his [or her] offense.⁵¹

Tutu refers to "*Ubuntu*," a term derived from the Nguni group of languages⁵² and incorporating such concepts as sharing, cooperation, harmony, and mutual respect.⁵³ According to Tutu, the concept roughly translates to "I am human because I belong."⁵⁴

South Africa's decision to focus on restorative rather than retributive justice was not without controversy. The widow of slain Black

45. ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 279 (2000).

46. See generally TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 6.

47. *Id.*; Alexander K.A. Greenwalt, Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court, 50 VA. J. INT'L. L. 107, 129 (2009).

48. See Greenwalt, Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court, *supra* note 47.

49. Janine Natalya Clark, The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina, 7 J. INT'L. CRIM. JUST. 463, 480 (2009).

50. Frank Haldemann, Another Kind of Justice: Transitional Justice as Recognition, 41 CORNELL INT'L L.J. 675, 677 (2008).

51. DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 54-55 (1999).

52. Haldemann, *supra* note 50, at 678.

53. Rosa Ehrenrich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2335 (2003).

54. TUTU, NO FUTURE WITHOUT FORGIVENESS, *supra* note 51, at 31.

Consciousness leader Steve Biko challenged restorative justice and its amnesty provisions, and the case reached South Africa's highest court.⁵⁵ The court ruled against Biko and in favor of the amnesty clause, noting that South Africa's interim Constitution following the end of apartheid had made an explicit decision of "reparation over retaliation" and "*ubuntu* over victimisation."⁵⁶

B. Restorative Justice as a Religious Ideal

The TRC often couched itself in traditional African values such as *ubuntu*, but the TRC also utilized religion and spirituality in the form of hymn, prayer, silent reflection, and candles in memory of the dead.⁵⁷ The religious nature of the proceedings was another source of criticism.⁵⁸ One member of the TRC, a former president of the United Methodist Church, acknowledged the criticism, but argued that the religiosity of the proceedings should be viewed within South Africa's overall religious character.⁵⁹

C. Scholarly Debate Over Restorative Justice

By utilizing restorative justice, South Africa gave up much of its ability to prosecute gross human rights violations. Under the TRC's amnesty provisions, perpetrators of past abuses could receive immunity from both

55. Steve Biko's widow writes about her disagreement with amnesty. *See generally* Biko, *supra* note 12, at 193-98.

56. *See generally* Graeme Simpson, "Tell No Lies, Claim No Easy Victories": A Brief Evaluation of South Africa's Truth and Reconciliation Commission, CENTER FOR THE STUDY OF VIOLENCE AND RECONCILIATION (1998), available at <http://www.csvr.org.za/wits/articles/artcryal.htm>; *See* Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205, 275 (1998).

57. *See generally* Lyn Graybill, *Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods*, 25 THIRD WORLD Q. 1117 (2004).

58. *See* Ebrahim Moosa, *Truth and Reconciliation as Performance: Spectres of Eucharistic Redemption*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 113, 113-22 (Charles Villa-Vicencio & Wilhelm Verwoeld, eds., 2000) (describing the TRC victims' hearings as "Christ-centric" and writing that the TRC itself required a suspension of traditional beliefs in justice, law and order and further arguing that the TRC "requires a faith in the *mysterium* of the event, a faith in the rite [sic] of reconciliation, a belief in the rituals of confession").

59. BORAINÉ, *supra* note 45, at 265.

(Against this criticism it must be noted that religion has played a dominant role in the South African society. In the 1991 census more than 70 per cent of those who responded indicated some relationship with one or other of the major denominations of the Christian church. The remarkable growth of the so-called African independent churches is a further indication of the importance that religion plays in the day-to-day life of the overwhelming majority of people in South Africa.).

criminal and civil prosecution if they (1) submitted an application to the TRC fully disclosing their role in past crimes, and (2) demonstrated that these crimes were politically-motivated.⁶⁰

Much like the South African public, scholars have hotly debated the role of amnesty in the aftermath of gross human rights abuses.⁶¹ More specifically, amnesty may contradict the established rule of law and damage the perception that justice requires that people answer for the crimes they have committed.⁶²

On the other hand, truth commissions give a real voice to the victims,⁶³ a prospect that likely could not have been obtained through criminal prosecution.⁶⁴ Prosecuting mass human rights abuses is a tricky business; until very recently, amnesty—“either by law or by default”—has been the ultimate result.⁶⁵ For South Africa, one added difficulty is that the judicial

60. National Unity and Reconciliation Act, *supra* note 6, at ss. 16-22. For a full report on the amnesty process, see generally TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 6, at vol. 6 § 6; *see also* Christopher K. Connolly, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L. J. 401, 406 (2006).

61. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2595 (1991). Advocating retributive justice, Diane Orentlicher argues that states have a duty to prosecute past offenses, noting that the world community “has resolved emphatically that it will not countenance impunity for massive atrocities against persecuted groups.” *Id.*

62. *See generally id.* at 2537-44.

63. For example, Andre du Toit argues the victim-center nature of truth commissions are more congruent with the ultimate goals of restoring human and civic dignity compared to the prosecution of offenders. He notes:

Criminal prosecutions involve an adversarial system. Consider, for example, whether cross-examination of witnesses, including victims, is appropriate in the context of a truth commission. Trials focus on the perpetrators, whereas truth commissions may choose to focus on victims. Perhaps we assume in trials that the focus on the perpetrator is compatible with the victim’s interests. We assume, then, that the victim desires punishment of the perpetrator. If that means the victim must be cross-examined, he is willing to accept it. I do not believe all victims think this way. Many are more interested in the restoration of their human and civic dignity. This may be difficult to attain in the adversarial context of trials.

Donald L. Hafner, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 103 (2007) (citing Andre du Toit, *Symposium Comments*, in TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT 20 (Henry J. Steiner ed., 1997)).

64. *See generally* ROSENBERG, *supra* note 23, at 325, 335.

