

**THE EFFECTIVENESS OF THE SOUTH AFRICAN TRUTH AND  
RECONCILIATION COMMISSION IN THE CONTEXT OF THE FIVE PILLARS OF  
TRANSITIONAL JUSTICE**

by

**STEPHINA MODIEGI MOTLHOKI**

Submitted in accordance with the requirements

For the degree of

**MASTER OF ARTS**

in the subject of

**POLITICS**

at the

**UNIVERSITY OF SOUTH AFRICA**

**PROMOTER: DR EVERISTO BENYERA**

**SEPTEMBER 2017**

## DECLARATION

I declare that:

**THE EFFECTIVENESS OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION THROUGH THE USE OF THE FIVE PILLARS OF TRANSITIONAL JUSTICE** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

**Signature:**

**Date:**

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## **ACKNOWLEDGEMENTS**

I acknowledge the support and advice of my supervisor, Dr Everisto Benyera and the entire Department of Political Science in the College of Human Sciences at the University of South Africa. I am grateful for the time I was given to focus on my studies. I am also grateful to my sister Mrs Tsholofelo Namane who cheered me on from the beginning but is now not there to witness the end. My entire family has been a pillar of strength and I am full of praise and thanks. I extend gratitude and love to my husband and kids for the patience, support and endless love.

## **ABBREVIATIONS AND ACRONYMS**

|         |   |
|---------|---|
| ANC     | African National Congress                                       |
| AZAPO   | Azanian People's Organisation                                   |
| BEE     | Black Economic Empowerment                                      |
| CODESA  | Convention for a Democratic South Africa                        |
| GEAR    | Growth Employment And Redistribution Strategy                   |
| ICC     | International Criminal Court                                    |
| IFP     | Inkatha Freedom Party   |
| IJR     | Institute for Justice and Reconciliation                        |
| JSE     | Johannesburg Stock Exchange                                     |
| MPF     | Multiparty Negotiation Forum                                    |
| NGOs    | Non-Governmental Organisations                                  |
| NP      | National Party  |
| NPHE    | National Plan for Higher Education                              |
| NUM     | National Union of Mineworkers                                   |
| OAU     | Organisation of African Unity                                   |
| OHCHR   | Office of the United Nations High Commissioner for Human Rights |
| PanSALB | Pan South African Language Board                                |
| PNUA    | Promotion of National Unity Act                                 |
| RDP     | Reconstruction and Development Programme                        |

|         |  |
|---------|--|
| RRC     | Reparations and Reconciliation Committee           |
| SA      | South Africa                                       |
| SADC    | Southern African Development Community             |
| SANDF   | South African National Defence Forces              |
| SAPS    | South African Police Service                       |
| SATRC   | South African Truth and Reconciliation Commission  |
| TJ      | Transitional Justice                               |
| TRC     | Truth and Reconciliation Commission                |
| UN      | United Nations                                     |
| UNGA    | United Nations General Assembly                    |
| UNIBO   | University of North West                           |
| USAID   | United States Agency for International Development |
| ZANU-PF | Zimbabwe African National Union Patriotic Front    |

## ABSTRACT

This study evaluated the effectiveness of the South African Truth and Reconciliation Commission (SATRC), using the theoretical and conceptual framework of the five pillars of transitional justice. Chitsike (2012) identified the five Pillars of Transitional Justice that the study uses. For that reason, Truth-Seeking and Truth-Telling, Trials and Tribunals, Reparations, Institutional Reform and Memorialisation are the Five Pillars of Transitional Justice that this study elected to use as the conceptual and theoretical framework. The Five Pillars of Transitional Justice that were delineated by Boraine (2005) are referred to for analytical purposes in the study. Methodologically, the study assumes a qualitative posture. Literature study through content analysis that uses description and exploration is deployed to make interpretation of the used literature.

This study notes that each one of the pillars of transitional justice has its recommendations and limitations, and the pillars are much more enriched and enriching when applied in complementarity to each other rather than in isolation. The SATRC process also had its achievements and limitations, and its popularity was based on political impressions rather than concrete transitional justice achievements on the ground, in the view of the present study. Furthermore, it appears to the present study that more time is needed for much more reliable evaluations of the effectiveness of the Truth and Reconciliation Commission (TRC) to be made, some of its successes and limitations will take many years and or even decades to manifest because at the end of the day, TRCs are historical process and not events.

**Key Words:** Accountability, Forgiveness, Human Rights Violations, Justice, Redress, Restitution, Truth and Reconciliation Commission , Reparations, Institutional reform, Memorialisation, Truth-telling, Democracy, Reconciliation, Victim, Perpetrator.

## **DEDICATION**

This work is dedicated to my husband Mokgethwa Ntsoane for the love and endless support, and my kids Thato Ntsoane and Masego Ntsoane who were my greatest motivators to keep on pushing hard when I felt like giving up. I also dedicate this to my mother Wageng Motlhoki who believed in me and gave me love and support. I also dedicate this to my siblings Rosina Motlhoki and Phaki Motlhoki and grateful for their endless support and prayers. I am not forgetting my late father, Stoki Motlhoki, who always believed we must push beyond where he was able to and my late sister Tsholofelo Namane for her overwhelming support. To everyone, thank you.

## **Chapter one**

### **Introduction, background and setting of the study**

#### **1.1 Background to the study**

The achievements of the South African Truth and Reconciliation Commission (SATRC) have been taken for granted locally and abroad. This can be attributed to the perceived success and effectiveness of the Truth and Reconciliation Commissions (TRCs) as a healing and reconciliation mechanism. The exportation of the South African model of the TRC has only aided to amplify its perceived effectiveness. This is often done at the express determinant and disregard for the complexity of the processes of healing, reconciliation, and finding closure after protracted mass violence.

The optimism of finding closure, healing and peace tends to cloud the practical difficulties and obstacles that are found in societies that are emerging from violent conflict. In the South African case, Alexander (2002: 81) notes that after years of racialised apartheid and violence, the prospects of reconciliation, peace and healing were received with “understandable euphoria” in South Africa and beyond in the world that was watching the conflict for many years with interest and concern (Alexander 2011). There was an anticipated fear that the South African conflict would increase and cause disorder in the region and abroad. This could be the case, especially as South Africa had such potential as an international investment and business destination (Esterhyuse 2012).

The use of violence or the threat of the use of violence was a part of South Africa’s way of governance between 1910 and 1994 (Austrian 1978). The years between the signing of the Treaty of Vereeniging and the occurrence of the all-race elections in 1994 witnessed some of the most institutionalised racially biased violence in South Africa (Austrian 1978). This violence took a long time and hence affected generations

of South Africans. This added to the complexity of the healing and reconciliation process after the official end of apartheid in 1994. This enduring legacy of violence was accompanied by fear that was instilled in the South African population, both white and black in the apartheid era. In Sparks' narrative (2003: 124), following the threat by the then Prime Minister and later First Executive State President PW Botha that black South Africans must "beware of the tiger in the Afrikaner" the black people had reason to fear and to fear deeply. Fear was instilled and deployed as a political instrument of control and pacification. The white South African population, in the observation of Esterhyuse (2012) also had to fear loss of privilege and also violence that was threatened by the armed forces and increasingly agitated liberation movement.

For that reason, the prospect of reconciliation was to the South African population a welcome prospect and a great historical relief from the burden of fear and animosity. Healing and reconciliation were expected to take place at various levels such as between races, tribes, communities, families and even at individual level. The other dimension was international reconciliation where the new apartheid free South Africa was to be readmitted into the international community after many years of isolation. South Africa and her citizenry as a polity and an economy had much to expect from the new dispensation that was coming in with promise. Even big business that had realised that apartheid was no longer good for capitalism, looked forward to a new era where capital could unroll and business make sense in a country that had been reduced to a pariah state in the comity of the nations of the world (Esterhyuse 2012: 21).

Against that background of the promise and euphoria about peace and healing, this study is concerned with the complex and contentious issue of reconciliation in South Africa. It endeavours to assess the effectiveness of the South African model of the TRC using a theoretical framework known as the Five Pillars of Transitional Justice as conceptualised by Chitsike (2012). While not universally accepted as the best method to evaluate the effectiveness of a mechanism like the TRC, the five pillars find credence in that they are very broad and cover most of the aspects considered key tenets for

any restorative transitional justice mechanism. These pillars are Truth Finding, Prosecutions, Reparations, Institutional Reform, and Memorialisation. There is no consensus on the composition of the five pillars with some scholars such as Chitsike (2012) differing with Boraine (2008) and substituting Institutional Reform with Memorialisation.

## **1.2 Introduction**

In the field of transitional justice, the South African model of TRC is taken for granted; it has assumed the status of a *de facto* transitional justice mechanism of choice. It has resultantly been replicated with various versions in countries such as Sierra Leone, Kenya and Ghana. While it is hailed as an international model of healing and reconciliation especially across races, the TRC appears not to enjoy the same prestigious status in South Africa. Extreme views on its effectiveness are that it actually robbed black victims of apartheid of a chance to access genuine healing and closure.

The limitations of the SATRC within South Africa might be felt and visible because the South Africans emerging from a long history of racialized apartheid, fear and violence might have expected more than was possible from a mere transitional justice mechanism. With that being noted, this transitional justice mechanism was not a miracle but an attempt to forge one nation between those that were perpetrators and beneficiaries of apartheid and those South Africans that were victims, a difficult process that cannot be achieved in a short period of time.

The evaluation of a healing mechanism such as the TRC is a daunting task. The task is rendered more problematic by the lack of consensus among scholars concerning the use of the Five Pillars of Transitional Justice by the SATRC to help move the country from conflict to peace successfully. South Africa made the transition from apartheid to democracy in 1994, and this transition reflected the dilemma in terms of the post-conflict accountability mechanisms available to African countries. Mbembe (2001: 235) captures this contradiction well when he emphasises the uniqueness of

the post-colony and concluded that African postcolonial formations do not lean towards any predictable path in their quest to establish post-conflict reconciliation. This reality has a bearing on studies of transitional justice that seek to map out a clear post-conflict path from violence to peace, from disunity to unity, from animosity to reconciliation, and from injustice to justice. The course of post-conflict history can be critically unpredictable, and positive change such as reconciliation and or healing may even be more difficult to gauge.

South Africa embarked on a path of transitional justice predicated on the TRC and domestic court prosecutions. Hayner (2001) regards the SATRC as a hybrid model encompassing the traditional concept of Ubuntu and notions of accountability like punishment or reparations. Ubuntu in Nguni (Zulu and Xhosa) terms is directly translated as 'humanly kindness'; when one shows another person Ubuntu one shows him/her kindness and compassion. The year Nineteen ninety-four (1994) is very crucial as it marked the historical change from disunity to unity in South Africa. The year also marked the beginning of reconciliation and transition for South Africa from conflict and injustice to peace. At national level, reconciliation can be defined as the calling upon of the past and addressing the past divisions with a common prospect that the victim and the perpetrator of human rights abuses make peace.

Apartheid in South Africa was a longer structural colonial process that was backed up by the ideology of racial segregation of blacks by whites. In Magubane's (2007: 178) argument, the invention of racism as an instrument of classifying people and discriminating others based on the skin and alleged purity of blood began with slavery, and grew with the spread of capitalism. Violence was also prevalent against blacks because they were resisting the segregation. Those who fought against apartheid were forced to resort to violence as part of a liberation strategy (Hayner 2001: 45). During the negotiations that took place between the African National Congress (ANC) and the apartheid leading political party like National Party (NP), a mechanism had to be found that would facilitate transition from apartheid to democracy.

The establishment of the SATRC in 1995 was meant to be a mechanism to deal with past conflict and human rights abuses that were committed during the apartheid era. During the apartheid era, white South Africans referred to all the non-white South Africans (Blacks, Asian and Coloureds) as blacks (Hayner 2001: 45). This classification, Magubane (2007) argues, allowed those that were called blacks to be exploited and excluded from mainstream South African modernity and life.

Apartheid colonialism in South Africa introduced a conflictual relationship mediated by rigidification of identities (Cooper 2002: 12). The conflict in South Africa was rooted in the apartheid colonial system that denied black people citizenship and other civil and political rights. Eventually, what had begun as a Black Nationalist struggle ended as an 'anti-apartheid' struggle (Cooper 2002: 12). It has been argued by social rights activists like Desmond Tutu that truth telling by the perpetrators together with accountability and punishing the perpetrators was the main requirement to achieve democracy and respect for the rule of law. Therefore, it is important for transitional justice structures to confront past injustices and in turn create a foundation authentic to justice and democracy (Graybill & Lanegran 2004: 4). The history of violence and injustices created expectations of justice from among the victims and fear of retribution from among the perpetrators (Esterhuysen 2012: 174).

The aim of most transitional mechanisms, after a history of violence, is to have a country free of conflict. This required all the truth be brought forward, victims receive reparations and are compensated for their loss, the country is reformed, past abusers account and there is ultimately reconciliation. Hence, the Five pillars of Transitional Justice: Truth telling, Trials or Prosecutions, Reparations, Institutional reform, and Memorialisation. Esterhuysen (2012: 12) describes the climate that existed before the talks that led to the negotiations that ended apartheid as a tense climate where former enemies had to talk, and where previously unthinkable friendships had to be forged. In a way, the Five Pillars of Transitional Justice in totality are supposed to be that one mechanism that ensures that the peace and unity among former victims and

perpetrators, that was previously deemed unthinkable and impossible is thought of as a realistic possibility.

The Five Pillars of Transitional Justice can then be viewed as a theoretical and conceptual approach to nation building after a history of conflict. They are an attempt to turn former perpetrators and former victims into fellow citizen, and an experiment in nation building and state building combined. Institutional Reform as a pillar of transitional justice, as it will be discussed later, is aimed at transforming state institutions that were angled for conflict into institutions that are shaped and formed for peace.

### **1.3 Problem statement**

The SATRC was imagined after it was impossible for many years to envisage an end to apartheid hostilities and animosities. Its various stakeholders in South Africa and elsewhere did not unanimously rate the SATRC positively. These mixed reactions that the TRC received from political parties, victims, victims' families deserves to be further studied given the high status in which the same model is accorded elsewhere in Africa. How can the same institution enjoy such contrasting fortunes? The main problem for this study emanates from the increasing level of disagreements over the long-term effectiveness of the SATRC, its regional popularity notwithstanding.

### **1.4 Study objectives**

The main objective of the study is to evaluate the effectiveness of the SATRC using the theoretical and conceptual framework of the five pillars of Transitional justice, by so doing the study will explore the advantages of the SATRC as a Transitional Justice mechanism.

## **1.5 Limitations of the Study**

For such processes as the TRC that seek to address historical injustices to achieve fruition, for their true failure and true successes to be seen, it may take many years or even decades. Secondly, there is no consensus amongst scholars on which ones are the Five Pillars of Transitional Justice. The present study may be delving on the five pillars that other scholars may object to or totally dispute. Furthermore, the study relies on literature for its analyses. The perception of victims of apartheid and those of the perpetrators have not been sought through interviews, and therefore, the study might suffer the effect of being bookish and theoretical, removed from concrete reality. However, care was taken in the process of the study to use literature and analysis in such a manner that observations, arguments and conclusions that the study makes are as close to reality as possible.

## **1.6 The TRC as a transitional justice mechanism**

Transitional justice is a set of mechanisms which are used by post-conflict communities to get historical accountability for past human rights abuses. Generally, a number of transitional justice mechanisms have been used in the world to achieve healing and reconciliation.

Chitsike (2012: 3) mention the following nine transitional justice mechanisms:

- Prosecuting individual perpetrators in courts of law, both modern courts and traditional courts such as those run by traditional leaders like headman and chiefs. Another form of trials is that before regional, continental or international courts or tribunals such the International Criminal Tribunal for Rwanda or the International Criminal Court (ICC);
- Lustrations, i.e. the removal of proven human rights perpetrators from public office;

- The payment of reparations to victims of human rights violations at individual, family or community level;
- The setting up of formal bodies empowered to investigate historical human rights abuses such truth and reconciliation commissions;
- Institutional reform in the form of rehabilitating those state institutions which were part of the system which abused the citizens;
- The granting of amnesties and pardons. This is a much contested form of transitional justice as mostly perpetrators liken it to benefiting those who abused human rights. These amnesties and pardons are normally granted in exchange of telling the whole truth;
- Offering psychosocial support to survivors and perpetrators of human rights abuses;
- Disarmament, demobilisation and reintegration of ex-combatants; and
- The conducting of traditional cleansing ceremonies that are believed to facilitate the reintegration of the former perpetrators back into their communities.

