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LEARNING FROM SOUTH AFRICA: THE TRC, THE ICC AND THE FUTURE OF ACCOUNTABILITY

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South Africa's Truth and Reconciliation Commission ("TRC") has drawn considerable international attention as the first comprehensive non-prosecutorial approach to past human rights abuses that maintained the principle of accountability. This paper will make the argument that for both practical and normative reasons, mechanisms like the TRC that provide accountability but fall short of formal prosecutions should be not only respected but supported by the international legal community.

INTRODUCTION

Over the last ten or so years, there has been a great deal of attention paid to the topic of countries in transition dealing with past human rights abuses. As time has passed and more and more countries have been making the transition from totalitarian rule to democratic dispensation, the scope of the literature on the topic has broadened from a strict call for punishment and prosecutions to explorations of other, less rigid, and more creative forms of accountability. South Africa's Truth and Reconciliation Commission ("TRC") drew considerable international attention as it was, in the eyes of many, the first comprehensive non-prosecutorial approach to past human rights abuses that maintained the principle of accountability (Dugard 1998). This paper will make the argument that for both practical and normative reasons, mechanisms like the TRC that provide accountability but fall short of formal prosecutions ought to be not only respected but supported by the international legal community. Specifi-

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cally the paper argues that such mechanisms be recognized by the future International Criminal Court ("ICC"), and thereby the international human rights community at large, under the complementarity provision of the Rome Statute, if those mechanisms meet certain criteria that will be set out in the paper.

The model mechanism for accountability in this paper will be the South African TRC. While many South Africans who worked on and with the Commission are quick to say that the TRC should not be seen as a blueprint to be used by other countries in transition, as it was contextual and distinctly South African, there are, nonetheless, valuable lessons of wider application to be taken from the South African experience and experiment.

The structure of the paper is as follows: Part I will rather briefly address the ever-perplexing question: is there an international legal duty to prosecute human rights abuses? Part II will examine some of the practical limitations countries in transition often face in trying to pursue a program of prosecutions for past human rights abuses. Part III will discuss South Africa's transition and the creation of the TRC. Part IV will evaluate the TRC, noting criticism it has received. Part V will turn to the proposed ICC and its treatment of amnesties and other accountability mechanisms that are not prosecutions. Part VI will draw conclusions from the South African experience and posit some guidelines for evaluating accountability mechanisms in the future.

International Law Obligations – A Duty to Prosecute?

Whether countries in transition have a duty to prosecute for past human rights abuses is the subject of a vast amount of debate and literature. Some, like many human rights organizations including Amnesty International and Human Rights Watch, argue that states have an affirmative duty to bring past perpetrators to trial and that amnesties which have the effect of hindering accountability before the law are unacceptable (News from Africa Watch 1992; Kritz 1995; Amnesty International). Others, like M. Cherif Bassiouni, argue that there exists a duty to prosecute for certain human rights crimes which have risen to the level *jus cogens*, including genocide, torture and crimes against humanity (Bassiouni 1998; Orentlichter 1991).[2] Most, however, agree that, with the exception of a handful of treaty-based obligations to prosecute, there is no hard and fast legal *duty* to prosecute for past human rights abuses in international law. Some interpret existing law to include *permission* to prosecute (Scharf

1996; Dugard 1998), some an *urging* to prosecute (Ratner 1999) and others read the current law to include a duty to do *something* about past human rights violations[3] (Simpson 1994; Hart 1998a).

Treaty Law

Currently there are seven conventional law instruments which explicitly place a duty on contracting parties to prosecute for human rights abuses,[4] including: the 1930 Forced Labor Convention;[5] the 1948 Genocide Convention;[6] the 1949 Geneva Conventions and Protocols I and II;[7] the 1956 Slavery Convention;[8] the 1973 Apartheid Convention;[9] the 1984 Torture Convention;[10] and the 1994 OAS Convention on Disappearances.[11] Article 3 and Protocol II of the Geneva Conventions extend the purview of the Geneva Conventions to non-international armed conflicts. The applicability of the Geneva Conventions, however, may be limited in that the violence and fighting incurred to effect the transition may not rise to the requisite threshold of 'armed conflict,' as is arguably the case in South Africa (Dugard 1998). The applicability of all of these treaties is even further limited by the fact that many outgoing authoritarian regimes, like the apartheid government in South Africa, were not signatories to any of these treaties.[12]

Other conventional law instruments often examined when trying to assess whether there is an international legal duty to prosecute for human rights abuses include the International Covenant on Civil and Political Rights,[13] the European Convention for the Protection of Human Rights and Fundamental Freedoms[14] and the American Convention on Human Rights.[15] None of these three documents expressly imposes on signatories a duty to prosecute for human rights violations; authoritative interpretation, including tribunal decisions, of all three documents, however, has suggested that a duty to prosecute is implicit in the promulgation and adoption of these stated rights (Orentlicher 1999; Shabacker 1999). What good is a right, after all, if violation of that right is neither punished nor deterred? Again, however, these instruments are useful only to the extent that the states dealing with the past human rights abuses were signatories. And again, most outgoing authoritarian regimes, the apartheid government included, refused to sign these instruments as well.