65. ROSENBERG, *supra* note 23, at 325, 334. *See also* TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 6, at vol. 1, 201. “The tragedy is that the former government deliberately and systematically destroyed a huge body of state records and documentation in an attempt to remove incriminating evidence and thereby sanitise the history of oppressive rule.” *Id.*

system is overwhelmed by crime in the country.⁶⁶ The fledgling government had few resources available to investigate, prosecute, and incarcerate potential human rights offenders.⁶⁷ Absent a truth commission, a small number of criminal trials are all any country would have accomplished in its quest for justice for victims.⁶⁸ Ultimately, amnesty-for-truth with the goal of restorative justice may not have been a perfect solution, but it allowed more South Africans to participate in the justice proceedings. Otherwise, the vast majority of victims would have been entirely shut out of the process.⁶⁹

Finally, the very public nature of the TRC—with its near-constant media coverage in South Africa—may have achieved a measure of retributive justice in its own right.⁷⁰ There are differing degrees of retributive justice: strong retributive justice that “can punish” and weak retributive justice that “can shame or extract contrition.”⁷¹ Strong retributive justice is typically utilized to restore a balance of pain, no matter how imperfectly it does so.⁷² But even without punishing the perpetrator, the TRC can re-equilibrate the balance of power between perpetrator and victim.⁷³ Retribution was never the Commission’s goal.⁷⁴

Absolute amnesty for truth is not the same as restorative justice. Restorative justice carries an obligation following violation to make all whole again. On the other hand, under the amnesty-for-truth model, a perpetrator has no further obligation to redress his wrongs once he has told the truth.⁷⁵

66. See, e.g., Michael Wines, *Wasting Away: A Million Wait in African Jails*, N.Y. TIMES, Nov. 6, 2005, at A11 (noting that some inmates in Johannesburg have waited seven years to see a judge); Rachel L. Swarns, *Johannesburg Journal; Unthinkable Attack Jolts a Crime-Wearied Country*, N.Y. TIMES, Nov. 16, 2001, at A14 (noting that South Africa has one of the highest reported rates of sexual violence in the world).

67. Markel, *supra* note 7, at 389, 394.

68. See generally ROSENBERG, *supra* note 23, at 325, 335. Dan Markel argues that the lack of amnesty would have completely changed South Africa’s transition to a fully functioning democracy. “[I]n the absence of some form of immunity,” he writes, “the security forces and their supporters would likely have mounted large-scale violent resistance to attempts by the fledgling new regime to prosecute them.” Markel, *supra* note 7, at 389, 394.

69. See generally ROSENBERG, *supra* note 23, at 325, 335.

70. See generally Charles Maier, *Doing History, Doing Justice*, in TRUTH V. JUSTICE (Robert Rotberg & Dennis Thompson, eds., 2000).

71. *Id.* at 261, 268.

72. See Markel, *supra* note 7, at 404 (discussing retributive justice generally and its role of reconciling the lives of victims and survivors to the wrongs committed against them).

73. Maier, *supra* note 70, at 261, 268.

74. Desmond Tutu makes this clear, writing that “[t]he purpose of finding out truth is not in order for people to be prosecuted. It is so we can use the truth as part of the process of healing our nation.” MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 127 (1998).

75. Howard Zehr, *Restorative Justice: When Justice and Healing Go Together*, 6 TRACK TWO 20 (1997).

For the victim, anecdotal evidence suggests the healing power of speaking about trauma, with truth-telling as a restorative power in its own right.⁷⁶ The TRC presented its hearings with a tone of safety, without cross-examining the testimony of victims of torture and other human rights abuses or their surviving family members.⁷⁷ As the TRC redefined its objectives over time, it moved away from more established judicial methods.⁷⁸

Moreover, the TRC's operation of truth-through-amnesty likely provides a better picture of the atrocities committed under apartheid and paints a fuller picture of the history of the regime (rather than the challenging of truth that inevitably happens in a criminal trial).⁷⁹ A court of law is more adversarial with competing versions of the truth, but the TRC hearings, given their structure, are less likely to have explicit denials and legal maneuvering.⁸⁰ As one scholar asserted: "truth commission may not establish the full truth, but they narrow the range of permissible lies, such that individuals may no longer reasonably deny the horrors of the past."⁸¹ In addition, truth commissions' inclusive nature may enable survivors to regain trust in their own government.⁸²

III. THE TRC AMNESTY IN ACTION

In January 1997, seven members of the Port Elizabeth security police applied for amnesty in connection with the deaths of the Cradock Four.⁸³

76. Martha Minow, *Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission*, 14.4 NEGOTIATION J. 319, 329 (1998); JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 175 (1992) (emphasizing the value of telling the story of trauma, deeming it the "second stage of recovery.").

77. TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 6, 144; Anthea Jeffery, *The Truth about the Truth Commission*, 27 HUM. RTS. 19, 19 (2000) (derived from ANTHEA JEFFERY, THE TRUTH ABOUT THE TRUTH COMMISSION (1999)).

78. Donald Hafner & Elizabeth B. L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 103 (2007).

79. Maier, *supra* note 70, at 266-67; see Colleen Scott, *Combating Myth and Building Reality*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION 107, 107-112 (Charles Villa-Vicencio & Wilhelm Verwoeld eds., 2000) (arguing that amnesty was the only way for truth to be discovered); see also Hafner & King, *supra* note 78, at 100 (noting that truth commissions have a greater latitude to sketch a larger picture of the extent of atrocity and responsibility than might be feasible under formal prosecutions).

80. See Hafner & King, *supra* note 78, at 101 (noting that because truth commissions are not formal judicial bodies, they are not saddled "with complex rules of procedure and evidence").