It is the volume and extent of transitional justice mechanisms, which contribute to the complexity in their evaluation. The Five Pillars of Transitional Justice forms part of some of the methods for accessing the effectiveness of any transitional justice methodology. Successful transitional justice is mainly when former victims and perpetrators find common ground, share a common vision, and enjoy reconciliation and even peace after a history of conflict and violence. The idea of transition is in moving a society and a people from conflict, violence and disorder to an orderly and peaceful future. Human beings of different beliefs, parties and identities are assisted to find common humanity and purpose.

### 1.6.1 Defining the truth commission

Of the above transitional justice mechanisms, this study is mainly concerned with an evaluation of the effectiveness of the TRC model. Owing to the sheer number and form of truth commissions, their definition is also not standard. However, a working or generic definition can be adopted. According to Vora and Vora (cited in Benyera 2014: 14), a TRC is an *ad hoc* and autonomous body of inquiry set up and authorised by the state for the primary purposes of:

- investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict; and
- making recommendations for their redress and future prevention.

In a strong way, from the above definition, the TRC has a duty to go back to the past in terms of investigating what happened during conflict and reporting it to make it public and available to public probity and debate. The TRC also has a responsibility for the future in terms of making durable recommendations for redress of past wrongs and ensuring that the wrongs are not repeated. In a word, the TRC looks at the past with a view to helping communities imagine a better future than that of conflict. The TRC is supposed to be a historical bridge through which a society passes and manages to deal with weighty issues of that past so that a better future can be realised.

In the argument of Lodge (2002: 176), truth commissions are based on a belief in the cleansing and healing power of the truth and in its liberating effects. Furthermore, Lodge (2002) observes that truth commissions carry the promise that the human rights violations that occurred during conflict would not happen again. Describing, specifically the SATRC process, Lodge (2002: 177) notes four key defining objectives:

- The discovery of the causes, nature and scope of gross violation of human rights between 1960 and 1994;

- The extension of amnesty to those who fully disclosed their involvement in politically motivated violations of human rights;
- The identification and location of victims of violations and the design of reparations for them; and
- The compilation of a report, which should contain recommendations for measures to prevent future violations of human rights.

When the TRC was set up in South Africa, it had a very clear mandate that sought to offer both the perpetrators and the victims of the apartheid regime a fair hearing. The major committees of the TRC dealt with the victims of human rights violation, rehabilitation, and granting amnesty to those who sincerely sought it. According to the TRC report (1998 vol. 1 Ch. 4), the Promotion of National Unity and Reconciliation Act of 1995 charged the SATRC with investigating and documenting gross human rights violations committed within and outside South Africa during the period 1960 – 1994 (Doxtader & Salazar 2007: 13). In order to do this task, the TRC had the following main objectives:

- To promote national unity and reconciliation in a spirit of understanding which transcends the conflict and divisions of the past by –
  - i. Establishing as complete a picture as possible of the causes, nature and extent of the gross human rights violations committed from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the victims' perspectives and the motives and perspectives of the people responsible for the commission of the violations, by investigating and holding hearings;
  - ii. Facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;
  - iii. Establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an

- opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;
- iv. Compiling a report providing a comprehensive account of the activities and findings of the Commission and also recommendations of measures to prevent the future violations of human rights.
- The provisions of the above bullet section shall not be interpreted as limiting the power of the TRC to investigate or make recommendations concerning any matter with a view to promoting or achieving national unity and reconciliation within the context of this Act.

The discovery of the causes and nature of human rights violation lends itself to the truth-seeking and truth-telling pillar of transitional justice in which this study has interest. The extension of amnesty to truth-tellers is meant to reward the telling of the truth and to avoid the long route of having to try and interrogate the perpetrators of human rights violations. The identification and location of victims privilege the ideal of awarding reparations and enabling the healing of the aggrieved, wounded and violated. The compilation of a report elects the recording of information and creation of a bank of knowledge for memory and remembrance of the nation. Lodge (2002: 177) adds that a truth commission, the South African one included, relies on being legitimate and gaining public acceptance for its success.

Another critical defining quality of a truth commission, according to Cole (2010) is that, to earn acceptance and legitimacy, it (truth commission) has to assume the shape of a performance. Like drama that is enacted on stage for the satisfaction of an audience, the truth commission must be seen to be happening in public through “stages” and “performances”. In the South African case, the truth commission and its processes were not only performed before live audiences, but the entire process was televised before the nation and the world. The confessions of the guilty, the testimonies of the victims, and the counsel of the commissioners became a drama and spectacle of truth telling and forgiveness (Cole 2010: 90). Truth telling, forgiveness and reconciliation were dramatized and made to be seen happening in the eyes and ears of the world.

By their nature, truth commissions are a “controversial model of reconciliation”, (Chipkin 2007: 179) because they propose to achieve justice not by punishing the perpetrators but by forgiving them in exchange for the truth. For that reason, the success or failure of truth commissions may remain always controversial and debatable in that their effects are difficult to measure and both sides of the conflict, the victims and the perpetrators, may not be equally satisfied by the outcomes. In the context of SATRC, Chipkin (2007: 183) notes that the language of human rights and the discourses of Christian theology were all mobilised to marshal both the perpetrators and victims of the history of violence into compliance with the truth commission processes. In a word, truth commissions tend to appeal to deeply held sentiments such as law and religion to shepherd the hearts and the minds of societies to desired results and nations to aspire for futures. Truth commissions seek to market a certain vision and to shape certain futures out of a certain history of conflict violence and even war. The next section of this chapter delves into the different categories of truth commissions.

### **1.6.2 Categories of truth commissions**

Different scholars in different contexts understand truth commissions differently. Hence, it is necessary to categorise truth commissions into some analytical classes for the purposes of this study. According to Benyera (2014: 16), Cassell (1996: 197), who defined six types of truth commissions, did one of the best categorisations of truth commissions. Because Cassell’s work was extensively based on Latin America, his categorisation of truth commission mostly uses examples from Latin America. Cassell (1996) identified the following categories of truth commissions:

- Truth-centred truth commissions: These bring out the truth. An example is the Argentinean Commission of 1983-1984;
- Victim-centred truth commissions: These use legal means to establish the truth, such as the Chilean Commission of 1990-1991;

- Exonerative victim-centred truth commissions: These truth commissions are mostly church-based and aim to exonerate the moral positions of victims with the aim of having them tell their stories. An example is the Guatemala Church Commission;
- TRCs set up only to identify the perpetrators of a specific period of human rights abuses. This type of TRC is usually employed when what occurred is general knowledge and the aim is to identify actual actors. An example is the 1992-1993 El Salvador Commission;
- Causality finding truth commissions: These truth commissions are set up for the single purpose of finding the causes of the conflicts. An example is the 1994-1999 Guatemala State Commission;
- Procedural truth commissions: These truth commissions emphasise their procedure and not their final report. The belief is that the process of going through the hearings and confessions will heal the post-conflict society. The SATRC is a good example of this type of truth commission.

From the above, it is clear that some truth commissions are set up to establish the truth when it is believed to be concealed. Yet other truth commissions are set up to identify victims and establish the nature and extent of their victimhood. There are other commissions where the purpose is to locate the perpetrators of injustices and establish the extent of their guilt. Some truth commissions are there to locate casualties of conflict and violence and establish the extent of their injuries and losses. Procedural commissions are those that are carried out as a matter of procedure or by the recommendation of parliaments and courts. In a way, all the types of truth commissions have a way of looking into the past of conflict and then pointing into the future of peace, order and reconciliation with healing. The type of truth commission that is chosen is normally dependent on the nature of the conflict and the type of justice and accountability that the society requires.

Mamdani (2010: 11) distinguished between “victor’s justice” and “victim’s justice”. At the end of the day, it depends whose truth and whose justice is prevailing at the time the truth commission is being carried out. For that reason, truth commissions may not be necessarily neutral. There was a strong way in which Mamdani (2010) and other critics felt that the South African truth commission was politically tilted in favour of the perpetrators and that the victims were hard done by, given a simulation and not a reality of justice.

### **1.6.3 Characteristics of truth commissions**

Besides the above categories, truth commissions have certain characteristics. Hayner (2001: 15) indicates that there are four characteristics of truth commissions, namely, firstly, characteristics of truth commissions come from the time on which they focus. A truth commission focuses on the past; they are concerned with events that took place in the past. Therefore, they are non-futuristic or predictive of future human rights abuses. They also do not look into current or ongoing human rights abuses.

Secondly, there are truth commissions that do not investigate single events. They investigate patterns of human rights abuses which occur over a period of time and not just once. This is the reason why truth commissions have a limited period on which they must focus. This time frame is usually contained in the terms of reference for the commission. In that way, truth commissions may have a temporality and spatiality, investigating violations that happened over a period of time in a given space.

Thirdly, truth commissions are not permanent bodies. This means that they are set up to deal with certain issues after which they are disbanded. This normally occurs after the submission of their final report. Fourthly, a truth commission is meant to be a temporary institution, operating only over the length of period required by the task and depending on the complexity of each situation. Its work is completed through submission of a report to the government that documents its findings.

The final characteristic of truth commissions regards the origin of their mandate. They are official bodies, usually but not always authorised and empowered by the state. The implication of this characteristic is that bodies set up by non-state actors such as non-governmental organisations and churches do not qualify as truth commissions. Observably, truth commissions are supposed to enjoy legitimacy, the trust and even faith of both victims and perpetrators within a conflict situation. The commissions are also supposed to carry a good measure of authority in themselves or from whoever appointed and instituted the commissioners.

In the South African case, the truth commission was established with the backing of an Act of Parliament (Promotion of National Unity and Reconciliation Act of 1995) and some widespread political consensus. This is the political disputants in the liberation struggle and the apartheid regime endorsed the commission and lent it political legitimacy, besides the legal bite that it earned from Parliament. From the arguments and observations of Esterhuysen (2012: 190), the SATRC even had international acceptance and endorsement as both the Eastern and Western countries, after the end of the Cold War, preferred a political and legal settlement in South Africa.

Characteristically, the SATRC process was not just the performance and spectacle that Cole (2010) describes. The truth commission events and processes also became “quasi-religious” ceremonies that became overwhelming rituals that moved both the participants and their audiences towards the persuasion of reconciliation (Lodge 2002: 182). Victims were exalted and honoured for their courage to forgive, while the perpetrators who had the courage to confess their crimes were also ennobled as responsible citizens who were prepared and fit to be admitted into a new future away from the painful history of violence and human rights violations.

In a strong way, victims had to be moved from being victims to forgivers and the perpetrators were graduated from guilty criminals to courageous tellers of the truth. In a way, the identities of both the victims and the perpetrators were changed to the status of those who had overcome a difficult past and were ready for a new future. For that

reason, truth commissions have the effects of changing the political and social identities of the people to prepare them for a new history and political dispensation.

### **1.7 Study justification**

Most studies on the truth commissions, particularly the South African model take the model as an obvious choice for post-conflict and post-dictatorial communities. As alluded to earlier on, this is largely due to the status that the South African model of a TRC enjoys in the field of transitional justice. The study rationale is premised on using the Five Pillars of Transitional Justice to question the effectiveness of the South African model of a TRC. This is important as far as the study departs from the chorus of scholars that have valorised the SATRC. Furthermore, for a long time, the South African transition from apartheid to democracy, in which the SATRC played no small part, has been framed in terms of the discourse of a miracle. It is important for scholars and their studies in different disciplines to uncover the true nature of the miracle and test the successes and the failures of the transition and its mechanisms such as the SATRC model of transitional justice.

### **1.8 Research methodology**

This is a literature review based assessment of the effectiveness of the SATRC undertaken through the deployment of the Five Pillars of Transitional Justice as the assessment tool. These five pillars will also serve as the theoretical framework for the study. The wealth of assessment literature by reputable scholars and institutions dealing with transitional justice will form the basis of this evaluation. Literature study, content analysis, description and exploration that allow interpretation to take place are part of the qualitative methodological tools that the present study mobilises and deploys. Qualitative methodology is suited to this study in that it allows the use of interpretation as a tool for understanding and study. Furthermore, the successes and failures of transitional justice in the lives of societies are themselves qualitative and

experiential and cannot be easily reduced into quantities and statistics. For that reason, the qualitative methodology of the study suits the nature of the subject.

This study will use the case study briefly as a method to understand transitional justice. This method is ideal because its procedures are not strictly formalised, whilst the scope is mostly expected to be undefined, and a more philosophical mode of operation is adopted. Here concepts and constructs are significant words that can be analysed in their own right to achieve a greater depth of understanding a given concept (Marais & Mouton 1996).

## **1.9 Chapter outline**

### **Chapter 1: Introduction**

This chapter outlines the study background. It also lays out the study aims and objectives, the problem statement and the study rationale. Major terms used in the study are also defined in this chapter. The concept of truth commission, which is central to this study, is discussed as a foreground to the whole dissertation.

### **Chapter 2: Theoretical framework**

The theoretical framework for this study is made up of the five pillars of transitional justice. These pillars are truth telling, trials, reparations, institutional reform, and memorialisation.

### **Chapter 3: On the popularity of the truth commission**

This chapter will trace the history of the truth commission as a transitional justice mechanism. It will trace its genesis from Uganda through to Latin America and back to South Africa. The chapter also explores the factors which causes the South African model of a TRC to be so popular such that it is now regarded as the default transitional

justice mechanisms in post-conflict and post-dictatorial states. This chapter will conclude by positing the downside of the truth commission.

#### **Chapter 4: Of half-truths and little accountability**

This chapter assesses whether the TRC was able to ensure that perpetrators of human rights abuses were held accountable and all the truth was recovered in post-apartheid South Africa. It achieves this by evaluating the work of the SA Amnesty Committee, which was a key player in granting amnesties to those perpetrators it believed told the whole truth. The central argument in this chapter is an assessment of amnesties as a transitional justice mechanism. The reaction of the various political parties, the reaction of victims and the response of perpetrators will form the analytical block of this chapter. The trial of Dr Wouter Basson will be presented as a case study of the way the TRC failed to hold him accountable.

#### **Chapter 5: Punishing victims and rewarding perpetrators**

This chapter continues with the debate on the effectiveness of amnesties and pardons. It explores the advantages and disadvantages of the use of amnesties in South Africa. It also debates the contentious issue of the expeditious awarding of amnesties and the protracted way in which reparations were paid. The cases of various perpetrators such as Clive Derby Lewis, Eugene De Kock, Winnie Mandela, and FW de Klerk will be examined in chapter four.

#### **Chapter 6: Conclusion**

This chapter provides conclusions on the effectiveness of the South African model of a TRC. The chapter will be organised thematically with the following themes covered: truth finding, reconciliation, accountability, by stating which mechanism delivered, succeeded or failed through its use of the five pillars of transitional justice.

## **1.10 Conclusion**

This chapter has deliberated the background and the introduction to the study. The objectives of the study have been stated followed by a notation of the possible methodological limitations of the study. The Truth and Reconciliation, its characteristics and categories as a transitional justice mechanism have been enunciated and discussed. The justification of the study has also been given followed by an elaborate section that provides the definitions of the key terms that are used in the study. This section has been elongated to allow the clarification of those terms that if not fully understood, the study may not achieve its objectives. A chapter outline precedes this conclusion. The following chapter delves into the theoretical and conceptual framework of the study, namely, the Five Pillars of Transitional Justice.

## **Chapter Two**

### **The Five Pillars of Transitional Justice: A conceptual and theoretical framework**

#### **2.1 Introduction**

This chapter seeks to explore what scholars such as Chitsike (2012) and Boraine (2006) have termed the Five Pillars of Transitional Justice. These are deployed in this study as a theoretical and conceptual framework in examining the effectiveness of the SATRC process. The Five Pillars of Transitional Justice as identified by Chitsike (2012) are truth-seeking and truth-telling, trials, reparations, institutional reform, and memorialisation. These pillars are understood as approaches that have been adopted in a multiplicity of post-war or post-conflict settings in the world in an attempt to achieve reconciliation, healing and durable peace.