Customary Law

Customary international law, too, seems to fall short of requiring states to prosecute for gross human rights abuses (Ratner 1999). Customary international law is traditionally identified by uniform and consistent state

practice accompanied by *opinio juris*, the sense that the practice is obligatory and required by law. A look at the practice of countries in transition in dealing with past human rights abuses reveals that states' responses vary widely (Scharf 1996). Some states have passed blanket amnesties, obviating the possibility of prosecutions altogether; other states have combined prosecutions and amnesties; some states have simply chosen not to prosecute; other states have instituted lustration programs, removing perpetrators from public office; yet other states *have* prosecuted perpetrators of gross human rights violations. Given this wide variety of responses, it cannot be said that state practice is either uniform or consistent enough to support the proposition that customary international law requires prosecution for human rights abuses (Dugard 1998). Even Bassiouni, one of the biggest proponents of state duty to punish criminally for human rights abuses, admits that inconsistent state practice ultimately renders it unclear "whether the inclusion of a crime in the category of *jus cogens* creates rights or...non-derogable duties *erga omnes*." (Bassiouni 1998) And if countries in transition are not prosecuting for past human rights abuses, then it seems clear that they do not view prosecution as obligatory or required by law, despite what they may 'say' to the contrary.[16]

If there is no customary international legal duty to prosecute for past human rights abuses, what does international law require of countries in transition? Steven Ratner argues, quite convincingly, that while state practice does not support a duty to prosecute, it may support a duty of "generalized accountability." (Ratner 1999) He points out that by and large, countries in transition are beginning to do *at least* two things: 1) attempting to reveal the truth of what happened by refusing to bury the crimes of the past and 2) imposing some form of sanction on the perpetrators of the crimes. Ratner observes that this state practice seems to be emerging in the absence of a clear expression of international law and yet states seem to be acting under a sense of normative obligation. This may suggest that the tireless efforts by the international legal community, particularly the international human rights community, to work towards ending impunity for human rights abuses are beginning to pay off. That is, more and more states in transition are recognizing and attempting to adhere to principles of accountability. The question that remains is, is this recognition and adherence to *general* principles of accountability enough? Or should these developments be viewed as building blocks toward the norm of *criminal* accountability?

Limitations to the Pursuit of Criminal Justice

Realpolitik

For a country in transition, often far more pressing than distant and largely unenforceable international law norms and obligations are the political realities and pressures on the ground. In South Africa, for example, the concession by the resistance movement, led by the African National Congress ("ANC") to grant some form of amnesty to the National Party ("NP") and its operatives was an essential part of maintaining a peaceful negotiated settlement.

Following President F.W. De Klerk's historic 1990 announcement that he would free Nelson Mandela, permit the existence of resistance parties, and begin dismantling apartheid, representatives from the NP and the resistance began a series of public talks and meetings aimed at effecting a peaceful transition from apartheid to democratic dispensation (Sparks 1994 Waldmeir 1997). Plagued by disagreement and escalating violence in the townships, the talks went on four years before the final plan for the transition was realized.

One of the main points of contention between the two sides was what to do about the human rights abuses of the past (van Zyl and Simpson [unpublished]). The NP solidly refused to relinquish power without a promise of amnesty for itself and its operatives. The NP sought a blanket amnesty, like the amnesties granted in Latin America, and its position was strengthened by its earlier concession to release anti-apartheid political prisoners and to indemnify exiles. The ANC flatly rejected a blanket amnesty for the NP, arguing that a self-amnesty promulgated by an outgoing regime was not only morally unjust but arguably legally unenforceable (Ratner 1999).[17]

This standoff, which came to light in the final stages of the 1993 Kempton Park talks, posed a huge threat to the continuation and success of the negotiated settlement. The ANC knew that if it were to reject the amnesty altogether it would have to return to a political campaign of mass mobilization, civil disobedience and possibly even armed struggle (van Zyl and Simpson). Medaard Rwelimira, now the Deputy to the Minister of Justice in South Africa and a participant for the ANC in the negotiated settlement, said of the decision to grant a form of amnesty:

> [f]rom a pragmatic political position, there was no choice at the time of the settlement and it was part of the package that one had to make in order to come to a peaceful transition... [T]he choice [was]....whether to have people continue dying, continued violence or whether...[to]...say fine, we

are going to make that kind of quantum leap on the understanding that this will generate a better society. (Hart 1998b, Sachs)

The State of the Legal System and the Totalitarian Legacy

Another real limitation on pursuing a campaign of prosecutions in a transitional society is the state of the legal system. Depending on the level of violence prior to and during the transition, it is a real possibility that the judiciary may be depleted. In Rwanda for example, almost 80 percent of the judges were killed during the civil war (van Zyl 1999). But even if the judiciary is still intact, many times the legal training and experiences of the judges and prosecutors were under the outgoing regime and their allegiances may still lie with that regime (Nicholson). As Paul van Zyl, the former Executive Secretary of the TRC notes, criminal justice systems that have functioned under totalitarian and authoritarian systems for extended periods of time develop modes and practices that are odds with democratic governance (van Zyl 1999). In South Africa, confessions were frequently beaten out of people by the police and state prosecutors could very often count on corrupt and partisan judges to render judgments in their favor, even when the evidence was less than compelling (van Zyl 1999). A change in political ideology does not necessarily mean that the rest of the country is ready for all that democracy entails (Simpson 1994). Retraining the old and training the new require money and time – both of which are often scarce in transitional societies.

Costs of Trials

Trials are also, as van Zyl points out, time consuming and expensive. The trial of Eugene de Kock, one of the four or five major cases of political crime actually tried in South Africa, ran for 18 months, required 120 state witnesses and cost R12 million (roughly $2.3 million) just in legal fees for the defense (Hart 1998c). In addition to being time and resource intensive, trials of past state operatives often require the new government to foot the legal bills for the defense. For a new government in a transitional society such expenses compete with other pressing concerns like providing housing, bettering education and, many times, ending lingering violence and crime (Hart 1998c). By allocating resources to prosecution of past crimes, a new government runs the risk of losing the battle on current crime and losing the support of the citizens who see their immediate needs not being met.