81. MICHAEL IGNATIEFF, THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE 173 (1997).

82. See Hafner & King, *supra* note 78, at 101-03; Minow, *supra* note 76, at 325-29.

83. EDELSTEIN, *supra* note 2.

The victims' surviving family members also testified before the TRC about the incident.⁸⁴

A. Justice from the Victims' Perspectives

1. *Beginning the Hearings*

The human rights violations section of the TRC had, on the one hand, aspects of a legal proceeding, but, at other times, functioned nothing like a trial. For example, the witnesses were sworn in when appearing before the TRC.⁸⁵ Though the Human Rights Violations hearings were less legalistic than the amnesty hearings, victims were still understood to be "giving testimony," not simply "telling life-stories."⁸⁶ After being sworn in, the victims were guided through their testimony by Commissioners, who largely are able to shape the direction of the testimony with their questions.⁸⁷

In other ways, the hearings depart from a typical legal proceeding. For example, the Commissioners themselves often seemed sympathetic to the witnesses appearing before them. At a memory service on the day before the hearings, TRC Commissioner Wendy Orr sat with the victims' families, including Cradock Four widows.⁸⁸ On April 16, 1996, just before the testimony of Calata, Mkhonto, and Mhlauli, Commissioner Alex Boraine addressed the witnesses and the audience at large. Addressing the witnesses, Boraine remarked:

The 27th of June 1985 is a day which will be indelibly printed in your minds and in your hearts and in the minds of many, many thousands and hundreds of thousands of people in South Africa. Many people within this hall and many of us sitting at this table knew your husbands well. We had met them, we had worked with them and like you we heard with horror of the gruesome killing of those four, the Cradock Four.⁸⁹

The oration from Boraine makes another important point: he knew (or at least knew of) the victims. Such a close relationship between victim and

84. See KROG, *supra* note 4, 56-58.

85. See Annelies Verdoolaege, *Managing Reconciliation at the Human Rights Violations Hearings of the South African TRC*, 5 J. HUM. RTS. 61 (2006).

86. Heidi Grunebaum-Ralph, *Re-Placing Pasts, Forgetting Presents: Narrative, Place, and Memory in the Time of the Truth and Reconciliation Commission*, 32 RES. IN AFR. LITERATURE 198, 201 (2001).

87. See generally *Testimony of Nomonde Calata, Sindiswa Mkhonto, and Nobuyiselo Mhlawuli*, TRUTH & RECONCILIATION COMM'N (TRC) (Apr. 16, 1996) [hereinafter *Calata*], <http://www.justice.gov.za/trc/hrvtrans/hrvel1/goniwe.htm>. See also *Testimony of Nyameka Goniwe*, TRC (Apr. 17, 1996) [hereinafter *Goniwe*], <http://www.justice.gov.za/trc/hrvtrans/hrvel1/goniwe.htm>.

88. ORR, *supra* note 37, at 33.

89. *Calata*, *supra* note 87.

judge would be considered irregular and questionable in most any legal proceeding.

After Boraine acknowledged his close ties to the victims, he struck a collective tone regarding the proceedings. “[E]verybody who comes to this Commission is as important as anyone else,” Boraine noted.⁹⁰ “[E]veryone who has suffered is a sufferer, you have come together and you will be answering questions about something that was very very painful for you.”⁹¹ Following his remarks of inclusiveness, Boraine offered a sentence of hope: “We’re hoping very much that you will find this experience helpful and healing and in the end will enable the Commission to be of some service to you as well.”⁹²

Witnesses themselves do not appear “cold.” That is, they have been interviewed prior to appearing before the Commission. In the transcripts, Commissioners often note they have the witnesses’ written testimonies and will utilize them as a guide in oral testimony so that all necessary material is orally recounted.⁹³ Still, the oral component of the hearings provides an emotional record to compliment the historical one.⁹⁴

The Commission seemed far more concerned about the women’s views about amnesty toward the perpetrators than their financial requests. When the women requested financial compensation from the Commission, there was no response from the Commissioners, who continued with other questions. The Committee’s limited response may be because it had little ability to influence financial reparations.⁹⁵

2. *Finding the Truth and Parsing the Ideas of Justice*

Even before the end of apartheid, Desmond Tutu has been a vocal advocate for the idea of restorative justice within South Africa, arguing that Africans see justice differently than the traditional Western conception.⁹⁶ During the TRC hearings, all four widows and the daughter of Sicelo Mhlauli spoke about justice regarding how it relates to the men responsible for their husbands’ deaths.⁹⁷

When hearing from Nomonda Calata, one of the Cradock Four widows, TRC Commissioner John Smith opened by asking whether Ms. Calata

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. See KROG, *supra* note 4, at 75 (writing that the “starting point of the human rights hearings was the indefinable wail that burst from Nomonde Calata’s lips in East London.”).

95. The Reparation and Rehabilitation Committee was officially assigned this task, though that Committee only had the power to recommend a course to the President and Parliament. ORR, *supra* note 37, at 225-31.

96. TUTU, NO FUTURE WITHOUT FORGIVENESS, *supra* note 11, at 54-55.

97. See generally Calata, *supra* note 87; see also Goniwe, *supra* note 87.

wished to learn the identity of individuals responsible for her husband's death:⁹⁸

Mr. Smith: The inquest has made a very general finding about your husband and those who were responsible for his death. Would you want to know the identity of the person or persons who were responsible for your husband's death, and if so, why would you like to know who exactly killed your husband?

Ms. Calata: I'd be very glad to know this person. If I can know the individuals who are responsible for this *I will be able to understand why they did it*. Most of the time I can remember that this child, the third born, Tommy does not have a picture of his father and the last born has no idea at all and they always ask how he was and what he will be doing at this time. . . . As a mother I always to play [sic] the roles of both parents but I'll be really glad if I can know what happened so that my children can get an explanation from me, so that I can say it is so and so and so and so. This will probably make me understand. I do not know the reason for their cruelty, but *I just want to know and my family will also be happy to know who really cut short the life of my husband. Not to say that when they are old I'm just teaching them to retaliate or to be revengeful, it's just to know who's done this and who changed our lives so drastically*. (Emphasis added)

Mrs. Calata does not delve into the specifics of what she wants done to the perpetrators if they are caught; however, she suggests that understanding is the most important aspect of these proceedings, similar to the TRC.