This chapter will use a multiplicity of views and arguments from different scholars who have written to elaborate on the Five Pillars of Transitional Justice that have been selected for use in this study. Those scholars that have also studied the SATRC from other perspectives and vantage points are also cited where their views are relevant or illuminate this study in any way. Firstly, this chapter will attempt to define transitional justice itself as a concept that is gaining importance in the area of justice. Secondly, Truth-Seeking and Truth-Telling will be discussed, followed by Trials, Reparations, Institutional Reform and finally Memorialisation. Notably, the Five Pillars of Transitional Justice are defined as concepts and also elaborated on as a theoretical framework that this study deploys in examining the effectiveness of the South African model of the TRC. The conclusion of the chapter will provide a brief summation of the gist of the chapter.

## **2.2 Transitional Justice**

According to the United Nations (2008), transitional justice is an approach to gross human rights violations that affords redress to victims and creates opportunities for the transformation of the political system, conflicts and other conditions that may have been the foundation of the crimes. The main aims for transitional justice are to acquire justice for the victims of human rights abuses and to strengthen the likelihood of peace, democracy and reconciliation. In order to achieve these two aims, it is necessary for transitional justice measures to combine elements of criminal, restorative and social justice. Transitional justice is not necessarily a special type of justice; it is simply the type of justice that is used for unique conditions of societies going through transformation from gross human rights abuse.

Transitional justice is in the main “a set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses” (Lee & Özerdem 2016: 11). Emphasis is placed on redress, which signals to repair and alleviation of whatever damage the conflict and the violence would have occasioned. Justice may not be adequately done to the aims and objectives of this chapter and this study at large if the concept of transitional justice is not clearly understood.

This section of the chapter seeks to highlight the importance of Transitional Justice and to briefly deliberate its genealogy. In the aftermath of massive human rights abuses in Africa and elsewhere, victims have well established rights to see the perpetrators punished, to know the truth, and to receive reparations. Because systemic human rights violations affect not just the direct victims, but society as a whole, in addition to satisfying these obligations, states have duties to guarantee that the violations will not recur (Bell 2009: 5). Therefore, a special duty to reform institutions that were either involved in or incapable of preventing the abuses was required. Institutional reform as a separate pillar of transitional justice will be deliberate later below in detail.

A history of unaddressed massive abuses is likely to be socially divisive, generate mistrust between groups and in the institutions of the State, and to hamper or slow down the achievement of security and development goals. It raises questions about the commitment to the rule of law and, ultimately, can lead to cyclical recurrence of violence in various forms. Failure to address a history of abuses may compromise the projects of national unity and reconciliation which, especially in the case of South Africa, have proven to be very important given the concern that the end of white rule and the beginning black would lead to possible conflict or national instability (Møller & Saris 2001: 99).

As observed in most countries like South Africa, Yugoslavia and Uruguay where massive human rights violations take place, the claims of justice refuse to 'go away,' or to be forgotten. Human rights violations can be defined as the conception of justice associated with periods of political change, or change of political regimes characterized by legal responses to confront the wrongdoings of repressive predecessor regimes; for example, the apartheid regime in South Africa. The brief genealogy of transitional justice presented in this chapter traces the historical pursuit of justice in periods of political flux. The genealogy also reviews the political developments of the last half-century and analyses the evolution of the conception of transitional justice.

The origins of modern transitional justice can be traced to World War I (Teitel 2014: 50). However, transitional justice becomes understood as both extraordinary and international in the post-war period after 1945. The Cold War ends the internationalism of this first, or post-war, phase of transitional justice. The second or post-Cold War phase is associated with the wave of democratic transitions and modernization that began in 1989 (Leebaw 2008: 99). Toward the end of the 20th century, global politics was characterized by acceleration in conflict resolution and a persistent discourse of justice throughout law and society.

The third or steady state phase of transitional justice is associated with contemporary conditions of persistent conflict that lay the foundation for a normalized law of violence. Phase I of the genealogy, the post-war phase, began in 1945 (Leebaw 2008: 106). Through its most recognized symbol, the Allied-run Nuremberg Trials, this phase reflects the triumph of transitional justice within the scheme of international law. Mamdani (2010) has written widely and expansively exploring this model of transitional justice.

Over the last quarter of the 20th century, the collapse and disintegration of the Soviet Union led to concurrent transitions throughout much of the world (Teitel 2000: 51). Withdrawal of Soviet-supported guerrilla forces in the late 1970s fuelled the end of military rule in South America. In South Africa, the collapse of the Soviet Union put pressure on the liberation movement led by the ANC to initiate talks for transition with the apartheid regime (Esterhyuse 2012).

By the end of the 20th century, the third steady state phase of transitional justice emerged. This third phase is characterized by the acceleration of transitional justice phenomena associated with globalization and typified by conditions of heightened political instability and violence (Teitel 2014: 51). Transitional justice moves from the exception to the norm to become a paradigm of rule of law that is now taken seriously almost throughout the world.

Transitional justice as a field and practice has grown tremendously over the past 15 years. The growth include the institution of international criminal tribunals, hybrid courts and the ICC; the development of a 'right to truth' and 'right to reparation' under international law; and the transnational proliferation of TRCs (Nagy 2008: 285). In addition, the transitional justice scholarship expanded to such an extent that it now has a dedicated journal, research centres and academic programmes. Lastly, the growth of the transitional justice field culminated in the birth of international and regional transitional justice Non-Governmental Organisations (NGOs) such as Genocide International. In other words, transitional justice has become a well-established feature

on the global terrain of human rights. It entails an insistence against unwilling governments that it is necessary to respond to egregious violence and atrocity (Nagy 2014: 216).

The international community sometimes provides fragile new governments with important financial, institutional and normative support. This support is for reckoning with the past, attending to the needs of victims, and setting the foundations for democracy, human rights, and the rule of law. South Africa received meaningful international and regional support during its period of the TRC and implementation of transitional justice mechanisms as this study will observe in detail in the following chapters.

While transitional justice has its celebrants and defenders, such scholars as Leebaw (2011) have their concerns and critiques of the paradigm of transitional justice. Furthermore, Leebaw (2011) believes that some goals of transitional justice advocacy and institutions are commonly portrayed as mutually reinforcing and complementary yet in evaluating the political significance of transitional justice; more attention should be given to their irreconcilable goals. Leebaw's (2011) analysis is informed by the work of some legal scholars and political theorists that have drawn attention to the dual role of law in relation to violence. While law can be a tool for regulating violence and exposing abuses of power, Leebaw (2011) argues that law is also utilized to obfuscate and legitimate abuses of power. Similarly, transitional justice institutions aim to challenge the legitimacy of prior political practices by confronting denial and transforming the terms of debate on past abuses, yet they also seek to establish their own legitimacy by minimizing the challenge that they pose to dominant frameworks for interpreting the past.

Leebaw's (2011) argument positions this chapter to some of the practical contradictions of transitional justice. The argument also demonstrates how a better understanding of this tension sheds light on problematic assumptions. Moreover, Leebaw's (2011) contention exposes unacknowledged trade-offs associated with the

claims regarding the role of transitional justice institutions in advancing political reconciliation through measures designed to counter denial, expand dialogue, and address trauma as the TRC attempted in South Africa. Such scholars as Mamdani (2000: 176) have raised a multiplicity of concerns regarding how the TRC in pursuit of transitional justice leaned more towards political agendas and interests at the expense of justice and in the process allowing impunity to the system and the perpetrators of apartheid. Observably, transitional justice has its own practical and compromising contradictions. This study will pay attention to the benefits and some of the contradictions in the process of the SATRC. Below, Truth Telling will be discussed as the first pillar of transitional justice.

In summation, from the above, the term “Transitional Justice” has come, in recent years, to designate a field of academic inquiry, as well as political practice, concerned with the aftermath of conflict and large-scale human rights abuses. Theorists and practitioners of transitional justice focus on the most effective and legitimate ways of addressing past wrongs and moving towards the (re)establishment of a decent civil order. In this chapter, interest is in the political and moral goals officials tend to pursue in transitional settings and map out some of the tensions between these goals. The SATRC was one such attempt at using transitional justice mechanism to put a troublesome and painful history of conflict and violence to closure. In the South African case, and in the book about the impossibility of a “future without forgiveness”, Tutu (1999) argues that there can be no justice or reconciliation without the truth of what happened during the long years of conflict and human rights violations. The following section of this chapter pays attention to the issue of Truth-Seeking and Truth-Telling as a pillar of transitional justice.

### **2.3 Truth-Seeking and Truth-Telling**

The word “truth” in the name truth commissions highlights the foundational importance of facts and accuracy in the pursuit of justice. Scholars have for a long time considered the truth as in facts and knowledge concerning conflict and victimisation and others

concerned with conflict resolution as very important (Hayner 2002: 16). Truth is considered a starting point to honesty and openness toward conflict and its resolution. Orentlicher (2004) has spelt out what she has called the fundamental aspects of the right to truth based on that victims of violence and conflict have a moral and legal right to truth.

Truth-telling is linked to the right to a remedy, including the right to an effective investigation, verification of facts and public disclosure of the truth and the right to reparation. Victims and their families have the imprescriptible right to know the truth about circumstances in which human rights violations took place. It is connected to the right of relatives and communities to commemorate and mourn human loss in forms that are culturally appropriate and dignified. In addition to individual victims and their families, communities and the society at large also have the right to know the truth about human rights violations (Orentlicher 2004: 223).

In order to understand the meaning of truth-telling fully, it is pivotal to understand what the truth is. The truth is the quality or state of being true; it is that which is actually true or in agreement with fact or reality. The truth is what is believed to be accepted by God as honesty with synonyms like just, literal, real, precise, sincere, or righteous. Directly explained truth-telling is an act of telling the truth. Transitioning governments squeeze the truth when they identify the past, the present and the possible future. The truth is expected and believed to be objective and solid but this is not always the case and transitioning states should therefore be cautious at all times when making the truth the main pillar of their transitional process (Daly 2008: 23).

Because the truth is believed to be so clear, factual and legitimate, the government should be careful not to promise more than what the truth is able to provide (Daly 2008: 23). Perpetrators used truth-telling as a currency to buy amnesty (Hopkins 2003: 290). Mendeloff (2004: 355) states that truth-telling is a very important element in the transitional justice process that will ensure lasting peace. Mendeloff (2004: 356) further argues that truth-telling is able to achieve major goals during the peace building

process, namely, to guarantee justice, encourage social and psychological healing; nurture reconciliation, allows for an establishment of an official historical record, serves as public education function, aids institutional reform, promotes democracy; and lastly, it prevents future conflicts. According to Berat and Shain (1995: 166), truth-telling is frequently linked to national healing as it restores the dignity of the nation and ensures survival of democracy.

Truth-telling can be viewed as a double-edged sword when the truth-telling process becomes a problem. It becomes a problem when the truth that was accepted to be true is suddenly a subject of debate and discussion and end up having two versions instead of the original one. On one end, the concern is whether the testimony is true or false, while on the other end focus is on who can tell the truth, what the truth is about, the consequences of that truth and their political status (Harwood 2004: 469). Truth-telling is believed to be of vital importance in spheres of life like religion and there is no space for lies. Withholding the truth or telling half-truths can have dire psychological consequences for people who uphold the norm of truth telling (Crawford & Sobel 1982: 1440).

Orentlicher (2004: 236) links truth-telling to the idea of remedy, investigations and verification of facts regarding human rights violations or conflict. Truth-telling is also concurs with Orentlicher's argument on the moral value of the right of relatives and society at large to know the truth and the facts regarding conflict or human rights violation. For that reason, truth-telling becomes not just one of the options and possibilities of conflict resolution but a fundamental precondition, an "imprescriptible right" as Orentlicher (2004: 236) puts it. Some legal systems consider the right to the truth to be integral to the enjoyment of freedom of information and freedom of expression (Curtis 2000: 66). Amnesty for perpetrators cannot be invoked to prevent the prosecution of certain international crimes, including crimes against humanity, genocide, and certain war crimes if truth has not been established (Pedain 2004: 785). As such, the prohibition against granting amnesty for such crimes relates to the right to truth insofar as it relates to verification of the facts in question. The state has a duty

to preserve documentary evidence for commemoration and remembrance, and protecting and ensuring adequate access to archives with information on violations.

Orentlicher (2004: 236) further argues that “the right to the truth should be pursued through both judicial and non-judicial proceedings”. The state should attempt to establish the truth about abuses and violations regardless of whether criminal trials are immediately possible. Knowing the truth “to the fullest extent possible” includes attempting to establish the identity of perpetrators, the causes that led to abuses, the circumstances, and facts of violations. The ultimate fate and whereabouts of victims in the event of enforced disappearances should be investigated (Orentlicher 2004: 237). Therefore, not only the truth is important to transitional justice and to conflict resolution; it must be the truth of the right quality or the desired truth. Since conflict and human rights abuses put victims against perpetrators, there cannot be one version of the truth, but there is always the truth according to the interests of victims and the truth according to the interests of perpetrators, and the state should always involve itself to mediate the truths from both sides. The TRC report (1998 vol. 1 Ch. 5) set out four types of truth, namely, narrative or personal truth, forensic or factual truth, healing and restorative truth, and social or dialogic truth.

Narrative or personal truth – the type of truth that is being told or narrated by an individual; it is that particular individual’s personal version of the truth and is linked to storytelling. This type of truth was given a platform in the SATRC and at the hearing on 21 May 1996 in Port Elizabeth. Archbishop Tutu said it is vital that the commission grants everyone an opportunity to say their own personal truth and for the commission to listen. In the SATRC, all the stories told by victims and perpetrators made it possible to map out possible events of the apartheid and gave meaning to the all the experiences of the South African story.

Forensic or factual truth – the kind of truth that is proven and based on facts. This kind of truth is not the type to be duplicated to have different versions; it is based on proven facts. For the SATRC to acquire forensic or factual truth, it implemented an extensive

verification and corroboration policy aimed at making sure that they acquire accurate information and also to find out the exact causes and patterns of a particular violation (TRC report vol. 1, 1998. Ch. 5). The SATRC obtained more than 20 000 statements as corroborating evidence between December 1995 and December 1997. However, this proved to be a challenge for the TRC because most of the statements were simply stories told by victims and had no supporting evidence and the commission had to try to find relevant evidence. There were cases that proved difficult for the commission to get evidence for like those happened from far or those that occurred than 20 or 30 years back or those that occurred outside South Africa (TRC report vol. 1, 1998. Ch. 6).

Healing and restorative truth – it is psychological in nature. It is the kind of truth that is needed by a victim to heal and accept the past and try to reconcile with the perpetrator. This kind of truth can also help the perpetrator to heal from the guilt of the pain they caused. Moreover, healing and restorative truth is easily ignored because it cannot be said that it is factual. However, it was also central to the SATRC because it focus mainly on human relationships and relationships between citizens and the state. Healing and restorative truth was very useful in the reparation process because it made it possible to avoid recurrence of human rights violations. Therefore, healing and restorative truth highlighted the fact that human pain is real and deserves to be attended to (TRC report vol. 1, 1998. Ch. 5).

Social or dialogic truth – the kind of truth that is discussed socially among individuals. It is the kind of truth that is discussed in the community and might be discredited and called “gossip” in some unfortunate instances. Social or dialogic truth served as a driver of some sort for narrative truth in the SATRC. Furthermore, social or dialogic truth is an opposite of factual truth because it cannot be proved to be true. It is a truth of experience and found through discussions and debate. The SATRC recognized social or dialogic truth to be important because it could affirm that the commission is transparent and respectful to public participation. Public participation allowed people

from different backgrounds like churches, the South African National Defence Force (SANDF), political parties and NGOs to participate (TRC report vol. 1, 1998. Ch. 5).

Establishing the truth about what happened and who is responsible for serious crimes help communities to understand the causes of past abuse and how to end it and avoid its recurrence. Without accurate knowledge of past violations, it is difficult for a society to prevent them from happening again. The truth can assist in the healing process after traumatic events, restore personal dignity, often after years of stigmatization, and safeguard against impunity and public denial. Establishing truth can initiate a process of reconciliation, as denial and silence can increase mistrust and social polarization. A political order based on transparency and accountability is more likely to enjoy the trust and confidence of residents and citizens in a democratic order such as the Republic of South Africa. In the case of South Africa, the truth became so important in the nation building project that was to follow the TRC process (Hamber & Wilson 2002: 36).