Procedural Limitations: Lack of Evidence, Due Process and Statute of Limitations

Yet another limitation on undertaking a program of prosecutions is lack of evidence. The rigors of proof needed to put someone in jail would preclude many victims from finding justice in the courts, since often times the perpetrators of human rights abuses are governmental operatives trained in concealing evidence (Neier 1999). For many of the victims and survivors in South Africa, the evidence necessary to carry a case through to prosecution has been long since destroyed, as one of the hallmarks of the South African security forces was its ability to cover its tracks.

Even if the evidence were available, a campaign of prosecutions raises due process concerns in situations where the abuses were widespread. In Rwanda, for example, more than a hundred thousand Hutus have been detained in prison for several years awaiting trial.[18] The more extensive the abuses, the greater the risk of due process violations. Statute of limitations issues may also be a problem. In South Africa, some of the crimes took place more than 30 years ago (Hart, 1998d).

SOUTH AFRICA'S EXPERIENCE AND EXPERIMENT

The Negotiated Transition

Faced with the political and logistical realities discussed above, the ANC realized that it had to grant some form of amnesty to the NP if the transition were to continue peacefully. Pressure to end the negotiations and finalize the Interim Constitution was mounting, unrest and violence in the country were rising, and the pre-set election date was fast approaching (Sparks 1994). Without the promise of indemnity, the South African security forces refused to protect the election and there were rumors of a right-wing extremist terrorist bombing campaign to disrupt the election (Sachs). The security forces had worked with the ANC in defending and protecting the negotiations and the ANC knew that the elections could not proceed without their help (Sachs).[19] The impasse which had arisen over the issue of amnesty simply had to be resolved. The last-minute compromise between the two sides took the form of a Post-amble to the Interim Constitution which read:

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

> The pursuit of national unity, the well-being of all South African Citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> ....In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, 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 is passed.... (South African Constitution).

For the NP, the constitutional assurance of amnesty removed the threat that once power was handed over NP members and operatives would be vulnerable to prosecution and imprisonment (van Zyl and Simpson).[20] For the ANC, the agreement gave the new government the power to construct the amnesty legislation and therefore confirmed the principle that only a democratically elected state had the moral right to forgive the past regime of its crimes (van Zyl and Simpson).

The Establishment of the Commission

In late April 1994 South Africans voted in the country's first democratic elections. The ANC won 62% of the vote and Nelson Mandela was sworn in as President on May 10 (Green). One of the first duties of the newly elected government was to construct a plan for the constitutionally-mandated amnesty.

The new Minister of Justice, Dullah Omar, was opposed to a blanket amnesty for those who had committed human rights abuses (van Zyl and Simpson). Omar, along with a number of human rights organizations and non-governmental organizations ("NGOs") argued that to grant an unconditional amnesty would be to cater to the perpetrators (van Zyl and Simpson). In order for justice and the moral order to be restored in South Africa, the needs of the victims had to come first (van Zyl and Simpson). First and foremost, it was argued, the victims and the families of the victims needed to know the truth (Simpson 1994).[21] During the apartheid era, the crimes committed by the government were often covered up[22] and the reports of human rights abuses were dismissed by the government as 'lies' and communist propaganda (Hart, 1998e). Reconciliation, they argued, could only happen if the truth of South Africa's past was known to all. The indemnity legislation proposed by the NP that granted

immunity and buried the truth, they continued, had "grave implications for the longer terms prospects of national reconciliation" (Simpson 1994). The taking away of both the possibility of legal redress and public acknowledgement of wrongdoing would inevitably lead to widespread resentment which would probably manifest itself in private retribution, vigilantism and increased violence (Simpson 1994).

The drafters of the amnesty legislation fused these two ideas, constitutionally mandated amnesty for perpetrators on the one hand and truth for victims on the other. The result was an unprecedented mechanism which conditioned amnesty on disclosure of the truth. In November of 1994, Parliament passed the Promotion of National Unity and Reconciliation Act ("The Act") (Truth and Reconciliation Committee Report). The Act established the Truth and Reconciliation Commission which was to:

1. Establish as complete a picture as possible of the causes, nature and extent of gross human rights violations which took place between 1 March 1960 and 5 December 1994

2. Grant amnesty to persons who fully disclose their crimes provided that the crimes had a political objective as defined in the Act

3. Establish the fate or whereabouts of victims of gross human rights violations and help to restore the dignity and civil rights of victims and survivors by allowing them to testify as to their experiences and recommend reparative and rehabilitative measures for them

4. Write a report which publicises the Commission's findings and provide a set of recommendations aimed to prevent the future violation of human rights in the country (van Zyl and Simpson).

Following the establishment of the commission, President Mandela appointed Archbishop Desmond Tutu as the Chairperson of the Commission (Lansing and King 1998). Submissions and nominations for the remaining positions were taken from the public, the candidates were reviewed and the President subsequently chose the 18 commissioners (Lansing and King 1998). The Commission itself was divided into three committees: the Committee on Human Rights Violations, the Amnesty Committee and the Reparation and Rehabilitation Committee (van Zyl and Simpson). The Human Rights Committee was charged with holding hearings around the country during which survivors and the families of

victims of human rights violations would be able to tell the stories of what had happened to them (van Zyl and Simpson). The Amnesty Committee was to be responsible for processing amnesty applications, holding hearings for the more egregious crimes and deciding whether the crimes committed were political in nature and therefore eligible for amnesty (van Zyl and Simpson). Finally, the Reparations Committee was to gather evidence about individual victims and make recommendations to the government about payment of reparation to the victims. The Reparations Committee was also to devise support strategies for victims and witnesses before, during and after testifying at the hearings (van Zyl and Simpson).