The next witness questioned is Sindiswe Mkhonto, the wife of Cradock Four member Sparrow Mkhonto. Commissioner Smith, the questioner, does not ask Ms. Mkhonto her specific thoughts on justice, but she offers them in the course of the proceedings. Here is the exchange⁹⁹:

Mr. Smith: Mrs. Mkhonto, what else do you request this Commission to do for you, how can the Commission assist you?

Mrs. Mkhonto: What I request from the Commission is that I'd like them to make thorough investigations about this and please establish who did this to my husband. *I do not just want them to be exposed, I want them to brought to court [sic] so that justice can be done*. (Emphasis added)

In this exchange, it seems quite clear that Ms. Mkhonto does not favor amnesty for her husband's killers. What is more, it seems Ms. Mkhonto

98. *Id.*

99. *Id.*

embraces the traditional ideal of retributive justice when she notes that she wants the killers brought to court so that “justice can be done.”¹⁰⁰

The next participant before the Commission is Nombuyiselo Mhlauli, the wife of Sicelo Mhlauli. As the Commission proceedings take their course, it seems that like Ms. Mkhonto, Ms. Mhlauli also wants justice in the traditional retributive sense. The transcript reads:¹⁰¹

Mr. Smith: I’m now going to ask you, the inquest court made certain general findings about your husband, would you want the Commission to use its powers to investigate further to be able to identify the person or the persons who are responsible? In other words would you like to know who were responsible for the death of your husband?

Ms. Mhlauli: I’d gladly love to know the murderers of my husband and they should also come to the fore and tell their story and the reason why they committed such brutal actions, and *I think, in order to be able to achieve, what we are all hoping for, justice should prevail, the law should take its course.* (Emphasis added).

Given the implications of her final sentence, Ms. Mhlauli seems to indicate that she favors traditional justice where punishment is meted out in exchange for crime. The terms “justice should prevail” and the “law should take its course” work together in greater syncopation when referencing retributive justice.

A bit later in the testimony, an unnamed TRC member Ms. Mhlauli her opinion about amnesty for the perpetrators. Here is the exchange:¹⁰²

Panel Member: If these perpetrators can explain and give an account and what would you do if they would request amnesty after the Commission has cross-questioned them, and then if the Commission realises that they have expressed their views and also giving their explanation for committing these brutalities. And what if the Commission is satisfied that this explanation is satisfactory and it decides to offer amnesty, what do you say about this?

Ms. Mhlauli: *The fact that they should be excused? I’m still moved, and I do not want to lie, because my family have [sic] suffered extremely from this. My children were extremely affected. We have been miserable for quite a long time and it was difficult to guide my child alone as a woman without the support of my husband, especially during this period when the child is an adolescent. Even if I say these people should be given amnesty, it won’t return my husband, but that hand, we still want it. We know we have buried them, but really to have the hand which is said to be in a bottle*

100. *Id.*

101. *Id.*

102. *Id.*

in Port Elizabeth, we would like to get the hand. Thank you. (Emphasis added).

Ms. Mhlauli seems to be against amnesty, though she never announces it clearly. Still, she notes that amnesty for the perpetrators will not return her husband or rectify the years of struggle she endured because of his death.¹⁰³ In her testimony, Ms. Mhlauli makes reference to her husband's hand.¹⁰⁴ Sicelo Mhlauli's body was recovered without its right hand,¹⁰⁵ which was long rumored to be with the Port Elizabeth police.¹⁰⁶ Ultimately, Ms. Mhlauli's testimony is strongly in favor of retributive justice, given her dismissal of amnesty for the perpetrators as bringing any change to her life.¹⁰⁷

Following Ms. Mhlauli's testimony, her 19-year-old daughter Bawuli testified before the Commission. Bawuli's testimony is short, but she announces the first strong example of restorative justice, as advocated by the Commission and particularly Desmond Tutu.¹⁰⁸ When asked if she would like to know the identity of the perpetrators who killed her father, Bawuli responds in the affirmative.¹⁰⁹ She adds:

I would love to know who killed my father, so would my brother, I suppose, because it's very hard for us right now to do anything, *because in order for us to forget, and forgive, we do want to forgive, but I mean I don't know what to say, we do want to forgive but I mean we don't know who to forgive, we don't know the killers, you know.* And I must say we're all upset about this.¹¹⁰ (Emphasis added).

Bawuli's testimony mirrors the restorative justice language where the victim must also forgive as part of coming to terms with the loss.

Bawuli is the final Cradock Four family member to testify for the day. It seems that her brief testimony has done the most to move TRC Chairman Desmond Tutu.¹¹¹ Though three of the Cradock Four widows are present (Nyameka Goniwe is to testify the next day), Tutu directs most of his closing remarks to Ms. Mhlauli, Bawuli's mother.¹¹² At the close of the proceedings, Tutu responds:

103. See *Calata*, *supra* note 87.
 104. See *id.*
 105. GEORGE BIZOS, NO ONE TO BLAME? IN PURSUIT OF JUSTICE IN SOUTH AFRICA 164 (1998).
 106. See TUTU, NO FUTURE WITHOUT FORGIVENESS, *supra* note 178-79.
 107. See *Calata*, *supra* note 87.
 108. See *id.*
 109. See *id.*
 110. *Calata*, *supra* note 87.
 111. See *id.*
 112. See *id.*

We are proud to have people like you and your husbands and the reason why we won the struggle, is not because we had guns, we won the struggle because of people like you. People of incredible strength and this country is fortunate to have people like you. *And I wanted to say to your daughter [Bawuli Mhlauli], that her father where he is looking down, is proud of her, and you should feel you've done a tremendous job with her . . . And that she, your daughter should say, I want to forgive, we want to forgive, after what she has experienced, and seen what happened to her mother and to her father, and she says, we want to forgive, but we want to know who to forgive.* We give thanks to God for you, and thank you for your contribution to our struggle, and thank you, even if it was reluctant in a sense, rightly, thank you for sacrificing your husbands. (emphasis added).¹¹³

Tutu also brings his conceptions of religiosity into the TRC with his closing remarks. He tells the widows that the deceased Sicelo Mhlauli is “looking down” on his daughter with pride.¹¹⁴ Tutu concludes his remarks with an odd choice of words: praising the women “for sacrificing your husbands.”¹¹⁵ The words seem strange given that the women spent the majority of their testimony describing how their husbands were arrested and murdered by the South African defense forces.