The truth concerning human rights abuses or violent conflict is important information that must be treated with care. The reason is there might be issues to do with criminality, the dignity and confidentiality of victims and sometimes the rights of perpetrators themselves at law (Galtung 2001: 18). Consequently, the state or other responsible authorities should manage the truth-seeking and truth-telling process in such a way it does not become a platform that will violate right or compromise the conflict-resolution process. The truth has the potential to be a double-edged sword that may help the healing process or cause further harm.

Normally, the state is obliged to provide victims' families with the truth about circumstances surrounding the crimes. The outcome of all proceedings must be divulged to the public for "society to know the truth," but this should be done in a way that is not compromising to the truth itself or the victims. Constitutional provisions such as freedom of expression, the right of the public to access to information and academic freedom to access to information, and such issues as the rights of suspected

perpetrators to be treated as innocent until proven guilty should always come to bear in the process of truth-seeking and truth-telling for the purposes of transitional justice.

In summation, the victims, their families and the society have the right to know the truth about violations of human rights and humanitarian laws. They have the right to an official account of what happened during a period of conflict. This includes general information regarding the history of the conflict, systematic violations of rights that took place as part of the conflict, and specific information about the identities of those responsible for violations. Truth-seeking and fact-finding are essential elements of transitional justice because, if left untouched, past violations have the potential to undermine a new government and to reinforce the efforts of those determined to bring a repressive government back into power. Emphatically, UNGA(2005) stresses that whenever the truth about human rights violations is sought and found and has to be told publicly, it must be told in a culturally sensitive and culturally relevant manner. This means that disclosure of facts about conflict and violations should not violate cultural norms and beliefs of the victims or the survivors of violations.

When alleged perpetrators of rights violations deny or conceal the truth, governments and other national and international authorities have an option to institute trials as a way of interrogating the truth and pressing it out of the offenders by legal means. Trials are a way of using legal instruments to probe and deduce the truth from those who are accused of perpetuating rights violations during conflict. The next section of this chapter delves into the issue of trials as a pillar of transitional justice.

## **2.4 Trials as a Pillar of Transitional Justice**

Trials or tribunals as means of transitional justice seek to establish who is guilty, and to punish perpetrators for serious crimes and human rights violations committed during a particular period. It is important to be aware that a statute of limitations can put a time limit on the prosecution of certain crime after conflict or after human rights abuses. Most importantly, the new government or regime will have to decide how to deal with

this. Trials can take place in civil or criminal, national or international courts. The important aspect is that perpetrators are brought before a court of justice to answer for the crimes committed. It may also be necessary to enact new legislation to address crimes that have not been considered before. Notably, the SATRC necessitated some constitutional changes and the creation of some new specific legislations. In most cases, governments emerging from repression embark on constitutional changes that effectively address crimes committed in the past. Therefore, states may create specific legal mechanisms to address past violations based on domestic and international standards. When designing a legal process for dealing with perpetrators, issues of impunity and the role of amnesty have to be confronted. Studying past transitional-justice processes can be useful here in providing an understanding for this chapter of initiatives aimed at engendering reconciliation.

For example, lessons can be drawn from the South African process in which amnesty was offered in exchange for the truth. This offers one way of getting around the issue of impunity but at the same time addresses the victims' right to full disclosure, and ensures that everyone knows about the perpetrators and their motives. Transitional justice is about transformation, nation building and healing at every level of society, not just punishment for offenders.

Prosecuting the guilty can harm political stability, as the prosecuted and their (often armed) or militarily trained followers become resentful about what they perceive as a politically motivated witch-hunt (Askin 2003: 288). Post-war or post-conflict prosecutions may also come into conflict with the need to cement the rule of law. As such, prosecutions often require departures from the rules of procedural justice. Such was the case with the retroactive criminalization that lay at the heart of the Nuremberg Trials. The doctrine of "Command Responsibility" first developed at Nuremberg and used later by the International Criminal Tribunal for Yugoslavia also departs from basic principles of legalism, by basing convictions on the status of defendants rather than on direct and specific evidence concerning their actions (Drumbl 2005: 1308).

Even when prosecutions do not threaten political stability and manage to stay true to the principles of the rule of law, they can still come into conflict with the desire to create a robust, comprehensive historical record. When trials are used as the primary mechanism of transitional justice, their very subjection to the rules of evidence means that some important information (namely, testimony that does not pertain to specific indictments, or evidence obtained without full due process) will be excluded from the record (Hagan 2010: 65).

This limitation has prompted some scholars to argue that truth commissions are preferable to war crime trials in this respect. Since such commissions are not subject to the rules of evidence, they are able to collect more information, expose a more comprehensive picture of past injustices, and to include a greater emphasis on the role of institutional, and commercial actors indirectly involved in supporting injustices. Arguments have been made that even if the will was there, it would have been difficult to use prosecution in dealing with apartheid perpetrators of human rights abuses (Verwoerd 1999: 120). Added to that, prosecutions were going to compromise the otherwise fragile project of reconciliation.

Finally, the need to set up a functioning bureaucracy is very important for the creation of public trust and the restoration of political normalcy, can clash with the desire for accountability inherent in the goals of prosecution. When most officials implicated in past crimes are purged or “lustrated”, few competent administrators remain to do the work of government. Most of those who were accused of apartheid crimes were individuals who were needed in the structures of the new government for their experience. Such a competence gap may, in turn, undermine political stability, economic viability, and public trust—all crucial factors in a successful transition. Indeed, worries about the trade-off between accountability and the functionality of government have led many polities to either hedge or give up their lustration policies mid-stream. In a large measure, South Africa had to choose economic and political stability before justice.

The celebrated SATRC, with its amnesty-for-truth arrangement, was the resulting political compromise meant to avoid both punishment and impunity. The ANC's demand for retributive justice went unheeded (to the outrage of many, including the family of Stephen Biko, who unsuccessfully sued the TRC in the South African Constitutional Court) because heeding it would have eliminated the chance for a democratic South Africa. The International Criminal Tribunal for Rwanda, operating in Tanzania, captured some of the Rwandan genocide's ringleaders. But Rwanda was not able to apply rigorous criminal responsibility to all those who participated in the murders. Doing so would have taken several centuries (Nabudere 2010: 388). Therefore, a system of traditional justice, *Gacaca*, was devised. These makeshift "Grass Courts" failed to live up to western standards of legalism (the judges were not professionals, rules of evidence were not followed) and it failed to produce satisfying punishments. However, it did provide a platform from which at least some of the crimes were admitted and acknowledged, and it did manage to empty the Rwandan jails, which contained hundreds of thousands of prisoners. In the tension between practical functionality and retributive justice, Rwanda nodded to the latter, but eventually focused on the former.

Trials and prosecutions as a mechanism of transitional justice can be expensive for regimes and governments that are emerging from war or long-term conflict like apartheid in South Africa (De Zeeuw 2005: 4866). Trials and prosecutions also tend to prefer what Mamdani (2010) has described as the "victor's justice" - a kind of justice that is biased towards those who have emerged as winners in a conflict at the expense of the losers who might remain aggrieved and not properly reconcile with the victors, compromising nation building and reconciliation in the process. Tribunals and trials also suffer from what has been described as retroactivity; those accused are at times tried for offences that were not illegal at the time of their commission. For example, most apartheid crimes were by the apartheid law legal at the time they were committed.

Tribunals and trials also tend to be selective and choosy of the offenders to be prosecuted, not everyone is tried, and only selected offenders are identified and

sacrificed while a majority of them get away with impunity. In short, because of their many contradictions and challenges, as a means of transitional justice, prosecutions and tribunals, trials, are not always feasible, especially because of their evidence-based mechanisms, evidence of crimes that took place during war or conflict may not always be easy to establish (Meron 2006: 557). When the truth has been established either voluntarily or through trials and tribunals, what follows is attendance to the injury or damage that the victims of conflict and violence have suffered. Trials have the important effect of eventually issuing a pronounced legal judgement. Furthermore, legal judgements are part of the attempt in transitional justice to achieve “the satisfaction and guarantee of non-repetition” that is important to victims, survivors and communities in the settings and societies where human rights violations have taken place. One of the ways of repairing the damage and or injuries that have been suffered by victims of conflict is reparations. The following section of this chapter discusses the important issue of reparations as a pillar of transitional justice. Reparations are mainly associated with the restorative intentions of justice in that they are trained at repairing the damage and restoring human relations to their original form prior to the conflict.

## **2.5 Reparations as a Pillar of Transitional Justice**

Generally, victims of human rights abuses suffered great losses like land, no access to education and an opportunity to improve their skills and therefore had to settle for lousy jobs earning very low wages. For this reason, the victims earned their right to receive reparations, and rehabilitation was the only fair solution to ascertain healing and reconciliation. When the SATRC granted a perpetrator amnesty, the victims could no longer make a legal or civil claim against the perpetrators. For this reason, the victims felt betrayed and felt that justice was not served and reparations served as the best counterbalance for amnesty (TRC report vol. 5, 1998. Ch. 5).

The UNGA considers reparations as an important part of “redress” that is covered under Article 19 of the Universal Declaration of Human Rights. As such, reparations are “a well-established and basic human right, which is enshrined in the universal and

regional human rights treatise as well as in other international instruments (UNGA 2005). For that reason, it will be important for this study to observe the extent to which the SATRC attended to reparations as a transitional justice mechanism.

The direct definition of reparations is the responsibility of wrongdoing and being obliged to compensate for the damages incurred by the victim. Though money and compensation cannot undo the wrongful acts of torture, psychological trauma or return the dead, the acknowledgment by the perpetrator to take responsibility for their actions speaks volumes to the victim. The perpetrator's acknowledgement symbolises their willingness to apologise and possibly restore torn relationships (Bowers du Toit & Nkomo 2014: 4).

The SATRC was tasked with identifying the victims of gross human rights violations; and the SATRC defined "gross human rights violations" as politically motivated acts that occurred between 1960 and 1994 like killing, abduction, torture and severe ill-treatment. This meant that no racial and politically motivated acts of torture that occurred from 1652 when whites first settled in South Africa were considered. The white minority abused the black majority since 1652. Moreover, blacks were forcefully removed from their land and ended up occupying 30% of the land regardless of blacks being the majority and these were also not included. The victims according to the screening methods of the SATRC were therefore entitled to reparations; the commission finally identified about 22 000 victims eligible for reparations (Daly 2003: 373). The SATRC further pressed the limitation bar by requesting that some sort of evidence validate all claims by victims and many victims could not produce proof. Therefore, it can be said that all non-whites or even all South Africans suffered during the apartheid era but they could not all be identified as victims (Daly 2003: 375).

The reparations granted to the victims of gross human rights violations were a much greater achievement than what the courts and the criminal justice processes could deliver. The reparations were fairer and physically tangible and were deemed more

possible to provide comfort because it was tangible to the recipients (Van Zyl 1999: 661).

Section 1 of the Promotion of National Unity Act 34 of 1995 defines reparation as any kind compensation, ex gratia payment (payment in favour of), restitution, rehabilitation or recognition. Through this definition, it can be deduced that as the government is responsible for the payment of reparations, they (the reparations) should be enough to compensate the victims, the government will do so voluntarily and out of kind with no recognition of obligation and insure rehabilitation. The (TRC report vol. 5, 1998. Ch. 5) stipulates the following five elements of the reparation and rehabilitation policy:

Urgent interim reparation – These kinds of reparations focused on individuals with urgent financial or services need and there was a small budget to facilitate it. The urgent interim reparation was the first form of monetary reparations and it was meant for approximately 17 000 victims who were in dire need of help (Daly 2003: 378). The allocated funds were not enough and the South African government was struggling to cope; the governments of Denmark donated R2 million, Switzerland donated R1.5 million and the Netherlands then contributed to the President's funds for reparations (Graybill 1998: 122). This funding brought a huge relief because by 1999 more than 2 500 interim payments were made between R2000 and R3000 (Berinyuu 2004: 28).

The little effort made but not very evident to the victims was the payment of the urgent interim grants offered to the most needy of the victims by 1998. Nevertheless, the general expectations of the reparation process was not met (Nagy 2006: 639).

Individual reparation grants – These kinds of grants were those paid to individual victims of human rights violations over a period of six years and was the second form of monetary reparations. The individual reparation grants had to promote three goals, namely, recognise the victims' suffering and restore the victims' individual dignity, facilitate service delivery and subsidise daily living costs (Daly 2003: 378).

In South Africa, the general public was unhappy with delays from the government regarding the payments of grants. Regardless of the SATRC having fulfilled their mandate and identified about 22 000 individuals as victims, the government had these victims eligible for individual reparation grants wait nearly six years while perpetrators received amnesty and walking free in the communities. There were high expectations for the individual reparation grants as it was expected to be between R17 000 to R24 000 per year for six years. The Former President of South Africa, Thabo Mbeki and his government seemed to focus more on freedom and the reparation debate shifted from what it stood for to a mere money squabble. The government later announced in 2003 that it will grant a once-off amount of R30 000 per person. This was an amount less than the amount recommended by the SATRC and victims were not happy to hear that. This amount was clearly not sufficient to meet the needs of the victims like education, housing, counselling, and reburials (Nagy 2006: 640).

Archbishop Tutu was not happy with the prioritisation of amnesty processes over reparations, when the governments of Switzerland and Denmark donated money to the President's funds for reparations. He urged the government to start prioritising the reparation payments. From these donations, the SATRC realised that it was no longer necessary to offer mere tokens to the victims and that they deserved compensation that is enough to change their standards of living (Graybill 1998: 122).

Symbolic reparation or legal and administrative measures – Focus here was on creating symbols of remembrance, making sure that the past pain and victories were commemorated well, by building monuments and developing museums. The South African government promulgated the Day of Reconciliation, which is celebrated on 16 December each year to this day. Legal and administrative measures were meant to help individuals get death certificates, catalyse legal matters and remove criminal records.

Van Zyl (1999: 661) states that in the intense investigations by the SATRC, the Commission found bodies of activists who were murdered and buried in secret

locations by security forces. The SATRC helped the families of the deceased to rebury their loved ones with dignity. With the SATRC initiative, monuments were erected in memory of those who lost their lives and the whole country could commemorate their suffering.

Millions of people who were victims of the apartheid regime were well aware that if the reparations were going to be monetary, the government will struggle to afford and they accepted that those reparations would be mere tokens of recognition by the government. However, it was not all these millions of people who were identified as victims eligible for reparations by the SATRC. Therefore, this was a possible source of more conflict in the communities because those who were not identified as victims believed they were sidelined in some way. To remedy this, the government used symbolic reparations to accommodate those individuals not identified as victims and erected museums, monuments, memorials, schools and peace parks (Graybill 1998: 121).

The government realised that the entire community will enjoy these non-monetary symbols because everyone can appreciate statues of fallen heroes and can benefit from improved schools (Daly 2003: 373). According to Daly (2003: 377), symbolic reparations would enable remembrance and help commemorate fallen heroes. The museums and memorials will help the upcoming generations to understand apartheid history and its implications better. To this day, the reconstructed South African calendar is still enjoyed by all South Africans in honour of all the fallen heroes (Daly 2003: 383).

A small number of the identified victims expected or prioritised monetary reparations. Most of them thought that things like a tombstone, renaming of a school, or a bursary for the children would be more appropriate and comforting (Graybill 1998: 121).

Community rehabilitation programmes – The government launched community-based services and activities to promote healing, recovery and reconciliation of individuals

and communities of past human rights abuses. During the SATRC hearings, some of the victims were referred back to these community programmes for assistance.

With monetary reparations being the first to be focused on, the community rehabilitation programmes were secondary forms of reparations meant to compensate the entire community who could not be identified as victims eligible for individual reparations. These include improvements of schools, provision of medical and mental health services, and the provision of proper housing with electricity and water (Daly 2003: 377).

Institutional reform – The committee’s main focus included legal, administrative and institutional procedures aimed at the prevention of the recurrence of the gross human rights violations. Institutional reform as a pillar of transitional justice will be discussed in the following section.