Evaluation of the TRC

Thus, say supporters, began South Africa's grand experiment, its creative response to the legal, moral and political demands of the negotiated transition. By conditioning amnesty on full disclosure, South Africa struck a delicate balance between the need to account for political realities and the need to combat impunity. The goals of the TRC were to uncover the truth and promote reconciliation, while adhering to the principle of accountability.[23] The following sections will consider whether these goals were met by looking first at the TRC and truth discovery; second at the TRC and reconciliation; and finally at the TRC and accountability.

Truth

For a society in transition, uncovering and publicizing the truth about past human rights abuses is arguably one of the most important steps toward building a future based on respect for human rights and rule of law (Simpson 1994). And a Truth Commission is often far better at getting at the truth than is a program of prosecutions. Even though the purpose of a trial is to get at the truth, that truth, as South African Constitutional Court Justice Albie Sachs points out, is usually a limited one. "The details are very narrowed down to the guilt of the individuals and are detached from the whole setting," Sachs notes. "It is very much personal conduct [and] misconduct and not the general story." (Hart 1998e) And uncovering the 'general story' about what happened during the time of violence is a very important part of a successful transition. Again Justice Sachs:

> I think [uncovering the truth] is important for the stability of any human rights project in a country....[In South Africa now] at least we have a common narrative for the country. We do not have a white story and a black story, an old regime story and a new, liberated story of what happened. We have a common tale with multiple open-ended aspects and holes and gaps

> and uncertainties. But at least it is a moral tale and the element of denial just does not exist anymore. No one can basically deny what happened. Just imagine trying to build a new country with common values, moral values without that shared story and tale of what happened—you just cannot have it. It lives into the future, it diminishes people, it creates tensions, it is a source of future mobilization and to me that is another huge plus of the TRC process. For me, it is paradoxical that ordinary law cases produce so little in terms of useful information for the society, whereas the TRC process is producing so much (Hart 1998e).

But there are some who think that perhaps there has been too much truth. Many in South Africa have recalled the old Zulu proverb which says that "all truth is bitter" (Boraine 1998). They question whether the telling of painful stories, the remembering of past pain and re-opening of old wounds isn't hindering, rather than helping, reconciliation (Boraine, 1998). Brandon Hamber, a psychologist at the Centre for the Study of Violence and Reconciliation ("CSVR") in Johannesburg thinks that it is much too simplistic to assume that truth will lead to reconciliation (Hamber 1998). Often, discovering the truth leads victims and survivors to want formal, criminal justice. But in many cases, they never would have learned the truth if they had not sacrificed their rights to formal justice.

In addition to claims that too much truth can be damaging, there are criticisms that the TRC process skewed and compromised the truth. Dr. Mahmood Mamdani, formerly of the Centre for African Studies at the University of Cape Town, notes that injustice during apartheid took many forms (Mamdani 1998). By focusing only on violent political crime, Mamdani argues, the TRC has stifled other truth (Mamdani 1998). Mamdani points out that during apartheid, while there were victims and perpetrators, there were also beneficiaries of the apartheid system (Mamdani 1998). These were people who, while not actively engaging in the oppression, were doing nothing to end it and were enjoying the financial fruits of the oppressive system, including cheap labor and inflated incomes (Mamdani 1998). The TRC process made no effort to hold those people accountable; it did not ask them to take responsibility for their part in the injustice (Mamdani 1998).[24] In fact, what the TRC has done, says Mamdani, is to isolate those people even more from the process of dealing with the past. When they watched coverage of the amnesty hearings on TV and saw the security forces admitting to and describing brutal acts of torture and murder, they thought to themselves, "well I did nothing like that." Thus by focusing on the horribles, the TRC allowed many who are

guilty in smaller ways to forget their part in the system and feel as if they have no reason to account. For Mamdani, until the non-violent, structural truth is exposed, the truth-telling is unfinished (Mamdani 1998).

Finally there are complaints that portions of the truth are still unknown. Some victims have said that half-truths and even lies were told during the amnesty hearings (Ntsebeza 1998). And some truth simply never came out. For victims who still do not know what happened to their loved ones, to see the multitude of others finally uncovering the truth is painfully bittersweet.

Reconciliation

And what of reconciliation? There is a great deal of disagreement in South Africa as to whether the TRC has met its goal of reconciliation. There are a handful of inspiring stories in which perpetrators and victims met face to face through the process and genuine apologies were offered and accepted. There are also many victims for whom telling their stories before the Commission was cathartic and therapeutic (Walaza 1998).

But there are many in South Africa who attack the TRC process for falling short of promoting reconciliation. And those attacks are coming from all sides. There are members of the NP who criticize the Commission as being ANC-biased, calling it a witch-hunt (1 Truth and Reconciliation Commission). There are victims who think that the process catered to the perpetrators (Hart 1998f; Hart 1998g). Many members of the mental health community are extremely critical of the TRC for not providing mental health services to victims and perpetrators both before and after testifying (Hart 1998h). Without proper psychological help, people cannot deal with the past and therefore cannot move forward (Hart 1998h). Others are critical of the nominal reparations scheme, arguing that without meaningful compensation for harms done, the idea of reconciliation is a joke.[25] Human rights organizations are also critical of the TRC's prospects for effecting reconciliation, arguing amnesty compromises reconciliation in that it does not send a clear message that future indiscretions will not be tolerated (Human Right Watch; Amnesty International). Without real punishment, they argue, the credibility and independence of the new government is undermined. And still others agree with Hannah Arendt, that it is only possible to forgive those whom one can punish (Hamber 1998).

As mentioned above, there is an argument to be made that too much truth may lead to animosity and that animosity hinders reconciliation. Yet, in addition to animosity, too much truth can also lead to apathy.