Nyameka Goniwe, the wife of Matthew Goniwe, testified the next day regarding her experiences.¹¹⁶ Similar to the others, part of Ms. Goniwe’s testimony focused on her opinion about amnesty. Commissioner Smith leads the exchange:

Mr. Smith: Now you realise of course that it’s quite possible for persons to come forward and to actually admit to the killing of your husband and to apply for amnesty to one of the committees of this Commission. What would be [sic] your attitude to that. [sic] How would you feel towards these people if they were in fact identified and that you were to know that these are the people who are responsible for the brutal slaying of your husband?¹¹⁷

Ms. Goniwe: Well I look forward to that. I mean I know it’s difficult after suffering such pain and trauma. But we need to know what happened and who they are, and also, I mean they have to need to show some remorse.

Mr. Smith: Are you saying that just coming forward and applying for amnesty would not be sufficient, that you would also maybe require a person to show remorse for what they have done.

113. *Calata, supra* note 87.

114. *Id.*

115. *Id.*

116. *Goniwe, supra* note 87.

117. *Id.*

Ms. Goniwe: Yes. They have to show us remorse, that they're sorry for what they did. *I don't say that, I mean it would immediately make us happy, it's a challenge, we're going to be challenged in that kind of way, and grapple with that, inside and it will take a long time. Healing takes a long time.* (Emphasis added).¹¹⁸

Ms. Goniwe seems to also favor restorative justice as advocated by Tutu, with the condition that the perpetrators show remorse for their actions.

Though Ms. Goniwe notes that she can only forgive the perpetrators if they show remorse, there is no such remorse requirement for the perpetrators to qualify for amnesty.¹¹⁹ Thus, while Ms. Goniwe might require remorse to personally forgive the perpetrators, the Commission itself will pay no heed whatsoever to whether the perpetrators are sorry for their actions.¹²⁰

At the conclusion of Ms. Goniwe's remarks, Chairman Tutu closes the proceedings. In this instance, he does not praise the efforts to achieve restorative justice, but instead offers his praise to the four women and all South Africans who have struggled against apartheid. Tutu remarks:

All of you were very young when this happened, and one of the things that I think has impressed us is how you have been supporting each other, I mean, even yesterday, just sitting together, and you were really children when this awful thing happened. . . we are an incredible country with some quite extraordinary people. I mean that you can laugh, you can sing, you have hope even you [sic] have been traumatized. It gives great hope for this land . . . maybe South Africa is God's favourite, because, and it's good, that we must hear the pain of everybody, and for people to know that this freedom was not cheap and that people must learn to nurse it, because it was bought at a very very great price.¹²¹

Though reconciliation might have been the stated ideal, the victims at the Cradock hearings stated a goal of reconciliation on a very limited basis.¹²² Most participants in the truth hearings sought retributive justice.¹²³ Though some individuals understood that the political compromises between President Nelson Mandela and former President F.W. de Klerk that brought an end to apartheid meant that there would be no retribution, the editor of

118. *Id.*

119. Aletta J. Norval, *Memory, Identity and the (Im)possibility of Reconciliation: The Work of the Truth and Reconciliation Commission in South Africa*, 5.2 CONSTELLATIONS 250, 253 (2004).

120. *Id.*

121. *Goniwe*, *supra* note 87.

122. *Id.*; Andrew Maykuth, *No Forgetting, Little Forgiving: The Cradock Four and the Search for the Truth*, PHILADELPHIA INQUIRER, Oct. 25, 1998, at A1.

123. See Mathatha Tsedu, *Questioning if Guilt Without Punishment Will Lead to Reconciliation: The Black Press Relives its Own Horrors and Seeks Justice*, NIEMAN REPORTS, Winter 1998, at 57.

South Africa's largest black newspaper suggests that the majority of black South Africans were initially unaware that there would not be criminal prosecutions.¹²⁴ Victims routinely appeared before Tutu and the Commission asking for justice in the retributive sense.¹²⁵ Of those victims, "[m]any were ordinary people who could not be bothered by the niceties of political arrangements between Mandela and de Klerk and who felt that the law of natural justice should be followed."¹²⁶ In addition, many in the black press felt that "justice was the only foundation for a lasting reconciliation."¹²⁷

B. Restorative Justice As Seen in the Amnesty Cases

1. *The Amnesty Proceedings*

The amnesty hearings were held for ten days in February and March 1998 and then recessed until June, when the final amnesty application was examined.¹²⁸ Seven individuals applied for amnesty in relation to the case.¹²⁹ Six of the applicants committed the crime itself or helped in the planning of the murders.¹³⁰ A seventh amnesty applicant¹³¹ applied for amnesty because of his role as an accessory to the crimes after they were committed.¹³²

Before the first witness in the amnesty hearings spoke, the attorneys from all sides addressed the court.¹³³ In the case of the victims and the perpetrators applying for amnesty, the written application was a critical

124. *Id.*

125. *Calata, supra* note 87.

126. Tsedu, *supra* note 125, at 57.

127. *Id.*

128. *Killing of the Cradock 4 (Part I)*, Hearing Transcript Collection, TRC: AMNESTY HEARING TRANSCRIPTS 1998 (2009), <http://www.justice.gov.za/trc/amntrans/am1998.htm>.

129. *Id.*; Transcript of Truth and Reconciliation Commission [TRC] Amnesty Hearing, Killing of the Cradock 4, (No. 5637/96) (1998) (S. Afr.) [hereinafter TRC Transcript] (statement of Johan Martin van Zyl, amnesty applicant), *available at* <http://www.justice.gov.za/trc/amntrans/pe/cradock1.htm>.