Reparations serve several purposes in national reconciliation. They serve as a form of acknowledgement by the nation that victims have experienced losses under the repressive regime; they allow the victims to recover some of the monetary costs of their losses; and they serve as a deterrent to future perpetrators by making them aware that to their actions will have consequences (Thorvaldsen 1980: 28). There have been debates about who should meet the costs of reparations if negotiators decide to provide financial compensation to victims. It is now accepted in international law that governments are obliged to pay compensation to victims of human rights violations and that, if the regime that perpetrated the violence does not provide compensation, and then the successor government should do so (Van Zyl 1999: 650). There are various types of reparations; namely, compensation, rehabilitation, restitution and reparations, and these are discussed in the introductory chapter under subheading: Definition of major terms used in the study.

Reparations are due when an object or relationship has been damaged. From a traditional perspective, it is normally thought that reparations differ from other forms of

compensation in that reparations do, but compensation does not always require that injustice has occurred (Boxil 1972: 115). This chapter will generally agree with this view, but argue that it does not have the implications normally attributed to it, namely, that only the wrongdoer should pay. Compensation can be needed because of acts of God such as the floods that inflict communities as natural disasters and accidents. But, on the traditional view, the idea of the need for repair is normally thought to be that one party has wronged another party in terms of a violation of justice. Walker (2010) provides conceptualisation reparations on the traditional account:

Reparations are made when those who are responsible for repair of a wrong intentionally give appropriate goods to victims of wrongs in a specific act (or process). This gesture of goodwill expresses acknowledgement of the wrong, responsibility for the wrong or its repair, and the intent of rendering just treatment to the victims in virtue of wrongful treatment (Walker 2010: 19).

For the traditional view, the “goods” in question need not be money but can include apologies as well as other gestures such as the construction of memorials, which will be discussed later below. Reparation entails restoring something to its original state, or good enough condition of something that has been damaged. When objects are damaged, it is different from when they are lost or taken away. When damage occurs, the objects are still in the possession of the original owner. It is just that these objects have ceased to perform their normal function and are in that sense less valuable than before. Reparation also concerns payments for loss suffered when wrongs were done that undermine livelihood or significant interests of the victims. In South Africa, apartheid is largely understood to have disadvantaged the black communities while privileging whites.

One may think of some of these cases as involving damage to earning capacity or the loss of opportunity that would have been beneficial. Reputation or status is also something that can be damaged, and for which reparations can be sought. One of the issues that distinguish restitution from reparation is that in restitution it is normally

possible to return things to the status quo whereas in reparations this is normally much more difficult to achieve (Mosely 2003: 354). Indeed, the legal literature has focused on the concept of satisfaction to mark the difference between return to the exact status quo and the approximate form of compensation that is called for in reparations, especially when the damage done is at least partially psychological (Bond & Brooks 1976: 31). Psychological damage is hard to rectify, as courts have found, because of vast differences in how people react to damage or wrong both in terms of how much they suffer at the time of the damage and in terms of what it would take to make amends. Apologies suffice for some, but others may require expenditures of resources. Repairing a damaged relationship is one of the central ideas in reconciliation in its many forms. Teitel (2000: 120) claims that:

The vocabulary of 'reparatory justice' [is] laying a basis for redistributive policies associated with radical upheaval... Because of their versatility, reparatory practices have become the leading response in the contemporary wave of political transformation.

Satisfaction can take on this radical cast when redistribution of goods is called for. The root idea behind the various forms of reparations is that payments are due as a result of damage done. Moreover, payment will restore the aggrieved party to the position he or she was in before the wrong occurred. In the case of war reparations, the idea is that one party owes reparation to the other party for the ravages of war or for the costs incurred to fight the war. In the case of violence to ethnic groups, it is similarly the case that what is called for is payment for wrongs such as slavery or genocide that have harmed the group in question and made it suffer losses that now need to be compensated. In the South African apartheid case, black people suffered as individuals and as communities. Therefore, that damage was of the kind of historical injustice or systemic injustice. There was loss of opportunities, discrimination and dehumanisation of black peoples (Mamdani 1992: 1056). In that case, the damage becomes difficult to calculate or to quantify.

It is noteworthy that someone other than the wrongdoer may have duties of reparation. Reparations are owed because the party who has the duty of repair has benefitted from the wrongdoing even if she has not also caused the wrong to the victim. This is perhaps a special case of unjust enrichment through gain of an opportunity. In South Africa, debate ensued on how those who benefitted economically from apartheid could pay reparations to those who were economically disadvantaged by apartheid (Ramphela 2008: 64). Because someone does now benefit, and benefits in a way that is similar to that of the thief's use of the stolen property, the current benefiter should pay for that benefit so as not to be tainted in the wrongdoing that took place.

As the Peruvian case demonstrates (Laplante & Theidon 2007: 230), delays in implementing reparatory measures have caused victim-survivors to become disillusioned and cynical about their country's truth commission. The authors argue that people's conceptions of justice are dynamic and complex. However, one constant in post-conflict settings is that reparations play a central role in satisfying victims-survivors' expectations of justice and redressing the serious harm caused them by structural injustices and political violence. Indeed, based upon the research in Peru, this study will argue that the implementation of reparations is critical to generating the recognition, civic trust, and social solidarity that are the foundation of a meaningful democracy. This study will take an interest in examining the option of reparations as a pillar of transitional justice within the process of the SATRC.

The South African government took part in international policies in the international law. This participation served as an obligation for the South African government to provide sufficient compensation to victims of past human right abuses. Some of the policies include the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It was vital that these reparations were enough to satisfy the victims who no longer had legal or civil claims against the perpetrators. The fact that the reparations are generally called 'compensation' in policy documents means it should be sufficient. The human rights abuses by the state and its agents were killings and abductions of individuals of whom some were bread winners to their

families and therefore their families needed sufficient compensation that will take off were their relative ended off. Though there is no amount of money that can bring back the breadwinners or undo all the harm and torture suffered, the reparations should at least be enough to improve the quality of the lives of the victims of human rights abuses and/or their dependants who are now being called 'the previously disadvantaged' (TRC report vol. 5, 1998. Ch. 5).

Reparations in South Africa were connected to amnesty with the broad aim to put an end to apartheid. South Africans recognised that in order to assist the government put an end to the apartheid regime, they would have to allow the perpetrators to go through the amnesty process while they (the victims or community) get reparations (Daly 2003: 394).

The SATRC prioritised the needs of the victims and recommended that the government provisionally assist the victims financially. The Reparation and Rehabilitation Committee made these submissions to the President and in no time R600 million was allocated to pay victim reparations over a period of three years (Van Zyl 1999: 659). This was provisionally accepted because the criminal justice system had failed to provide compensation to the victims; a limited few of the victims were successful in their civil claims against their perpetrators (Van Zyl 1999: 659).

The government was responsible for the issuing of reparations. Therefore, the Reparation and Rehabilitation Committee had to work closely with the government through an inter-ministerial committee at Cabinet level; this was to ensure the fast delivery of reparations and rehabilitation to deserving victims (TRC report vol. 1, 1998. Ch 10). The Reparation and Rehabilitation Committee was given five responsibilities by the Promotion of National Unity Act to ensure well-prepared and smooth-running reparation and rehabilitation process. The Committee was supposed to:

- deliberate matters referred to it by the commission, the Human Rights Violations Committee and the Amnesty Committee.

- collect all the relevant information that could substantiate the victims' identity, fate and their location and also find evidence of the nature and extent of the abuse they suffered.
- recommend to the President the suitable reparation and rehabilitation measures that the victims deserve and also recommend on the best way to restore the victims human and civil dignity.
- make recommendations for urgent ad hoc reparation measures for victims where necessary.
- recommend best institutions to be created that will enhance a stable and fair society (TRC report vol. 1, 1998. Ch. 10).

Financing reparations was clearly a challenge because the problem that created the need for reparations was changing hands in the transition. Attempting to remedy the problem, Professor Sampie Terreblanche suggested that South Africa would have a higher success rate if it turned its lemons into lemonades. According to Professor Terreblanche (TRC report vol. 4, 1998. Ch. 2), South Africa had an extremely uneven dissemination of wealth and needed a solution that could enhance reconciliation, social stability and economic growth while laying a good foundation for reparations for those impoverished by the apartheid era. Professor Terreblanche thought a wealth tax would be the best solution because

- Africans were robbed off the land they had used for farming with their fore fathers for decades.
- Africans were exploited by employers in all sectors earning slavery wages.
- There were many laws that segregated Africans from getting skills and constrained them to dull humiliating jobs with low wages.
- Africans could not accumulate human capital because of the existing power structures.

- Africans could not develop as entrepreneurs and could not accrue property because of the hefty legal restrictions on property and business for Africans.
- Africans suffered for a third of a century under hefty power structures. However, the response by the liberation struggle and the state was disturbing to the poorer 60% African population.
- African societies were destroyed and left to suffer and the power structures did not allow Africans to build a united society (TRC report vol. 4, 1998. Ch. 2).

The wealth tax was designed to help rebuild the post-apartheid society by introducing the payment of a once-off levy on corporate or private income and a 1% once-off contribution of the market capitalisation of companies listed on the Johannesburg Stock Exchange (JSE) (EIU ViewsWire Africa 2003: 4).

Reparations, too, have a place in the history of conflict in the globe, but until recently they have not received sufficient systematic attention. The individual reparations issued by the Federal Republic of Germany were a watershed moment in the history of reparations. Until 1952, reparations were solely inter-state affair-payments by the losing state to the victorious one, as in the Versailles Treaty (Boraine 2006: 19). Reparations to victims of the Holocaust were the first instance of a massive, nationally sponsored reparations program to individuals who had suffered gross abuses of their human rights.

It is noteworthy of this study that from the standpoint of the victims, the reparations programme occupies a special place in a transition to democracy such as the South African. For victims, reparations are the most tangible manifestation of the state's efforts to remedy the harms they have suffered. Scholars like Ramphela (2008) in South Africa have belaboured this point. In the end, criminal justice in the form of trials discussed above is a struggle against perpetrators rather than an effort on behalf of victims. From truth-telling, victims will obtain significant benefits that may include a

sense of closure derived from knowing the fate of loved ones, and a sense of satisfaction from the official acknowledgement of that fate. However, in the absence of other positive and tangible manifestations, truth by itself can easily be considered an empty gesture, cheap and inconsequential talk. It can be reducible to political rhetoric meant to pacify rather than empower victims. Meanwhile, institutional reform, which this chapter discusses immediately below, will always be a long-term project which affects the lives of the victims only indirectly (Boraine 2006: 22).

Thus, reparations play an important role for victims and are one of the few efforts undertaken directly on their behalf. However, Boraine, Nice & Veil (2004: 50) reminds us in his excellent unpublished essay for the International Centre for Transitional Justice that a freestanding reparations programme disconnected to other transitional justice processes, is also more likely to fail, despite its direct efforts for victims. The provision of reparations without the documentation and acknowledgement of truth can be interpreted as insincere, or worse, than bribing victims of conflict (Boraine 2006: 19).

In many ways, the dilemmas and challenges in reparations are a microcosm of the overall challenges of transitional justice at large. How does one balance competing legitimate interests in redressing the harms of victims and ensuring the democratic stability of the state? Similar to other areas of transitional justice, such as truth-telling or institutional reform, simple judicial decisions cannot provide the comprehensive solutions demanded by such interests. Rather, solutions must be found in the exercise of judgment and creative combination of legal, political, social, and economic approaches. This means that the pillars of transitional justice that are discussed here work better in combination than in isolation. While reparations may attempt to restore relations or repair the damage that is suffered by the victims of violence and conflict, they may not guarantee that violations will not take place again.

An attempt to assure victims of conflict and society at large that conflict may not be easily repeated and that injuries may not be inflicted is to reform the security, legal and

other institutions that facilitated the violations or failed to stop the violations when it was in their power to do so. The next section of this chapter examines the important issue of Institutional Reform as a pillar of transitional justice.

## **2.6 Institutional Reform as a Pillar of Transitional Justice**

Generally, conflict degenerates into violence and slips out of control because individuals and institutions that are supposed to control them have failed in their duties or have facilitated the degeneration of the conflict into the level of violations. Violent conflicts have a tendency to destroy a country's justice system, leaving behind corrupt, illegitimate, and dysfunctional institutions. Post-conflict societies under new governments often struggle to manage ongoing tensions in contexts in which the rule of law has broken down and where people have lost trust in the impartiality or effectiveness of the justice system (Beitzel & Castle 2013: 47).

Institutional reform in this context refers to the modification or redrafting of a country's legal framework, and the reforming or rebuilding of its justice system (including institutions such as the judiciary, the police and prison services (Boraine 2006: 23). This may include removing perpetrators from public positions and arranging for human rights training for all public officials – repressive governments tend to entrench their doctrines throughout state institutions. Often, certain public institutions, including the judiciary, police, military, and state-intelligence agencies, have contributed directly to repression and other human rights violations.

Land – Colonial and Apartheid era laws deprived blacks the right to land ownership having 80% of land owned by whites who are less than 20% of the population (Atuahene 2011: 955). To reform these painful acts, the Restitution of Land Rights Act 22 of 1994 was formulated and through the Act, land rights were restored, and compensation was also offered (Henrard 2003: 47). The land agreements between the ANC and the National Party included in the South African Constitution of 1996 focused on land theft from 1913 onwards and not before 1913 under colonialism. The rationale

behind this was 1913 was the year that the South African state which was formed in 1910 first used the Native Land Act and dispossessed land from Africans (Atuahene 2011: 967).

Other acts that took part in the land theft include the Group Areas Act of 1950 where many non-whites were evicted in the urban areas and left the area to be occupied by whites only. About 3.5 million people were evacuated from the urban areas to the townships and remote villages between 1960 and 1983. One example of the segregation by the Group Areas Act is the forced removal of non-whites from Marabastad in Pretoria. This was a multi-racial neighbourhood, to places like Atteridgeville for Blacks, Eersterust for Coloureds and Laudium for Asians (Atuahene 2011: 967).

Land reformation was needed in South Africa in order for the government to be able to access most of the land that was unfairly dispossessed from rightful owners. Without land reform, the permanent marks of apartheid and colonialism will forever haunt the nation with the possibility of further riots (Atuahene 2010: 778). The five-phased Restitution of Land Rights Acts was passed in 1994, tasked with the reformation of land issues. The claimants hoping for compensation had to lodge their land claims by end of December 1998, and the SATRC would research to validate whether the claim involved a person and that the dispossession happened after 19 June 1913. The Commission also conducted research on the background of the claimant to find out if the claimant was the owner of the property or tenant or if the claimant was the dependent of the original owner. The claimants were then given the option to choose between monetary compensation and land restitution. (Atuahene 2011: 968). To this day, majority of the black population believe that most of the land their ancestors owned was stolen by white settlers and these whites therefore have no right to own land today. Conversely, 91% of white South Africans disagree and believe land is owned by its rightful owners (Atuahene 2010: 774).

Through land reformation, blacks are still enjoying to this day the benefits of the Reconstruction and Development Programme (RDP) where people who cannot afford to buy their own houses, most of which are black, are provided houses by the government. The RDP also provided productive land to the poorest who were aspiring to become commercial farmers. Through the RDP and the Growth Employment and Redistribution Strategy (GEAR), the ANC government could catalyse the land transfer process to the rightful owners (Diale 2012: 1345). South Africa's Commission on Restitution of Land Rights which was formed in 1994 managed to settle 74 808 land claims out of 79 696 by 2008 at a cost of R16 billion (Diale 2012: 1346).

Travel and legal representations – During the apartheid era, South Africans had to provide their own legal representation if they needed to go to court and provision of legal representation meant paying for it themselves. Because the black majority were poor, they could not afford their own counsels when they needed legal representation and therefore had to struggle through the case representing themselves and ultimately losing the case. In earlier years, there were possibilities for legal aid like the Legal Aid

Another possible help for legal aid was the Defence and Aid Fund of 1960, which was established to help people who were accused of political crimes (Meadows 1995: 467). However, the Department of Justice under the apartheid government later took over the assets of both the Legal Aid Bureaux and the Defence and Aid Fund and liquidated their assets. After the transition in 1994, the government reformed the system and introduced the policy for legal aid. In the new South African legislation, the accused had a right to legal representation and if they could not afford their own legal fees, the state would provide (Meadows 1995: 459).