Perhaps the most startling and disheartening aspect of the TRC process has been witnessing the apathy and even resentment of a large part of the white community toward the TRC. Many 'mainstream white South Africans,' that is, mostly middle-upper class whites who were neither members of the NP nor actively involved in the transition—and are the lawyers, doctors and business people of South Africa—think that the Commission was a huge waste of time and money.[26] They call it "the Kleenex commission" for all the tears that were shed during the human rights hearings. They grew tired of seeing reports from the Commission on their nightly news and would not even bother to turn it on. In their opinion, the TRC was pointless, bothersome and dragged on much too long. This apathy has real implications for the prospects of reconciliation in South Africa. Such apathy undermines one of the main goals of the TRC: to let the truth be known, so that the country can have a common past on which to build its future. If parts of the society close themselves off to the truth, reconciliation will certainly be more difficult.

The supporters of the TRC counter this barrage of criticism by saying that reconciliation is a long term project and that the TRC should be seen as one step along the way (Nzimande 1998). At the core of reconciliation, they argue, is transformation: class, race, and gender inequalities must be eradicated (Nzimande 1998). True reconciliation will take time and the TRC, they argue, should be seen as an important beginning to the healing of the nation.

Accountability

Traditionally, the word 'accountability' has been used in conjunction with judicial prosecutions (Orentlicher 1999, Roht-Arriaza 1990). To try someone for his crime was to hold him 'accountable' for that crime. South Africa's use of accountability was similar in that perpetrators were forced to take responsibility publicly for their actions. The difference, however, is that once they did that, they would not face judicial punishment. Albie Sachs argues that the kind of accountability the Truth Commission engenders is just as, if not more, effective than accountability by prosecutions. He says:

> The effect of publicly acknowledging what you did in the community can be quite profound. It can in fact be far more profound than the shame of going to prison because in going to prison it is the imprisonment that is the shame. It is not the deed so much, rather it is the humiliation from the way in which society segregates you and castigates you as a criminal. The shame that comes from having to look your neighbours in the eye, your children, your family—

'daddy did you do this?' 'my husband did you do that?'—to my mind is quite profound (Hart 1998e)

John Dugard, a professor of law at the University of the Witwatersrand in Johannesburg and the University of Leiden in the Netherlands, echoes Sachs' sentiments. He thinks that accountability is what international law demands of countries in transition dealing with past human rights abuses and that the TRC provides a mechanism which ensures that wrongdoers are held to account, and that crimes of the past not buried (Hart 1998b). Also, stress supporters of the process, those who did not apply for amnesty, who did not take advantage of the historically generous offer, can, and hopefully will, be tried in a court of law.

Not everyone in South Africa is convinced, however, that the Truth and Reconciliation Commission adequately holds people accountable for their crimes. In May of 1996, the families of Steven Biko, Dr. and Mrs. Fabian Ribeiro, and Griffiths and Victoria Mxenge, all five killed by the security forces, challenged the legitimacy of the Truth Commission before the Constitutional Court (Azapo v. President). The families alleged that the granting of amnesty to perpetrators was unconstitutional because it contravened the constitutionally guaranteed rights of victims of crimes to seek criminal and civil redress in the courts (Azapo v. President). The applicants also alleged that the granting of amnesty for gross human rights violations was contrary to international law (Azapo v. President). The Constitutional Court decided in a unanimous judgment that the TRC was both constitutional and consistent with international legal norms (Azapo v. President).

Despite the high court's ruling, the families of the slain resistance leaders are still not satisfied with the process. Churchill Mhleli Mxenge, the brother of Griffiths Mxenge and one of the applicants in the case, calls the Truth Commission a "joke," and stresses the need for "true justice," justice through the courts (Hart 1998h). In the Mxenge case, the family knows that it was Dirk Coetzee who killed Griffiths and they have enough evidence to mount solid criminal and civil cases against him (Hart 1998h). The TRC has taken away their power to see Coetzee at the mercy of the law. Mxenge says that he would not care if Coetzee was granted amnesty *after* a judicial process, because "justice would have taken its course" (Hart 1998h).[27] With the Truth Commission, however, Mxenge feels as if he and other victims like him who knew the truth are left with nothing (Hart 1998h).

Others echo Mxenge's frustration with the TRC process and lack of accountability. Tlhoki Mofokeng, the Community Services Coordinator at the CSVR, who works with the victims of gross human rights violations, thinks that while the shame that results from having to admit publicly to a crime is meaningful, it does not do enough (Hart 1998f). He says that the perpetrators of the crimes never thought that they would have to account for their actions; they thought that they were "untouchable" (Hart 1998f). Forcing them to admit to what they have done does, in his words, "bring them down to earth" but it does not offer punishment that is in any way comparable to the crimes they committed (Hart 1998f).

Assessment

In the midst of all of these criticisms, it is important not to forget what the process can and did do. It allowed a peaceful transition to take place. It gave a voice to those who had been voiceless for many years. It exposed much truth about what went on during apartheid. It provided South Africa with what Sachs calls 'a common narrative' about the past. And it forced perpetrators to account publicly for their crimes, and at least *some* of them felt shame and humiliation as they admitted what they had done before the country and the world.

In many ways, the limitations and frustrations associated with the process are endemic to situations of transition where there have been gross human rights violations. Terrible things have taken place in the past, and yet in order for the country to move forward, compromises have to be made, corners have to be cut and some peoples' interests will be sacrificed. As van Zyl says of the process, echoing the famous Churchill quote, "I think that the Truth Commission is probably the worst possible way to come to terms with the past, except all others" (Hart 1998d).