130. TRC Transcript, *supra* note 131 (statement of Johan Martin van Zyl, amnesty applicant). Amnesty applicants included Eric Taylor, Gerhardus Lotz, Nicholas van Rensburg, Harold Snyman, Johan van Zyl, and Hermanus du Plessis. *Id.*

131. *Id.* The seventh amnesty applicant was Eugene de Kock. *Id.*

132. *See Eugene de Kock to Testify in Goniwe Amnesty Hearing on Friday*, S. AFR. PRESS ASS'N (S.A.P.A.), Mar. 5, 1998 (S. Afr.), *available at* <http://www.justice.gov.za/trc/media/1998/9803/s980305e.htm>.

133. TRC Transcript, *supra* note 131 (statement of Johan Martin van Zyl, amnesty applicant). The transcripts for the amnesty proceedings of the Cradock Four case before the TRC can be found on the TRC website. The opening amnesty hearings regarding the Cradock Four can be found at <http://www.justice.gov.za/trc/amntrans/pe/cradock1.htm>. I will indicate other web address throughout this chapter as they differ with each day of the amnesty proceedings.

component of testimony.¹³⁴ For the perpetrators, it was used as a jumping off point in the quest for “truth.” During the amnesty hearings, nearly all the applicants made reference to their amnesty filings.¹³⁵ In some instances, a defendant was asked to read a piece that he had written regarding the crime. Unlike the human rights violations proceedings, there was less collaboration between the Commissioners and the amnesty applicants.

2. *The Amnesty Hearings in Action*

The first amnesty applicant to take the stand was Johan Martin Van Zyl, who also went by the nickname “Sakkie.”¹³⁶ Van Zyl was a member of the South African Defense Force who, as part of his duty, helped plot the interception and murder of the Cradock Four. J.A. Booyens, the attorney for amnesty applicant Sakkie Van Zyl, walked him through his testimony. According to the testimony, Van Zyl claimed that Colonel Van Rensburg summoned him to the Colonel’s office and told him the troubles in the Eastern Cape required “the elimination” of Matthew Goniwe and his associates.¹³⁷ As part of the attack, the goal was to make the crime appear to be the work of vigilantes or AZAPO (Azanian People’s Organization), a rival black political organization to the UDF (United Democratic Front).¹³⁸

When Van Zyl’s attorney asked about the murders being against the laws of the country, Van Zyl replied: “I knew strictly speaking that it was an illegal operation, but I knew and I felt that it was an authorised operation . . . that I could and should continue with it.”¹³⁹ Under the amnesty provisions, an individual’s violent action must have served some political aim, rather simply being an act of violence.¹⁴⁰ In regard to amnesty, Van Zyl told the Commission: “I am applying [for amnesty] because I feel that the crimes in which I participated formed a part of the political struggle of that time. Unfortunate as it was, it was nothing else but that and that is what I base [my amnesty application] on.”¹⁴¹

134. See Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT’L L. & POL’Y 373, 382-83 (2006).

135. See TRC Transcript, *supra* note 131 (statement of Johan Martin van Zyl, amnesty applicant) (this transcript can also be found at: <http://www.justice.gov.za/trc/amntrans/pe/cradock2.htm>).

136. TRC Transcript, *supra* note 131 (statement of Johan Martin van Zyl, amnesty applicant).

137. *Id.*

138. NICHOLSON, *supra* note 3, at 34-35.

139. TRC Transcript, *supra* note 131 (statement of Johan Martin van Zyl, amnesty applicant).

140. See Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Courts*, *supra* note 47, at 129.

141. TRC Transcript, *supra* note 131 (statement of Johan Martin van Zyl, amnesty applicant).

After a spirited exchange where the applicant's truthfulness was questioned,¹⁴² the Commission asked Van Zyl if he enjoyed carrying out the operation. "No, Mr. Chairman," Van Zyl replied, "To the contrary."¹⁴³ The chairman asked why Van Zyl committed the crime. "Mr. Chairman, I have asked myself that question many times," was Van Zyl's response.¹⁴⁴ But the response was not adequate for the Chair, who pressed Van Zyl for a more formative answer. Ultimately, Van Zyl responded, "I think at that time I was just so motivated that I was prepared to do anything for this country. Which in retrospect was misplaced, but I have no other real explanation as that."¹⁴⁵

The only hint of restorative justice comes next when the TRC Chair asks Van Zyl if he has met with the victims' families.¹⁴⁶ Van Zyl says that he has been advised to wait until the proceedings conclude and the amnesty results have been announced. "And do you intend to do so, irrespective of the results?" the chair asks.¹⁴⁷ Van Zyl replies, "I have no objection." After being asked to clarify his answer by the chair, Van Zyl remarks, "I do not know if there is any wish from their side to speak to me."¹⁴⁸ Such an answer is telling. Restorative justice might be a lofty goal, but Van Zyl seems to know nothing about it. He has no idea whether the families even desire to speak to him about the event, let alone forgive his role in the murder, which would seem to be the ultimate aim of restorative justice.

3. *Restorative Justice in the Case of Eric Taylor*

The most explicit example of restorative justice from any participant in the Cradock Four case came from South African Defense Force (SADF) member Eric Taylor. Taylor had participated in the Cradock Four murders in 1985. Over the ensuing years, he came to realize that his actions committed on behalf of the apartheid regime were wrong. During his amnesty hearing, Taylor noted that his political point of view began to change around 1990, when apartheid came to an end and Nelson Mandela was released from prison.¹⁴⁹ In addition to a changing political opinion against apartheid, Taylor testified that for many years he carried a burden of guilt about his role in the Cradock killings.

142. *Id.* The attorney opposing amnesty pointedly questioned van Zyl about his honesty, repeatedly questioning whether the home was bugged with a listening device. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. TRC Transcript, *supra* note 131 (statement of Johan Martin van Zyl, amnesty applicant).

147. *Id.*

148. *Id.*

149. Transcript of Truth and Reconciliation Commission [TRC] Amnesty Hearing, Killing of the Cradock 4, (No. 3918/96) (1998) (S. Afr.) [hereinafter TRC Transcript] (statement of Eric Taylor, amnesty applicant), available at <http://www.justice.gov.za/trc/amntrans/pe/cradock6.htm>.