During the apartheid era, blacks had many limitations to their movements in different parts of the country. They were under full guard by the Pass Laws that promulgated that every native adult should carry a passbook at all times. The police had the task to raid the natives at any time and if it happened that a native is found without their passbook, they would be arrested. Their charge was that they did not meet the

administrative requirement that natives should carry passbooks (Mamdani 2002: 46). Immigration laws were also unfair during the apartheid era where whites from Europe were most welcome to visit the country as they wished but black immigrants were seen as possible threats (Crush & McDonald 2001: 2).

When it comes to travelling, reformation was evident in the formal running of border posts between South Africa and Lesotho, Botswana, and Swaziland which was not monitored properly during the apartheid era. Migrants from these countries mostly worked for whites as domestics or gardeners and monitoring the borders meant that they would no longer enjoy cheap labour. The ANC government offered once-off compensation to victims of apartheid's immigration policies. The National Union of Mineworkers (NUM) made a request to the ANC government that immigrants who have been contract mineworkers for over 10 years be offered permanent residence. It was from this initiative by NUM that the ANC government's Department of Home Affairs approved immigration amnesties for non-citizens in 1995-1996. Compensation was offered to past victims of the migrant labour system and also gave the migrants the choice to opt-out of the migrant labour system (Crush & McDonald 2001: 3).

In 1996, the ANC Cabinet also approved the legalization amnesty for Southern African Development Community (SADC) citizens who could prove that they resided in South Africa for at least five years legally or illegally. Those who complied with this requirement could qualify to be permanent residents of South Africa. A similar amnesty was declared in 1997 but implemented in 2000 mainly for Mozambican refugees (Crush & McDonald 2001: 3). There is still not much transformation in the new South Africa because the migrant labour system for immigrants is still in place. The mentality that immigrants are a danger to individuals or a society is still evident to this day, where there are xenophobic confrontations and immigrants called degrading names like "Kwerekwere" (Crush & McDonald 2001: 4).

Water – Colonialism and the racist laws and practices of the apartheid government led to black people losing all the powers they had even access to natural resources like

water became a struggle for blacks under the white man's rule. Blacks were made citizens of homelands and not South African citizens and therefore had no claim to South African resources or participation like voting. After the transition, the ANC government took it upon them to initiate institutional reform. The Constitution was amended and many laws were passed like the National Water Act of 1998. The homelands were later abolished and blacks in the homelands became citizens of the Republic of South Africa and were eligible to basic resources like water (Ahlers, Kemernk & van der Zaag 2011: 588). The main aim of the National Water Act of 1998 was to balance past injustices and inequality in water access. Nevertheless, little progress has been made because commercial farmers still keep their claim to the water rights.

Education and Language – Segregation in the education division was too prevalent, especially on the youth as they were attending school. This led to riots such as the June 16 Soweto youth uprising in 1976 where the youth fought for better education and the use of Afrikaans as a medium of instruction in schools. The education system of the apartheid era was designed to degrade blacks and prepared them for manual labour. This warranted for institutional reform that will be prevalent for years to come.

The National Party government engaged in a vigorous combat to avoid permanent erosion of Afrikaans. The inclusion of other African languages to form part of the official languages was not a problem for the National Party so long as Afrikaans was one of them. Once there were 11 official languages, it was agreed that the government should make efforts to develop all the nine languages to a point that they are also in the same status as English and Afrikaans. Provincial legislatures were also allowed to choose any language as the respective province's official language. The government established the Pan South African Language Board (PanSALB) that was meant to improve all the nine official languages and promote multilingualism in South Africa (Henrard 2003: 42).

The education policy of the apartheid era subjected the African majority to poor inferior education with no room for blacks to grow and attain better qualifications. One prevalent reform was that blacks were free to choose their medium of instruction as opposed to the imposed Afrikaans as a medium of instruction. Blacks could now choose their mother tongues as mediums of instruction (Henrard 2003: 42).

Reformation in the education sector was needed to curb the imbalances and the education department under the ANC government is still undergoing changes to improve the education system in South Africa. The reform has been evident in the possibility for blacks to enjoy the same education that whites enjoy, and blacks can choose any school they prefer whether private or public and also the preferred medium of instruction. There has been improvement also in higher education where the number of black student enrolment in all institutions of higher learning has increased and not only those institutions subjected to blacks only (Louw, Mouton & Strydom 2013: 130).

The ANC government through the National Plan for Higher Education (NPHE) of 2001 was aimed at increasing access to higher education for all men and women of all races from all class lines. The NPHE also sought to create new institutional identities through regional collaboration between institutions to accommodate all people. In 2005, tertiary institutions in South Africa were merged and the number of institutions reduced from 36 to 23 and this saw previously black institutions like Vista or University of North-West (UNIBO) absorbed by the previously white institutions. This came after a recommendation from a report published in 2002 by the Department of Education called Transformation and Restructuring: a new institutional landscape for higher education. The mergers started in 1999 after the recommendation from the Higher Education Act of 1997 to merge smaller institutions to bigger ones and the institutions mainly absorbed were the former teachers training colleges among others. The Higher Education Act of 1997 recommended that there be funding allocated for higher education to assist the previously disadvantaged (Louw et al. 2013: 132).

Health and HIV/AIDS – Apartheid era laws had adverse consequences on the daily lives of all the non-whites even on their health. Being subjected to low paying jobs with the option to improve education and later get a better job meant that whites had limited funds to afford things like proper health care services. Forced removals of non-whites from the city centre meant that they were too far from basic services and needed money for transport in case they needed the service (Eyles, Goudge, Harris, Penn-Kekana & Thomas 2014). Furthermore, the migration of blacks to urban areas in search of better paying jobs meant that only men left to find work in the cities while their wives remained behind in the rural areas to take care of the family, namely, young children and the sick elderly.

Adding on to limited access to health care, the health care system under the apartheid era did not follow the quality-of-care guidelines. Blacks were refused emergency care, subjected to false medical records, and mentally disturbed blacks were mistreated as well. There were separate health departments for independent homelands – Bophuthatswana, Ciskei, Transkei and Venda and there was poor coordination with many disparities (Kon & Lackan 2008: 2272).

Migration from the homelands to the cities in search of employment increased the spread of HIV/AIDS because mainly only men moved to the cities while the wives remained in the homelands to care for the families. The male migrant labourers partnered with female prostitutes and that is how they contracted the virus. The virus would then spread when the men visited their wives and families in the homelands or when the men or prostitutes were sick and cared for at home (Harrison, Karim, Lurie & Wilkinson 1997: 19).

Institutional reform in the health sector was needed to close the social, cultural, financial, and physical gap and allow all non-white patients to enjoy the same health care services offered to areas occupied by non-whites. The ANC government passed laws like the Bill of Rights, Batho Pele Principles (People first), the National Health Act and the Patients' Rights Charter, that recognised proper health as a democratic right

(Eyles et al. 2014). Transformation is still very slow in the health sector. Moreover, the physical gap is still evident leading to transport costs for poor blacks in the rural areas. A sudden jump in population to be serviced from less than 20% to 85% of the population all dependent on the 56% of the health expenditure deterred progress even more (Eyles et al. 2014).

After 1994, the homelands were absorbed into the nine provinces and the health care of the homelands belonged to the provincial health system. Two kinds of health care systems emerged in the new South Africa, namely, public health care funded by the state and private health care enjoyed by those who could afford to pay the bills (Kon & Lackan 2008: 2272). The reform in the health sector showed progress in some instances. The overburden of HIV/AIDS, TB and non-communicable diseases were now under the manageable control of South Africa's Antiretroviral (ART) programme which is currently the largest in the world. New HIV infections have dropped by 63% while mother-to-child transmission dropped by 5% (Eyles et al. 2014). The new National Health Insurance system that is underway is also promising great progress in the health sector.

For truth and reconciliation to be effective, serious and focused attention must be paid, not only to individuals but also to institutions. Institutional reform should be at the heart of transformation (Boraine 2006: 25). The latter author argues that TRC is an ideal model for holding together both retrospective truth and prospective needs. Unfortunately, most truth commissions have chosen to focus almost entirely on individual hearings. Individual hearings are critical, but if commissions were to hold institutional hearings, this would enable them to call to account those institutions directly responsible for the breakdown of the state and the repressive measures that were imposed on citizens of that state.

In the SATRC, an opportunity was created for spokespersons from the military, the police, the security forces, politicians, faith communities, legal representatives, the media, and labour to give an account of their role in the past and, importantly, how they

saw their role in the future. In other words, it is simply not enough to be merely concerned about the past. We must deal with it, but we must not dwell in it. We deal with the past for the sake of the future. The researcher argues that the TRC was seen as an attempt at forging a future of a reconciled and a united people after a history of conflict and hatred. It is for that reason that Desmond Tutu (1999) wrote a book entitled, "No Future without Reconciliation."

As observed by Boraine (2006), in the case study of Serbia, it was quite clear that one of the major problems preventing the country from moving beyond its dark and ominous past into a brighter democracy is that the institutions remain almost exactly the same. The same police officers control the police forces; the same generals control the army like Slobodan Milošević who was the President of Serbia from 1989 to 1997 and was alleged to have had a role in the genocide during the Yugoslav wars. This was true of the major institutions. As Boraine moved from one group of leaders to another, as part of her research, it was clear that unless and until institutions are radically restructured, there would be little opportunity for growth, for development and for peace in Serbia. This is not only true of Serbia but it is true of the former Yugoslavia as a whole (Boraine 2006). The following chapters focus on how successful or not institutional reform has taken place in the South African attempt at transitional justice.

Indeed, it seems that, Institutional Reform is needed in all states that have failed and are in transition. In deeply divided societies where mistrust and fear still reign, there must be bridge building and a commitment not only to criminal justice, but also to economic justice. For that to be a reality, institutions as well as individuals have to change. The vetting of former repressive security establishments is an essential part of institutional reform. However, reform must be carefully managed (Boraine 2006: 24). Immediately after the invasion of Iraq, the Baath Party was totally banned (Boraine 2006). This makes no allowance whatsoever for the need for security and favours collective guilt over individual responsibility. There can be little doubt that many Iraqis joined the Baath Party in order to survive. In addition, there are many other instances in the other countries where people were forced to join a party in order to enable their

children to have access to education and food. It is well known, for example, that many Zimbabweans joined the Zimbabwe African National Union Patriotic Front (ZANU-PF) for the sake of their own personal security and the welfare of their children (Sachikonye 2011).

Reforming state institutions involved in, or that failed to prevent, the commission of heinous crimes is an essential element of the transitional justice processes. Without the reform of institutions, transitional justice would be unable to prevent such crimes and human rights violations from recurring (Filippini, Sandoval & Vidal 2013: 9). Institutional reform is closely linked to guarantees of non-repetition (reparations process) as discussed above in this chapter. An obligation required from states that have breached international obligations by the international community as an assurance that what happened will not happen again. The key concern of such measures is prevention.

In processes of transition, such as that of South Africa from apartheid to democracy, states will be dealing with the atrocities that were committed but also with the structures that made them possible. Therefore, in order to prevent their recurrence, it is essential to identify and transform such structures. In particular, but not exclusively, the process of institutional reform aims to transform the security sector and the justice sector. Security sector refers to “the structures, institutions, and personnel responsible for the management, provision and oversight of security in a country” (UN 2008). It includes the police, military personnel, intelligence services, customs, certain segments of the justice sector, and non-state actors with security functions. The justice sector is not fully included in this concept. Nevertheless, it is an element of institutional reform, which should be at the heart of transitional justice processes. Indeed, one of the key aims of transitional justice, from a human rights perspective, is to bring to account those who are responsible for the atrocities. To this end, both the security and justice sectors are essential. If they are not up to the challenge, impunity and corruption will prevail. South African political debate has largely centred on the functions of such

offices as the National Prosecuting Authority, the courts and other centres of legal and institutional power such as the office of the Public Protector.

Truth-Seeking and Truth-Telling demand cold facts about conflict, and Trials and Tribunals seek to get all the truth out of perpetrators through legal interrogation. Reparations are aimed at repair damaged relations and allegation of injuries suffered during conflict. Institutional Reform attempts to assure society that the institutions that perpetuated violations or failed to prevent them when it was their power to do so have been removed or reformed. Of all the above pillars of transitional justice, none deals with the human imagination in a direct way. Memory and sentiment are human attributes that can remain long after problems have supposedly been solved. Truth, justice, reform, and restitution may not be enough for people who are followed by memories of their former status in society or loved ones that they lost during conflict and violence. There is need in transitional justice to manage memories and marshal them in a way that does not encourage the return to anger and revenge, but points to a peaceful picture of the future. The following section of this chapter focuses on the important issue of memorialisation as a pillar of transitional justice.

## **2.7 Memorialisation as a Pillar of Transitional Justice**

Anderson (1993) describes nations as creatures of the imagination, and societies as whom they imagine and believe they are. Furthermore, Said (1978) has elaborated on “imaginary geographies” the belief in our belonging to space and time as imagined memory and fantasy of our selves. Imagination in its relationship to memory of the past and fantasy of the future is important in the lives of nations and communities. Memorialisation is about honouring the dignity, suffering, and humanity of victims, both living and dead, and commemorating the struggles and suffering of individuals and communities (Heeke, Stammel & Knaevelsrud 2015: 60). Such a process aims to contribute to healing and reconciliation, and to ensure that history is never forgotten regardless of how horrific it may have been.

Memorialisation mostly comes after the initial phase of transition, and can be achieved by constructing monuments and museums, establishing national days of remembrance, and including information about the past in the school curriculum. Transitional Justice processes have serious implications in terms of human, technical and financial resources. This can create problems for emerging democracies, especially where state coffers have been depleted by the previous regime. However, it is generally agreed that efforts have to be made to source the funds, and that failing to address the abuses of the past can lead to countries eventually paying a much higher price. Where transitional governments cannot meet the costs of transitional justice, donors can be approached. This should be approached cautiously as donors may have their own agendas and wish to attach conditions to funds they provide, or seek to position themselves relationally to the regime in power (Rosoux 2004: 166).

Memorialisation has emerged as an important feature of post-conflict societies, countries emerging from violent conflict, and of what this chapter defined and explained as transitional justice. Though practised for centuries as an almost instinctive reaction to violence, or some ritualistic and also religious practice, more sustained attention to memorialisation has only recently gathered pace, with the process gradually democratised over the course of a number of years (Schmidt 1994). Local, national and international actors are now frequently part of the development and implementation of memory initiatives that are intended to serve a number of purposes after violent conflict. Commonly understood in terms of commemoration, the non-recurrence of violence and symbolic forms of reparations, research now demonstrates that memorialisation must be considered beyond these traditional understandings and as contributing in much more dynamic and diverse ways to attempt to deal with a violent past, including truth and justice.

In this respect, more profound participation in memory, struggles over history and debates about the relationship between the past and the present have dramatically increased (Schmidt 1994). An awareness and understanding of context should be central to any intervention after conflict. As the principle suggests, context denotes

mindfulness to a number of essential factors that directly relate to the violence that was perpetrated, but also those factors that are idiosyncratic of the particular society or culture. Context thus implies consideration of the different contextual layers within a society, including the traditional and local, the regional and international, as well as recognising the actors involved and the roles that they play (Dube & Guzura 2016: 980). Context also denotes recognition of the importance of societal norms and socio-cultural traditions, having regard to the inherent differences that exist within societies. With South Africa, this is even more important given the many cultural traditions that are in the country. Ramphele (2008) and Lodge (2002) have raised concerns about how Christianity was allowed to dominate the events and proceedings of the TRC at the expense of other faiths and cultures.

When engaging in memorialisation, it is even more essential to be conscious of these factors than when becoming involved in mechanisms such as criminal justice. Memory initiatives are often much more value-driven and moulded by the idiosyncrasies of the individual context, rather than restrained by external procedures (Dube & Guzura 2016: 989). Given the choices that will have to be made in decision-making on memorialisation, this comprehension will lead to better understanding of the potential of memory initiatives to positively contribute to dealing with violence and the risks associated with involvement. It will also avoid attempts to transplant models from one context to another, termed 'one-size-fits-all' approaches. Architectural memorials, museums and commemorative activities are indispensable educational initiatives to establish the record beyond denial, and prevent repetition (Ross & Sriram 2012: 27).