ICC and Amnesty

This paper now turns to the International Criminal Court and how mechanisms like the TRC which offer conditioned or 'accountable' amnesty will be handled by the Court.[28] Will they be disregarded by the Court, seen to be exactly the type of messy political compromises that the ICC is striving to end? Or will they be evaluated and examined by the Court under the principle of complementarity? This discussion assumes, of course, that the Court will come to fruition, though there are some who argue that it may and even should not come into existence, at least in its current form.[29]

In its current form, the court has jurisdiction over perpetrators who are

nationals of signing nations or who commit an ICC defined crime in the jurisdiction of a signing nation. It seems clear, however, that the court's focus will be on the "big fish"—those who have committed the most egregious violations, those who ordered and orchestrated massive programs of human rights violations. Thus, in some ways, domestic solutions like the TRC will not be affected by the Court at all. In fact, a lot of the literature on the future of accountability envisions a world in which truth commissions and other non-criminal accountability mechanisms, like civil suits for damages and lustration programs, will complement the work of the ICC, casting a much wider net of accountability. This vision is certainly the one held by South Africans like Richard Goldstone, Constitutional Court Justice and former Chief Prosecutor for the ICTY, South African Justice Minister Dullah Omar, and Alex Boraine, the former deputy Chairperson of the TRC, all of whom have publicly endorsed and praised the ICC, all the while supporting the TRC (Goldstone 1997; Omar; Boraine 1998).

Yet it is not entirely clear that the relationship between the ICC and non-prosecutorial mechanisms like the TRC is quite as harmonious as it appears. First, the messages of the ICC and TRC stand in sharp contrast. The unequivocal message of the ICC, as relayed in the Preamble and repeated throughout the Rome Statute of the International Criminal Court ("Rome Statute") is one of zero tolerance for impunity, a stance implemented through punishment and prosecution. The TRC, on the other hand, sends a message of creative compromise and a balancing of interests. These conflicting messages lead to a second concern: what will and should the external pressures felt by leaders of totalitarian regimes be? If the message is the "ICC message" of no impunity, and the leaders of an oppressive, totalitarian regime like the former apartheid government know that if they, the "big fish," lose power that they will potentially be prosecuted, either domestically or by the ICC, what incentive do they have to hand over power peacefully (Scharf 1999)? If on the other hand, the leaders know that whatever negotiations they undertake domestically to hand over power will be respected by the ICC, as long as they agree to some degree of accountability, and that they will not face international prosecution, they may have incentive to stop the fighting, end the human rights abuses and allow a peaceful transition. It is, then, important to look at the Rome Statute and to see what the language indicates about non-prosecutorial accountability mechanisms and complementarity.

The Language of the Rome Statute

The Preamble to the Rome Statute takes a strong stance supporting prosecution for human rights abuses, stating that:

> [T]he most serious crimes of concern to the international community as a whole *must not go unpunished* and that their *effective prosecution must be ensured* by taking measures at the national level and by enhancing international cooperation,
>
> ...[State Parties must]...put *an end to impunity* for the perpetrators of these crimes and thus...contribute to the prevention of such crimes,
>
> [I]t is the duty of every state *to exercise criminal jurisdiction* over those who have committed international crimes.... (Rome Statute of the International Criminal Court)

Thus the language of the Preamble, against which the articles of the Statute are to be interpreted (Vienna Convention), seems to indicate that domestic amnesties and other accountability mechanisms that fall short of formal prosecutions will not be respected by the Court.

The section of the Statute most relevant to the question of whether domestic amnesties would be respected by the ICC is Articles 17.[30] Article 17 deals with the admissibility of cases to the Court and the principle of complementarity. This principle states that the ICC will exercise criminal jurisdiction only when a state has failed to do so. According to Article 17, a case will be deemed inadmissible to the Court if:

> (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute:
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint.... (Rome Statute)

Inability is explained in Article 17 to mean situations in which the criminal justice system of the State has wholly or partially collapsed,

leaving the State unable to obtain the accused, the evidence or testimony of witnesses or is otherwise unable to carry out the proceedings (Rome Statute). Unwillingness is defined to include bogus proceedings undertaken to shield the person from criminal accountability, undue delay in initiation of proceedings and proceedings that are not conducted impartially or in a manner consistent with "an intent to bring the person to justice" (Rome Statute).

The language of this article makes clear that domestic *prosecutions* will be respected by the ICC, but it is not so clear as to domestic amnesties like South Africa's. The article prevents the ICC from obtaining jurisdiction while the state is conducting an ongoing investigation or prosecution of the accused. Perhaps an argument could be made that an amnesty mechanism, particularly one like the TRC, constitutes an "investigation' (Scharf 1999). But the context in which the word is used suggests that 'investigation' refers to a pre-prosecution inquiry and not a prosecution alternative. Even if an amnesty mechanism could fit under a wide conception of investigation, it could still be debatable if the mechanism was conducted in a manner consistent with "an intent to bring the person to justice." That is, depending on the definition of "justice," an amnesty mechanism could be invalidated as the state's unwillingness to prosecute. If "justice" is interpreted to mean "criminal justice" only, then non-prosecutorial accountability mechanisms would not qualify under for complementarity under the Statute. If, however, a broader definition of justice were considered, perhaps mechanisms that sought to bring about social justice or restorative justice, might qualify under the article.

Jurisdiction and Prosecutorial Discretion

Article 13 of the Statute says that a case may be referred to the Court by a State Party or the Security Council or the Prosecutor may initiate an investigation *propio motu* (Rome Statute). Article 16 of the Statute gives the Security Council the power to adopt resolutions requesting a 12 month renewable deferral of investigation, prosecution or ongoing proceedings (Rome Statute). Under Article 53, the Prosecutor has discretion to decline to initiate a prosecution or investigation upon a state party's request if the Prosecutor does not believe that the "interests of justice" would be served (Rome Statute). Such a decision is, however, reviewable by the Pre-Trial Chamber of the Court (Rome Statute).