As a result of his guilt, Taylor met with the families of the Cradock Four in 1997 to offer remorse for his crimes and to request forgiveness.¹⁵⁰ There was some disagreement between Taylor and the families, however, about what exactly could be revealed prior to his amnesty hearings. Recounting that meeting in his amnesty testimony before the TRC, Taylor offered that “[I]nitially, in the light of my amnesty application I told them that I was there because I was admitting that I had killed these people and I’m asking their forgiveness. There was a bit of conflict of interest at a certain stage because they asked me to provide them with certain facts. I explained to them initially that if I should do that it would have an influence on my amnesty application and also I would expose myself to make those facts known at that forum [the TRC amnesty hearing].”

A Dutch Reform minister brought Eric Taylor and the victims’ families together in April 1997, but the meeting provided little resolution.¹⁵⁰ Upon meeting, Nomonde Calata “refused to shake [Eric Taylor’s] hand, but the others did so briefly, looking down at the floor.”¹⁵¹ Appearing before the families, Eric Taylor asked for the forgiveness of the families. Since the meeting was prior to the submission of amnesty applications, Taylor would not discuss certain details of the event. The families left the meeting to confer. When they returned, Nicholson describes their reaction: Nomonde Calata “told [Eric Taylor] that they had traveled many hours to attend the meeting. There was not going to be any quick absolution for murdering their husbands. No facts; no forgiveness. Taylor looked at [Minister] Coetzee and shook his head. His eyes misted with tears and Dominee Coetzee put a reassuring hand on his shoulder.”¹⁵²

During his amnesty hearing, Taylor describes the emotions of the day he met with the victims’ families:

[Meeting the families] is one of the most difficult aspects of the whole process, *it was a very emotional occasion because I had this desire, an almost expressed desire which I felt. I wanted to meet these families, it was really a need which I felt. Amongst others, especially from a Christian point of view, I don’t think amnesty at that stage was more important for me than reconciliation*¹⁵³ [Emphasis added].

Reconciliation requires the cooperation of both sides: victims and perpetrators. The victim meeting indicates remorse on Taylor’s part for his role in the killings, particularly since he arranged to meet the victims’ families without external prompting. The idea of restorative justice seems to be best demonstrated in this exchange, where victims and perpetrators return to equal footing and are able to become part of the community again.

150. *Id.*; NICHOLSON, *supra* note 3, at 180.

151. NICHOLSON, *supra* note 3, at 180.

152. *Id.* at 181.

153. TRC Transcript, *supra* note 151 (statement of Eric Taylor, amnesty applicant).

Yet this was not the outcome of the meeting. The victims were unable to forgive Eric Taylor. Restorative justice was not attained.

Interestingly, during the hearings, the TRC commissioners seem flippant about Taylor's remorse and his decision to meet with the families. During the hearings, Taylor's attorney asked him where "from the depth of your heart came the idea to talk to [the families]?"¹⁵⁴ The attorney opposing amnesty responded, "He told the witness where it came from Mr. Chairman but anyway we will have to see."¹⁵⁵ With that remark, the Chairman responded, "Maybe he was talking about different ventricles" in reference to Mr. Taylor's change of heart about the killings.¹⁵⁶ While one must remember that while remorse has no bearing on the amnesty decisions, the reaction of one commissioner toward the witness is telling of the role restorative justice played within amnesty hearings.

4. *Restorative Justice in the Amnesty Hearings*

For all the talk about restorative justice and the need for reconciliation, there was little of it on display with regard to the amnesty hearings of those involved with the Cradock Four. The only example of any question of remorse in questions coming from the Committee happened during the testimony of Sakkie Van Zyl, who expressed regret for his actions. Eric Taylor offered remorse prior to the hearing and recounted his meeting with the victims' families while testifying before the Commission. While the family did listen to his confession, full forgiveness did not ultimately happen. And while Taylor clearly expressed remorse during the hearing, the attorney for the families opposed amnesty for Taylor and attempted to cast him as dishonest and holding back the truth.

The hearings for victims and the amnesty applications served separate functions, and the notion of restorative justice were much more explicitly addressed in the human rights violations hearings. Is reconciliation and restorative justice only a one-way street? Must the victims initiate the healing? In the least, victims must be somewhat open to hear from the perpetrators before any sense of restorative justice can be reached. The human rights abuses proceedings operated to shape national consciousness—or more specifically, that the hearings and media selections of testimony have been "made to 'fit' a particular narrative of a 'new' South African history."¹⁵⁷ If this is the case, then it makes sense for forgiveness to figure prominently within the human rights hearings, as South Africa's black majority and white minority collectively work to move beyond its apartheid past. The amnesty hearings, on the other hand, do not fulfill the

154. *Id.*

155. *Id.*

156. *Id.*

157. Grunebaum-Ralph, *supra* note 86, at 201.

role of reshaping the collective consciousness. Consequently, forgiveness and remorse figure less prominently.

5. *The Amnesty Decisions*

Following the conclusion of testimony, the Amnesty Committee of the TRC reached its decision. For six of the seven applicants, amnesty was denied.¹⁵⁸ The only applicant receiving amnesty was Eugene de Kock who did not participate in the killings, but advised on the cover-up after the attacks.

In order to qualify for amnesty, the Amnesty Act required that the offense must be an “act associated with a political objective committed in the course of the conflicts of the past” and the applicant must have “made a full disclosure of all relevant facts.”¹⁵⁹ The Commission questioned whether the amnesty applicants fulfilled either aim. On the one hand, the Committee questioned whether all the murders were necessary, when Matthew Goniwe seemed to be the main target. Specifically, the murder of Sicelo Mhali seemed to be the most questionable since he was not a resident of Cradock and the amnesty applicants claimed that the murders were committed to ease unrest in the Cradock area. But the Commission does not ultimately determine whether all the murders fulfilled a political objective, because the Amnesty Committee ruled that the applicants have not been forthright before the Commission. More specifically, the Committee found that “[the amnesty applicants’] forgetfulness on crucial issues regarding the events so often referred to over the years and their lack of explanation surrounding the order, planning and execution of these offences does not lend itself to a favourable credibility finding.”