In many cases, by launching commemoration activities such as Freedom Day or Human Rights Day, civil society has been the catalyst for states to assume their duties. Examples of commemoration include museums and monuments educating the public about past abuse, such as the Museum of Memory and Human Rights in Chile (Ross & Sriram 2012: 27) dedicated to present the history of the military dictatorship and document its abuses. Spaces transformed to mark the site of a violation—such as Constitution Hill in Johannesburg, a former prison that is now South Africa's

Constitutional Court. Other activities of remembrance include the annual March 24 demonstrations in Argentina, which mark the beginning of the 1970s military dictatorship. In Peru, relatives of the disappeared people have joined efforts to knit a gigantic “Scarf of Hope” in memory of victims (Ross & Sriram 2012: 28).

Memorialisation can also take the shape of holidays and ritualisations, events and celebrations such as the ANC centenary festivities. Recently, South Africans’ attention and imagination were captured by incidents of contested memory when students demanded the removal of the statue of Cecil John Rhodes and those of other colonial figures. The fact that there was wide public debate and even academic debate shows that statues as memorial symbols have power and representational significance. Therefore, they cannot be ignored.

The role and impact of memorialisation in combating impunity has been explored by other studies, leading to interesting findings, and new questions. For example, in Cambodia, memorialisation was practised almost exclusively top-down and was managed in a one-sided way (Dube & Guzura 2016: 995). In Burundi, the ruling elites denied the magnitude of the atrocities and tried to silence any debate on traumatic past. Consequently, the survivors of the atrocities have a hard time organizing themselves and claiming their right to truth and memory (Dube & Guzura 2016: 995). In the Balkan region, some high level perpetrators were brought to justice, but truth finding, dignifying the victims and memorialisation had hardly taken place.

On the contrary, in Guatemala, truth finding, exhumations and memorialization progressed, but here justice and reparations proved to be the weakest elements in the transitional justice process (Rosoux 2004: 167). While memorialisation can easily be mistaken for art and performance, what literature on transitional justice and collective memory suggests strongly is that it is an important healing and memory management mechanism, which compliments other pillars of transitional justice. If nations are imagined communities as opined by Anderson (1993) and countries are imaginative

geographies as Said (1978) stated, then memory as part of imagination and remembrance is important in the life of a country and a nation.

The management of remembrance of what was lost during conflict and the attempt to fantasise as to what the future may be after all the trouble requires a careful attendance to memorialisation as a pillar of transitional justice. While memorialisation attends mainly to the symbolic forms of reparation and justice, it might as well be very critical in that it then manages the emotions and the psyche of victims and can be critical in deciding whether forgiveness or vengeance are achieved. In South Africa, perhaps the two most prominent examples of memorialisation are the Hector Peterson Monument in Soweto and the Constitutional Hill Monument in Johannesburg. These monuments are not only venerated locally but have also become international tourist attractions.

## **2.8 Conclusion**

This chapter discussed the five pillars of transitional justice that were used in this study as a conceptual and theoretical framework to evaluate the effectiveness of the SATRC. Views of a multiplicity of scholars who wrote on transitional justice was used to illuminate, Truth-seeking and Truth-Telling, Trials, Reparations, Institutional Reform and Memorialisation as critical pillars of transitional justice. The preliminary conclusion of this chapter is that the five pillars are each not exhaustive as they may not be an answer to transitional justice when applied in isolation. It appears to this study that the Five Pillars of Transitional Justice become effective when they complement each other, each pillar is dependent on the next to be more effective.

Notably, besides the material forms of seeking and finding justice, memorialisation as symbolic reparations and attendance to the honour and dignity of the departed and pride of the living appears to be very important to this study. Furthermore, memorialisation seems to attend to the psyche and the ego of the society that must be able to remember the painful past and also fantasise a peaceful and better future if transitional justice is to be realised. The next chapter seeks to survey the popularity of

Truth and Reconciliation Commissions in the world and as such to locate the SATRC in that tradition. In the view of Milan Kundera (1985: 3), “the struggle of man against power is the struggle of memory against forgetting.” Remembering in that view is part of the struggle for a fuller and freer life. It is argued in this study that if truth commissions do not pay attention to the memories of society, they may miss a big part of transitional justice.

## Chapter Three

### On the popularity of the SATRC

#### 3.1 Introduction

The popularity of the TRC model in Africa is remarkable (Graybill 2002: 23). It is given the status of a transitional justice mechanism of choice. Its position as the prime transitional justice mechanism in post-conflict states is undisputed. Yet in South Africa, victims of the apartheid system have a different opinion regarding the TRC that is remarkable to the world. The victims mostly look at the TRC model with suspicion and contempt.

Right from 20 of October 1998, when the TRC officially published its report, criticism of its work, processes and report were outpouring, especially from the victims of the apartheid system. Mamdani (2002: 33) refers to the report as an assault on the rights and dignity of millions of South Africa. Victims were more critical of the process arguing among others that the TRC failed them by granting amnesty quickly while taking forever to pay victims reparations (Mamdani 2002; Andrews 2004). The criticism was not only limited to the victims of the apartheid system as the report received further criticism from other political parties, particularly from the Zulu-based Inkatha Freedom Party (IFP) and sections of the white elite with both characterising it as a witch hunt (Campbell 2000: 21). Support for the TRC mainly came from its Chairperson, Desmond Tutu (Campbell 2000: 21).

Besides the sheer popularity of the SATRC, it played an inevitable political role of helping society in the view of Alexander (2002: 111) to deal with a difficult past in a way that could give hope to the diversity of South Africans. Chipkin (2007: 173) believes that the SATRC “sought to provide a principle of commonality that would ground South Africans, despite their differences of culture, religion, language, and

race, as a people.” In this observation by Chipkin (2007: 173), the SATRC had a role to play in the difficult project of nation building in South Africa after a long history of violence and unrest. For that reason, the SATRC had a momentous political role.

This chapter sets out to interrogate the reason behind the contrasting fortunes which befell the SATRC, especially identifying the factors that led to its international popularity. This chapter is organised into four sections. The first section presents a history of the SATRC. The second section accounts for the international popularity of the TRC and the third section details the operations of the TRC and some of the factors which made it an international transitional justice model. The fourth and final section of this chapter alludes to some of the challenges inherent in the SATRC model.

### **3.2 History of the TRC**

Debates about the TRC started even before the TRC was officially mandated to look into South Africa’s past human rights abuses. It was indeed a product of protracted negotiations between the ANC and the National Party. The debates about the suitability of the TRC as a model to seek historical accountability in post-apartheid South Africa were played out not only in the political arena but also in other various forums such as the academia, religious circles and even the legal circles.

One of the most contentious issues was how to ensure the effective participation of ordinary South Africans in the processes of the TRC. These debates culminated in the official mandate of the TRC being adopted and thereby giving a clear direction in which the healing and reconciliation processes were to follow. The document that contains this mandate is the second chapter of Promotion of National Unity and Reconciliation Act of 1995 (TRC report 1998 vol. 1). Chapter two of the Promotion of National Unity and Reconciliation Act of 1995 stipulates that the TRC shall, “...be established to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past” (Doxtader & Salazer 2007: 14).

The set cut-off date was 1 March 1960, meaning that all atrocities committed prior to that date fell outside the mandate of the TRC. This had its own shortcomings in that it obviously left some cases outside the mandate of the TRC, which victims felt deserved to be heard and for which they deserved some compensation. However, it must be admitted that such a process needed a cut of date and 1 March 1960 received little criticism. A key lesson for other countries is that the cut-off date must be debated in the public domain before being set so that it will not appear as if it is a date set arbitrarily by stakeholders such as politicians in a bid to avoid accountability. If necessary, such dates must be clearly justified.

The mandate of the SATRC was very broad and this broadness can be explained in historical terms as it set out to account for historical human rights abuses which occurred over decades, and covering the atrocities committed by an illegal government. Specifically, the TRC set out to establish “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date” (TRC report 1998 vol. 1).

It also set out to deal with the balance between trading the truth for amnesty. This was set out in political terms as the criterion for amnesty eligibility was political motive for committing the crimes. The mandate thus stated that the granting of amnesty to persons who make full disclosure of all the relevant facts relating to the acts associated with a political objective (TRC report 1998 vol. 1).

The key lesson here is that political crimes must be clearly demarcated from other acts of criminality so that common criminals do not end up benefiting unfairly from amnesties. At implementation level, the challenge relates to the criteria to use when establishing political motives.

The third mandate of the SATRC was to establish the whereabouts of victims thereby contributing to the restoration of the human dignity of their families and communities.

Furthermore, the TRC sought to re-establish the human dignity of the victims and their families by “granting them an opportunity to relate their own accounts of the violations of which they are victims, and by recommending reparation measures in respect of them” (TRC report 1998 vol. 1).

This formed a major pillar of the SATRC as the processes of victim participation enhance the effectiveness of the process and made it more authentic. The major challenges of the TRC also emanated from this aspect of the mandate and will be explored further in subsequent sections of this chapter.

The fourth mandate of the SATRC was the compilation of a report which contained recommendations on measures to prevent the recurrence of such atrocities. This is where political parties contested vehemently as they foresaw some of the recommendations as not feasible or unfounded. Theoretically, a TRC report is deemed to be most effective and useful when it has been riposted as a statement of the truth. In this form, it can inform future policies and political decisions, hence the reason which political parties such as the IFP and the National Party were in disagreement with the contents of the report. A key lesson in that regard is to present draft reports to all major stakeholders for comment and inputs so that the final report is less contested and not full of surprises.

The gathering of inputs from a wide section of the population especially perpetrators, victims and political parties would go a long way in crafting a final report which is generally acceptable and which can inform the country’s human rights record in a less contestable format. Countries undergoing the processes of historical accountability using the TRC also needed to consider employing the expertise of former truth and reconciliation commissioners in the drafting of their final reports as they amassed a lot of experience in this regard which can benefit other TRC. The lessons they learnt thus can be passed on to these new TRCs, which will go a long way in enhancing their effectiveness.

### **3.3 The areas of contention**

Given the large mandate of the SATRC, it is hardly surprising that there were some disagreements over the contents of the final report. Again, it is not surprising at all that the areas of contention around the TRC report covered virtually all its major areas of reference, i.e., truth telling or truth recovery, memory, amnesty, reparations, reconciliation and justice. These continue to be accessed even today more than a decade after the finalisation of the TRC report. Two camps emerge in the access of the effectiveness of the TRC and where it constitutes a transitional justice role model. These are those who argue for the primacy of the justice and those who value the truth at any cost (Hamber 2003: 6).

A smaller group values the processes of the TRC more than the eventual outcome. These argue that not much emphasis must be placed on the final TRC report. Rather, more and rightful emphasis must be placed on the processes that the TRC undertook. There was more value in having victims come forward with their testimonies, some confronting their perpetrators and in the process finding healing and reconciliation. This then points to the need of truth commissions to balance the expected outcomes by operating in a manner that ensures the three broad categories of justice seekers, truth seekers and process driven constructivist are all considered.

### **3.4 Which method to use to evaluate the SATRC**

One of the most contentious areas in the evaluation of the effectiveness of the SATRC is how to undertake that analysis. There are two broad camps in this regard, one which reads the work of the SATRC from a truth perspective, that is, whether truth was attained as a result of the work of the SATRC or not. The second perspective looks at the issue from a process point of view. Those who evaluate the SATRC from the process point of view emphasise the role that the various TRC processes achieved. One of these is that the SATRC afforded both the victims and the perpetrators an opportunity to tell their story and most importantly, to face each other. The debate can

be reduced to whether to emphasise the authenticity of the TRC or to put more weight on the role of the processes that were undertaken.

The perspective which gives more weight to the processes argue that the TRC gave birth to national unity in post-apartheid South Africa, something which was going to be very difficult if the processes of TRC were not undertaken. While both agree on the need to seek accountability for past human rights abuses, they differ on both the method to be used and the areas where emphasis should be put (Hamber 2003: 7).

The implications of this debate on the evaluation of the SATRC and to those countries that have drawn lessons from it are that there will never be an agreement on how the outcomes of the process of the TRC can be evaluated. This is partly due to the diverse nature of the mandate that most TRCs try to resolve. This debate has to be expected but must not be allowed to stop both the implementation and evaluation of the SATRC model.

### **3.5 Who should evaluate the TRC?**

Equally debated is the nature of those who should evaluate bodies such as the TRC. The majority of the people in post-conflict communities opine that this must be undertaken by the victims or victims' bodies simply because they are the wronged and hence they have the moral ground to judge if either truth or reconciliation or both were achieved.

On the contrary, there are those who argue that both the victims and the perpetrators must be allowed to judge the effectiveness of the TRC simply because they were both involved in the violence, although one was the perpetrator and the other a victim. The argument here is that both require to be healed and also that reconciliation needs the participation and acknowledgement of the two. According to this view, side-lining perpetrators is not recommended as it somehow amounts to retaliation. Therefore,

perpetrators need to be treated as an important complement of the new society (Hamber 2003: 7).

The debate is complicated by the role of NGOs. Their role in the evaluation of the SATRC is much contested given that these organisations are not answerable to the government giving doubt on their agenda. These organisations can be viewed as having the best interests of the victims at heart as they are always in touch with the victims. While some local NGOs are locally funded, some are funded by international donors and governments such as the United States Agency for International Development (USAID) which has been accused of sponsoring coups in Latin America.

The second set of institutions that have also attempted to evaluate the work of the TRC are regional bodies, mainly the Southern Africa Development Community (SADC). While unofficial, SADC has variously praised the SATRC as having promoted unity and cohesion in post-apartheid South Africa. The African Union and its predecessor, the Organisation of African Unity, also took such a stance. This is an expected endorsement, which is hardly surprising. This leads to speculation that SADC may at one point officially recognise the SATRC model as its preferred post-conflict truth and reconciliation method. Other non-state actors that have also variously commented on the effectiveness of the SATRC model include the United Nations and its various agencies such as the ICC and the UNGA.

All these regional, continental and international bodies' recognition that has been accorded to the SATRC attests to its effectiveness, one way or the other, in healing communities torn by decade long conflicts. Therefore, it is worth mentioning that the contestations over the means by which the work of the SATRC should be evaluated do not reflect a contest over words and meanings. Rather this implies a deep and wide struggle experienced in post-conflict communities in terms of the identities of such communities. These contests over the identities in post-conflict communities are usually fought around issues of justice, reconciliation, truth-telling and truth-recovery and finally memory and memorialisation. These form the five pillars of transitional

justice which this study employs as the theoretical framework and was discussed in greater detail in the previous chapter. The next section explores the challenges faced by the SATRC.

### **3.6 Challenges of the TRC**

The major challenge with the SATRC model is that it tried to be both restorative and retributive and ended up not achieving both. Reparations that are a key restorative mechanism finally did not materialise for the victims of apartheid, and this compromised the TRC to an extent that it appeared to have been designed to let the perpetrators of apartheid lose than to ensure justice. Furthermore, the Amnesty of Committee of the TRC had powers to implement amnesty whereas the Reparations Committee only had enough powers to recommend reparations but not to implement them. Clearly, bias was towards granting amnesty to perpetrators of apartheid human rights violations (Mamdani 2002).

#### **3.6.1 Semantic challenges**

Right from the onset, the SATRC was bogged down and troubled by the issue of semantics. Both definitions of the victims and the perpetrator were not conclusive and left many loopholes that could be exploited by either side. The 'victim' was not defined at all in the Act which set up the TRC while the 'perpetrator' was defined in loose terms. This left the TRC with the very difficult task of bridging the gap created by these inadequate definitions in the Act.

What made the work of the TRC very difficult in defining the 'victim' and the 'perpetrator' is the fact the apartheid government never officially acknowledged the role played by the various agencies and individuals who carried out the orders of abusing human rights. Those who executed these official orders thus had the individual decision to make whether they wanted to come before the TRC as perpetrators or not. For the reason that the identity of the victims and the perpetrators was not semantically clear,

conclusiveness in getting the truth and establishing a clear way forward became next to impossible.