Thus there are several layers of evaluation and discretion built into the process by which cases are admitted to the Court's jurisdiction. An amnesty mechanism like the TRC could be evaluated and protected by the

Prosecutor and, indefinitely, by the Security Council. The final word, however, seems to rest with the Pre-Trial Chamber and if it felt that there was an international legal duty to bring the perpetrator to criminal justice, there is nothing in the *language* of the Statute or anything the Prosecutor could do to stop the trial from proceeding. Of course, in reality, the Security Council's deferral and the prosecutor's ability to control the intensity of the investigation, make such a situation unlikely.

Plenipotentiaries' Intent: Ambiguity

At the August 1997 preparatory conference, the United States delegation sent around a 'nonpaper' arguing that some amnesties ought to be respected by the proposed court in the interest of peaceful transition to democracy and national reconciliation (Scharf 1999). The paper was met with criticism, particularly from the human rights NGOs present (Scharf 1999). Mahnoush Arsanjani notes that the question of how to address amnesties and truth commissions was never seriously discussed because of pressure from human rights organizations both at the preparatory conferences and at Rome (Arsanjani 1999). Apparently the issue was never fully resolved and the provisions as written are intended to be ambiguous, allowing the prosecutor discretion as to whether or not to extend complementarity to domestic amnesties (Scharf 1999).

In South Africa prior to the Rome Conference, those familiar with the TRC and the proposed ICC were under the impression that the ICC would permit some flexibility in the evaluation of amnesties (Hart 1998d; Hart 1998c). The issue had come up in preparatory conferences, and the South African delegates and the human rights organizations debated what should be done with domestic amnesties (Hart 1998c). The South Africans, under mandate from the government and in an uneasy alliance with several Latin American countries, argued that the ICC should not be able automatically to override domestically negotiated amnesties (Hart 1998c). The human rights NGOs responded that such amnesties were exactly why the ICC was needed (Hart 1998c). The South Africans were quick to defend their amnesty as qualitatively different from the Latin American ones, arguing that because the TRC conditioned amnesty on public disclosure, it was consistent with the principle of accountability(Hart 1998c). Medaard Rwelamira was part of the South African delegation and said that many countries were sympathetic to the South African position but were reluctant to include amnesty language in the actual statute (Hart 1998c). Instead, said Rwelamira, it was understood, at least at the time leading up to the Rome Conference, that the prosecutor would have

discretion as to amnesties and that if an amnesty, like the South African one, was consistent with norms of accountability, it would be respected as "an investigation and decision not to prosecute" (Hart 1998c)

Assessment

Ultimately, then, it is unclear how domestic accountability mechanisms other than prosecutions will be treated by the future ICC. While the ambiguity in the language of the Rome Statute leaves room for interpretation, and while there seems to be some support for respecting mechanisms like the TRC, without specific language articulating exactly how and under what circumstances non-prosecutorial accountability mechanisms will be respected, the future of such mechanisms will remain uncertain. Verbal assurances can only go so far, and political pressures and momentum often carry the day. The issue ought to be clarified in the form of regulations or even informal guidelines to accompany the Statute before the Court comes into being. The South African experience and TRC can offer insight and guidance in shaping an amnesty exception to the ICC.

Learning from South Africa: The Future of Accountability

The international excitement generated by the TRC has caused many to speculate on the applicability and transferability of the TRC process to other countries in transition.[31] But those who worked on or with the commission caution against such thinking, noting that the TRC grew out of historical, political, social, and moral circumstances specific to South Africa (Hart 1998c; Hart 1998d; Hart 1998g). Despite these admonitions, there *are* aspects of the South African experience that can provide valuable guidance for countries in transition and for the international legal community in evaluating non-prosecutorial accountability mechanisms.

First, the mechanism should be the product of the legislature or some other deliberative body of a democratically elected government. Outgoing regimes cannot indemnify themselves from civil or criminal prosecution; only a democratically elected government has the moral and legal authority to provide amnesty.

Second, in keeping with Ratner's minimum duty of 'generalized accountability,' the mechanism should provide truth and acknowledgement. Victims and survivors of gross human rights violations ought to know the truth about the human rights abuses, including what happened, who the perpetrators were, what the motivations were, and where the still-missing bodies are. That truth ought to be published for

the country to see, so that there can be public acknowledgement of what happened in the past.

Third, the mechanism should impose some form of sanction on the perpetrators, whether it is public disclosure, civil sanctions, or removal from public office.

Fourth, the mechanism ought to provide some form of reparation to the victims of the gross human rights violations, as they have a right to compensation under international law. If the accountability mechanism is an amnesty that extinguishes their rights to civil redress, the government should ensure that the victims receive some financial compensation (Simpson 1994).

Conclusion

In the beginning of the paper, the assertion was made that, for both practical and normative reasons, accountability mechanisms like the TRC ought to be respected and even supported by the ICC and the international legal community at large. The practical reasons are those political and logistical limitations discussed in Part II. There are normative reasons, too, to support accountability mechanisms like the TRC, as long as they meet the standards outlined above. In a submission to the Justice Minister during the negotiated transition, Graeme Simpson of the CSVR in Johannesburg noted that in times of transition there is a tendency among the international legal community to maximize the responsibilities of successor regimes, regardless of political consequences (Simpson 1994). But, Simpson continues, standards that are insensitive to political realities run a very real risk of undermining international standards and domestic stability (Simpson 1994). Even beyond the problem of holding states to standards they cannot realistically meet, requiring prosecutions of countries in transition inhibits the ability of the new government to debate and decide the best approach to try to heal the country, promote democracy and inculcate respect for rule of law and human rights given the particular circumstances and needs of the country. As long as the state meets Ratner's 'generalized duty of accountability,' there ought to be flexibility and accommodation as to how the country meets that goal.