In the view of the Committee, memory of the events mattered. The Amnesty Committee’s view of memory is an interesting departure from traditional testimony. It was important for amnesty that perpetrators remembered what they had heard over the years, not merely what they actually remembered. In traditional testimony, however, an individual is expected to separate the two: he is expected to recall only actual memories, not what has been reported over the years in the press. The ultimate justification was that the applicants (excluding de Kock) “failed to disclose everything they know about the murders.” Consequently, amnesty for the perpetrators in the Cradock Four killings was denied.

158. Transcript of Truth and Reconciliation Commission [TRC] Amnesty Decision, (No. AC/99/0350) (1998) (S. Afr.), available at <http://www.justice.gov.za/trc/decisions/1999/ac990350.htm>.

159. *Id.*

CONCLUSION

This work explored the idea of restorative justice within the Cradock Four case of the Truth and Reconciliation Commission. Though the notion of restorative justice—with both victims and perpetrators restored to their place in the community—might be a noble idea, in the Cradock Four case, it remained only an idea that did not translate into reality. Some factors complicated restorative justice and made the push for restorative justice unequal between victim and perpetrator. For example, the promotion of restorative justice itself differed depending on the hearings. In the human rights violations case, victims were asked their thoughts on reconciliation, reconciliation was particularly encouraged, and Committee Chair Desmond Tutu was quick to praise any victim who offered forgiveness. In the amnesty hearings, Commissioners themselves seemed unmoved and unconcerned about restorative justice or fostering much reconciliation between the perpetrators and victims' families. Instead, those hearings operated much like a court, with the goal of finding the facts, but offering little in terms of reconciliation.

As much as reconciliation through restorative justice was pushed in the victims' hearings by the TRC, some of the victims seemed unready to embrace the concept. In the end, two of the witnesses seemed to favor the more-familiar retributive justice, though three others did express a willingness to forgive the perpetrators. In the amnesty hearings, Eric Taylor, the one perpetrator who best exemplified the ideals of restorative justice received no acknowledgment from the TRC. His application for amnesty was ultimately denied.

Reflecting on the amnesty decisions, one scholar posited that, "At best [they] were unpredictable and arbitrary. At worst, they entailed an unconscious selection process that sanitised the apartheid past and its uncomfortable lack of political orthodoxy."¹⁶⁰ The Cradock Four killers did not receive amnesty, with the only amnesty nod going to an individual who helped cover the crime.

The difference of victims' and perpetrators' emphasis on restorative justice may ultimately be the result of the natural order of forgiveness. The wronged party must be ready to forgive before any reconciliation can occur. In this case, victims may be willing to meet with perpetrators and accept repentance. A perpetrator cannot bring restorative justice without a receptive victim. This may explain why perpetrator Eric Taylor's attempts at reconciliation were unsuccessfully received.

Restorative justice is a noble concept. Who wouldn't want to heal victims and restore the wrongs of the past? Of course, restorative justice is easier in theory than in life, where the scars and pain are not abstract. In the end, the reliance on restorative justice relies on a romantic version of a pre-

160. See Simpson, *supra* note 56.

colonial past, a vision Desmond Tutu echoed when he claimed that African justice was more concerned with restoring balance rather than punishing.¹⁶¹ Though *ubuntu* might be used to promote an inclusive nationalist ideology, *ubuntu* itself glorifies an imagined past.¹⁶²

The TRC's emphasis on reconciliation may have even been counter-productive.¹⁶³ As the TRC took its course, it became increasingly clear that reconciliation could not simply come through a Commission. With the understanding that full reconciliation could not be achieved in such a short time, Committee Chair Desmond Tutu even began to change his position, arguing that the more reasonable goal for the TRC was to promote reconciliation rather than fully achieve it.¹⁶⁴

The Cradock Four hearings exemplify the complexity of the South African Truth and Reconciliation Commission as it looked to balance many objectives. The TRC was, among other things, about bringing reconciliation, uncovering the truth, recognizing and healing victims, and fostering equality. The TRC stands alone among truth commissions in its attempts to bring reconciliation. Reconciliation was an aim of the TRC, but the transcripts of the Cradock Four case show that full reconciliation was ultimately not achieved.¹⁶⁵ As a test case, the Cradock Four hearings show the limits for a truth commission to achieve reconciliation through the means of restorative justice. Though a Commission can encourage restorative justice on numerous fronts, the divergent victim opinions about reconciliation emphasize that the decision to forgive can only be personal.

161. Minow, *supra* note 76, at 341.

162. Christoph Marx, *Ubu and Ubuntu: On the Dialectics of Apartheid and Nation-Building*, in 29 *POLITIKON* 49, 49-69 (2002).

163. HAYNER, *UNSPEAKABLE TRUTHS*, *supra* note 15, at 156 (noting that A Market Research Africa poll revealed that two-thirds of South Africans felt that the truth commission revelations had made South Africans "angrier" and had "led to a deterioration in relations between races.").

164. *Id.*

165. In fact, later news stories after the TRC depict the Cradock Four widows as holding out hope for retributive justice in the form of prosecution. For example, in 2002, Nomonde Calata told one American reporter, "We are still waiting for the perpetrators to be judged for what they did." In 2009, Calata re-iterated those remarks, noting, "If these people get prosecuted and found guilty for what they did, that is the one thing that will set me free . . . I have learned that when people have wronged you, it's something that hurts you so much you long that justice must punish those people." Similarly, in the 2009 article, Sindiswa Mkhonto stated, "We have no husbands, no nothing. I can't forgive." See Karin Brulliard, *Apartheid's Intractable Legacy*, *WASH. POST.*, (Feb. 15, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/14/AR2009021400537.html>; Andrew Maykuth, *For S. African Widows, Truth Without Justice: They Still Wait for Reparations—While the Killers Walk Free*, *PHILADELPHIA. INQUIRER*, June 13, 2002, at A15.