Alex Boraine, former Deputy Chairperson of the TRC, said that the Commission should be seen as "a guide to a serious attempt by the people of South Africa to deal with their past" (Boraine 1998). Dr. Boraine's statement captures what is perhaps the most valuable lesson to be taken from the South African experience. The TRC process has provided and encouraged a level and intensity of debate about South Africa's past and

the best way to move forward that simply would not have occurred had South Africa been under a strict duty to prosecute. Rather, the South African government set in motion a process that covered a wide breadth of topics beyond criminal liability, including truth, acknowledgement, shame, humiliation, forgiveness, reconciliation and reparation. The process also required the input and assistance of various sectors of society, including NGOs, the mental health community, lawyers, police, community volunteers, and victims groups. And while there has been a cacophony of complaints and criticism about the TRC, it cannot be denied that the process has facilitated meaningful dialogue and widespread participation in the forging of the new country.

NOTES

1 She would like to thank the Centre for the Study of Violence and Reconciliation in Johannesburg, South Africa for the research opportunity and, particularly, Executor Director Graeme Simpson for his help and guidance. The author also thanks Professor David A. Martin at Virginia Law for his time and help and Professor Alfred P. Rubin at the Fletcher School for his comments.

2Bassiouni's position is bolstered by the Rome Statute of the International Criminal Court, of which Bassiouni was a main proponent, which claims in the Preamble that states indeed have a duty to prosecute for gross human rights violations as included in the Statute. Rome Statute of the International Criminal Court, preamble, U.N. Doc A/Conf. 183/9, July 17, 1998.

3 Simpson cites Cachalia, arguing that governments at least have the obligation to establish the truth.

4 Note that some of the treaties call for prosecution *or* extradition.

5 June 28, 1930, as modified by the Final Articles Revision Convention of the International Labor Organization, art. 25, 39 U.N.T.S. 55, 74.

6 Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (111), 78 U.N.T.S. 227 (1948).

7 Four Geneva Conventions of Aug. 12 1949: Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 75 U.N.T.S. 28; Protocol I Additional to the Geneva Conventions of Aug 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 4, 1125 U.N.T.S. 3; Protocol II Additional to

the Geneva Conventions of Aug. 12, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

8 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, arts. 3, 6, 266 U.N.T.S. 3.

9 International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/930 (1979) *reprinted in* 13 I.L.M. 50.

10 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985,39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1984) (*entered into force*, June 26, 1987).

11 Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529 (1994).

12 While South Africa signed the Torture Convention in 1993, the government did not ratify it until late 1998. Many speculated that the government did not ratify the treaty until after the amnesty hearings were complete, so as not to contravene its mandate to prosecute for acts torture. Also, of course, the treaties are applicable to the extent to which they have led to the creation or solidification of customary international law, which is discussed in the next section.

13 International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res 2200, 21 U.N. GAOR Supp. (No. 16), 999 U.N.T.S. 171.

14 European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S 221 (*entered into force* Sept. 3, 1953).

15 American Convention on Human Rights, *adopted* Jan. 7, 1970, O.A.S. Official Records, OEA/ser.K./XVI/1.1 doc 65 rev. 1 corr. 1 (1970), *reprinted in* 9 I.L.M. 673.

16 Countries may say that a duty exists when they are not in the situation of having to enforce that duty; they may also support a duty to prosecute through the treaties they sign.

17 Pardoning oneself violates the principle of Roman law that prohibits a person from serving as his own judge: *nemo debet esse judex in propria causa.*

19 It should be noted, however, that elements within the security forces, especially in the KwaZulu region, had participated in destabilization campaigns to ferment political violence.

20 In a speech at SMU, Albie Sachs said that he heard from a friend who participated in the negotiations that the NP representatives did not understand (due to translation difficulties) that wording of the postamble allowed for a truth commission to accompany the amnesty. Sachs speculates that had they realized that, they may not have agreed to it.

21 See also NEWS FROM AFRICA WATCH, and 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 49 (1998) in which Kader Asmal is quoted, calling for the truth of the past to be known.

22 For example, see The Azanian Peoples Org. et al v. President of the Republic of South Africa et al, 1996 (4) SALR 671, § 17 (CC) <http://www.law.wits.ac.za/judgements/azapo.html>.

23 In the five interviews I conducted with people either involved in the TRC process or closely following it, all stressed that the key to TRC's success was that it provided accountability. See also Dugard 1998.

24 Though it is important to note that the TRC did hold institutional hearings in which it explored the roles played in apartheid by the media and by the business, faith, legal and health communities. See also 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (1998).

25 The amount paid to victims of gross human rights abuses is far less than originally anticipated.

26 This section is based on my observations and conversations with numerous white South Africans. Perhaps I can be accused of stereotyping; this was, however, my experience. Several people I spoke to in the sizable South African Indian population echoed these sentiments.

27 Bassiouni agrees with this idea that proper amnesty can only take place *after* a criminal trial (Bassiouni 1998).

28 The jurisdiction of the Court is not retroactive; this is a discussion of the future of accountability.

29 The U.S. delegation to the ICC is working to amend the jurisdiction of the Court. See, e.g., Alfred P. Rubin, *A Critical View of the Proposed International Criminal Court*, 23 FLETCHER F. WORLD AFF. 139 (1999).

30 Article 20 is also about complementarity but has to do with proceedings before other courts and thus is not implicated in this discussion. Article 20 of the Statute addresses the principle of *ne bis in idem* and says that no person shall be tried by the Court for conduct previously tried by another court unless the other proceeding was, again, undertaken to shield the accused from criminal responsibility or not conducted with an intent to bring the person to justice.

31 In fact, when the peace accords were signed in Northern Ireland in 1997, a group of South African delegates were flown to Belfast to discuss the possibility of a truth commission there. See Gary Grattan, *Truth Commission member to visit*, BELFAST TELEGRAPH, June 8, 1998.

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