### **3.6.2 The individualisation of victims**

The TRC, despite its understanding that apartheid was a system that was a crime against humanity and that affected communities in a systemic way, individualised victims and perpetrators. This individualisation of both victims and perpetrators somehow put some selected individuals as victims and others as perpetrators, leaving the system of apartheid at large unresolved and unscathed. For that reason, the focus of the TRC was narrowed, making it less effective than it was going to be if it focused on apartheid as a system that had communal and societal impact.

The individualisation of the victims and that of the perpetrators also obscured the fact that apartheid treated natives and non-natives differently. Mamdani (2013: 4) emphasises that “the apartheid state spoke the language of *rights* to the white population,” as a favoured group and “it disaggregated the native population into tribal groups—each to be administered under a separate set of laws—in the name of enforcing *custom*.” For that reason, victims of apartheid suffered as communities and perpetrators and beneficiaries were favoured also as communities. In this logic of Mamdani, society became a victim of apartheid and there was a need for the TRC if it was to be more effective to have a societal approach as well not just the isolated focus of individual victims and individual perpetrators. Mamdani (2002) insists that by doing so, the TRC extended impunity to some perpetrators of apartheid who remained unidentified.

### **3.6.3 Political party (non)involvement**

Interestingly, both the ANC and the National Party as contesting disputants during the apartheid era critiqued the TRC report in 1998 (Cherry 2000: 9). To some scholars, the

fact that both disputants were unhappy with the report proved that the report was not only non-partisan but also non-political. However, in another way, the complaints might have been proof that the report might have been a limited account. What exposes the limits of the Report was the silence of the two disputants regarding the finding that the TRC identified 20 000 victims of apartheid, which raises the critical question of exactly how a crime against humanity that was perpetrated over so many years in a big country could only have 20 000 victims (Mamdani 2002: 34). In the view of Mamdani (2002), the TRC to a large extent obscured the bigger picture and distorted the larger truth about apartheid in the end for the benefit of the perpetrators.

#### **3.6.4 Timeframe for the crimes covered by the TRC**

Another worrisome limit and question regarding the effectiveness of the TRC is that it reported that almost half of the total of human rights violations that occurred took place during the short period of transition from apartheid and only 15% of the violations are said to have been committed in the heydays of apartheid (Mamdani, 2002: 35). This does not only mean that the TRC almost blamed atrocities of apartheid on its victims. It also meant that the larger truth about apartheid was concealed as atrocities of so many long years remained unaccounted for in the TRC report findings (Gibson 2004: 23). The impression that most apartheid atrocities occurred towards its end and not during its heydays in a strong way conceals rather than reveals the important truth.

#### **3.6.5 Ranking of perpetrators**

Yet another concern rises with the ranking of what are described in the TRC Report as perpetrator organisations (TRC 3: 7, table D2A.1-1). In that list, the ANC is first, followed by IFP, the South African Police ranks number seven. This categorisation and ranking provides an inversion of history as is it is known and understood (Grisham 2014: 45). In that way, the crimes of apartheid are almost directly being blamed on

those organisations that are historically known to have been fighting apartheid or in their own violence reacting to the violence of apartheid.

That the South African Defence Forces would be less of a perpetrator organisation than the IFP dramatically signals a distortion of history at the expense of the liberation movement and for the benefit of perpetrators of apartheid atrocities. At the end of the day, black-on-black violence is made to overshadow apartheid violence (Kaufman 2012). The magnification of black violence and the minimisation of systematic white supremacist apartheid atrocities forcefully discredit the TRC. Mamdani (2002: 37) observes that the TRC ignored obvious evidence that apartheid was a systematic crime against humanity perpetrated against black people, firstly as a collective and secondly as individuals.

### **3.6.6 Apartheid as a crime against humanity**

The TRC argued that "the recognition of apartheid as a crime against humanity remains a fundamental starting point for reconciliation in South Africa" (TRC report 1998 vol. 1). However, it appears that a full understanding of the impact of crimes against humanity does not follow the recognition. The fact that apartheid was institutionalised and that it disadvantaged the black population at a very large scale is fundamentally obscured. The fact that apartheid violence amounted to racial and ethnic cleansing is a reality that the TRC avoids illuminating. For that reason, in word and not in deed did the TRC consider the fact that apartheid was a crime against humanity as its starting point?

According to Eden (2013: 90), the human rights violations of the apartheid era in South Africa provoked worldwide condemnation and a wide selection of diplomatic and legal responses. One such response was the drafting of an international convention declaring that "apartheid is a crime against humanity" in 1973 and called for the "practices of apartheid" to be included in the list of grave breaches contained in Article 85 of Additional Protocol I (AP I) in 1977. Even though the end of apartheid gave the

concept and the attempts to criminalise it to history, apartheid was included as a crime against humanity in the 1998 Statute of the International Criminal Court (ICC Statute).

### **3.6.7 A crime without victims**

Mamdani (2002: 39) notes that the irony was that, whereas the Commission recognized this “system of enforced racial discrimination and separation” as a crime against humanity, in South Africa it did not acknowledge any victims of this crime. Consequently, it also recognized no perpetrators. We have a crime against humanity without either victims or perpetrators. By obscuring that blacks as a collective were victims of crimes against humanity, the TRC also effectively obscured that apartheid had communal and systemic beneficiaries that benefited from it as a collective.

### **3.6.8 Lack of international prosecutions for international crimes**

The TRC ruled out international criminal prosecution for the perpetrators of apartheid as a crime against humanity (TRC report vol. 1, 1998. Ch. 9). The reason given was that the idea of international prosecution would militate against the spirit in which the TRC was formed. Furthermore, the Commission noted that apartheid culpability was more of a moral matter than it was a legal issue. Ironically, in the observation of Mamdani (2013), the spirit in which the TRC was formed included ruling out any blanket amnesty but promised to scrutinise the merits and demerits of each application for amnesty case-by-case. In that logic the perpetrators who confessed the truth stood to earn amnesty, society would earn the truth and specific victims would be entitled to reparations. As Mamdani (2013) effectively argued, the victims of systemic apartheid were communities in their collective not just individuals.

### **3.6.9 The TRC as an inhibitor of reconciliation**

The injuries that the communities suffered included, in the observation of Mamdani (2000), disrupted family lives, forced labour, unfair laws, restricted movement and location. One may add loss of social and economic opportunities such as education. For that reason, Mamdani (2000) concludes that the TRC had limited success in facilitating transitional justice since it did not occasion reparations for communities but effectively facilitated amnesty for offenders.

### **3.7 Critiques of the South African Truth and Reconciliation Commission**

This section of the study seeks to carry out a survey of critiques of the SATRC process. In so doing, the section is aimed at assisting the study to make a balanced evaluation of the SATRC process as an attempt to transitional justice, reconciliation, nation building, and peace as some of the objectives of the Commission from its foundation. For that reason, the section draws voices from scholars, politicians and even some commissioners of the SATRC.

In his forceful argument that in South Africa there is to be “no future without forgiveness,” Tutu (1999) admits that the SATRC process was an important “international experiment” in politics, reconciliation and peace building. Being an experiment that it was, its political results and effects should be available for observation and evaluation, processes to which this humble study aims to contribute.

Having been one of the chairpersons of the Commission, Tutu (1999) makes telling disclosures and critiques that enable this study in its project of evaluating the effectiveness of the TRC in aiding transitional justice, reconciliation, peace building and nation building that South Africa needed after many years of racialised and violent conflict. To start with, Tutu correctly observes that the true success and failure of the SATRC will be observed “in the fullness of time,” not even a few decades after the process. Boldly, Tutu asks the question, “What about justices?” and charges that the

question of justice to the victims of violations of human rights and apartheid was suppressed in preference for reconciliation and peace.

In the view of Tutu, South Africans were willing to forgive the past, but those who were to be forgiven did not receive that gesture with earnest and honesty. They continued as perpetrators of and beneficiaries of the system of apartheid to claim that “we did not know” and plead ignorance of what happened during apartheid, making apartheid as a crime against humanity to be a crime that Mamdani (2000) quoted earlier in this study claimed to be a crime without criminals. For those reasons, Tutu (1999: 206) concludes that with the denialism of perpetrators and beneficiaries of apartheid, there will be no true forgiveness, and “without forgiveness there is really no future,” putting the total success of the SATRC, in his authoritative judgement into serious question.

Tellingly, Tutu (1999: 153) describes the work in the SATRC as having been in reality a “thankless job” that was not appreciated even by its ultimate beneficiaries, more thankless. In the view of Sparks (2003: 135), it was the denialism of perpetrators and some beneficiaries of apartheid, a denialism that Desmond Tutu also notes and condemns:

Yet other Afrikaners are in denial, claiming they knew nothing of apartheid atrocities and dismissing the TRC hearings as witch-hunt, or simply saying they are sick and tired of guilt confessions and it is time to bury the past. Still others are eager to find a new basis for giving meaning and legitimacy to the concept of a discrete Afrikaner Volk within the larger rainbow nation and to define a new role for it to play.

The denialism of some Afrikaners and the intention by others to continue white privilege and supremacy discretely within the new South Africa jeopardises the success of national building and reconciliation. It also proves that as mechanism for reconciliation and nation building, the SATRC was not such a success.

Discussing the important subject of nationalism, nationhood and democracy in South Africa, especially concerning the identity and perspectives of “the people” Chipkin (2007) asks the important question, “Do South Africans” really “exist?” In total, Chipkin (2007) doubts if nationalism and nationhood in South Africa have been properly understood. Furthermore, (Chipkin 2007) doubts if they have been translated into democracy in the daily experience of the people, in that doubt, the success and effectiveness of such projects as the work of the TRC are thrown into doubt and serious question as effective mechanisms of nation building, peace building and reconciliation.

Chipkin (2007: 173) argues that as an effort at nation building and peace building, the SATRC was a “controversial model” with doubtful success. The language of human rights was conflated with the language of theology (Chipkin 2007: 183) in the process concealing politics and suppressing concrete historical facts that needed to be dealt with in order to bring the victims of apartheid and the perpetrators of the crime against humanity together into the citizenship of one nation.

The mobilisation and deployment of theological thinking and language in the SATRC processes introduced an understanding of the South African transition from apartheid to democracy as the work of a divine miracle. Sparks (2003), in his exploration of the politics of “inside the new South Africa,” warns that South Africans should, in their thinking about South Africa and the future go “beyond the miracle” thinking and face realities of history and politics.

In the understanding of Sparks (2003: 160), the SATRC entailed “an exchange of truth for amnesty,” so those who violated human rights during apartheid could confess and seek forgiveness while avoiding prosecution and punishment. Against this background, Sparks (2003) demands that the SATRC be viewed in light of politics and history where human beings of flesh and fault are involved. He further argues that the South African transition from apartheid to democracy should be undressed of its miracle and divine covers so that human actions, politics and history can be correctly accounted for and articulated. The understanding of the South African transition in divine and miracle

terms creates euphoria and needless expectations that history presently confirms are unachievable.

Perhaps, believing that South Africa, its transition from apartheid to democracy has been overly covered in the divine and the miraculous, Alexander (2002) declares in a book that South Africa is and should carry itself as “an ordinary country” that has more work to do to build itself to a democracy and prosperous country with happy citizens. To Alexander (2002: 1), the question is, “Are we dealing with a miracle or mirage?” And in his view in dealing with South Africa, “we are in fact dealing with a very ordinary country, one which has come very late to the table of the comity of nations.” During and after the TRC process in South Africa, euphoria and excitement frequently overtook history and portrayed a new South Africa that might after all, never come.

In a justifiable fit of euphoria, Archbishop Tutu incanted at the swearing in of the National Assembly of South Africa in 1994: “We of many cultures, languages and races have become one nation. We are the rainbow people of God. At the time and for a few months afterwards, it appeared as though there was some truth in this apodictic pronouncement. However, scholars of social dynamics warned in numerous articles against simplistic notions of instant identity change (Alexander 2002: 81).

Euphoria around the South African political transition and around the SATRC and what it could do for South Africa tended to conceal the national political homework at hand. Part of the ineffectiveness and even failure of the SATRC may be that it was overloaded with impossible expectations that were couched in the political and religious grammar of the extraordinary. The grammar of the religious and the miraculous, the extraordinary and the otherworldly consequentially detached the SATRC from the experiences of the ordinary South African people.

While Cole (2010) correctly understood the work of the TRC of South Africa as staged performance of the truth and of reconciliation, Lodge (2002: 99) understands it to have been quasi-religious ceremony and repertoire. Boraine (2006) who served as the

Deputy Chairperson to Tutu at the Commission understood that of all the pretensions of the SATRC, “it was a ritual, deeply needed to cleanse a nation. It was a drama”. The actors were in the main ordinary people with a powerful story. But this was no well-written play; it was it was the unvarnished truth in all its starkness.” Once again, emphasis in on the public performance, ceremony and ritual that accompanied the work of the SATRC and how it was removed from the real to the surreal. Lodge (2002: 182) notes that:

The quasi-religious opening ceremony of the public Human Rights Violations hearings in the East London City Hall in April 1994 set the tone for much of what followed. After an overture of hymn singing led by Commissioner Bongani Finca, all stood with heads bowed while Archbishop Tutu prayed and the names of those who died and disappeared, who were to be the subject of the day’s hearings, were read out. A big white candle inscribed with a cross was lit. The candle symbolised the bringing of the truth.

The performance of the SATRC that was also enmeshed with religious ritual and deep Christian symbolism remove the SATRC from the daily and the real to the symbolic and dramatic. Truth and forgiveness, reconciliation and nationhood ended up being dramatised rather than actualised and enacted. Performance overtook history and achieved a life of its own that might not have had anything to do with resolving historical injustices. In a way, the effectiveness and success of the TRC might have been compromised by the entrance of drama, performance and symbolism that reduced reconciliation and nation building to an article of faith rather than that of history. Ramphela (2008) bemoaned that the ghosts of South African history would not be put to their final rest if the narrative of the South African political transition continued entrapped in the symbolic, miraculous and ritualistic.

By its entrapment in the religious and the ritualistic, the SATRC ignored other professional processes that were needed in healing in preference for the belief and faith in the religious and the divine. Lodge (2002:189) notes that unfortunately “the TRC did not have the resources to undertake long-term counselling programmes, social

rehabilitation or local conflict resolution in the wake of its hearings,” and “its failure to enlist the support of the wide range of NGOs to undertake such ventures in a coordinated way was truly a missed opportunity”. This study can argue therefore that, the SATRC, in terms of effectiveness and success became a historical and political missed opportunity where not everything that needed to be done was done.

Other scholars such as Christodoulidis and Veitch (2008) have the view that reconciliation as privileged by the SATRC became “surrender” and giving up by black who had been outwitted by their oppressors and victimisers. That the majority poor black people were defeated and surrendered to the apartheid regime is witnessed in their continued “widespread poverty, ill health and severely limited life chances for millions of black South Africans” (Christodoulidis & Vleitch 2008: 10). They continue to suffer long after apartheid ended, only a minute black political and economic elite benefitted while whites continue to monopolise the economy and life in the Republic. The two scholars see the SATRC as having been a smoke screen to cover the continuation of apartheid.

To Gobodo-Madikizela (2008), the ideal of forgiveness that the SATRC aimed at was itself elusive and slippery, because in reality it is a myth that human beings can forgive or punish each other; they can only pretend to do so. Drawing from Arendt, Gobodo-Madikizela states that apartheid was, as a crime, an act of radical evil whose punishment and forgiveness is beyond the human except in pretence and simulation. In that reasoning, the SATRC is seen as having been a big pretence and simulation of reconciliation and forgiveness for mass political deception that allowed apartheid to continue by other means.

Du Bois-Pedain (2008: 62) argues that in the communication of the SATRC, criminality was suppressed or concealed to the extent that apartheid leaders such F. W. de Klerk got away with publicly claiming that they were not guilty, ignorant and innocent of what happened during apartheid (Du bois-Pedain 2008: 62). Creatively, the SATRC isolated blame for apartheid to a few Afrikaners that were sacrificed by the system and tried as

“few bad apples” among many people of integrity, which is misleading. The SATRC is seen as having been an exercise in deception and concealment of criminality, and therefore it could not have been effective and successful as mechanism of transitional justice, a justice that values truth in the first place.

Before stating the limits of the SATRC in the ministering of criminal justice, Nerlich (2008: 90) contends that the SATRC had the “combination of a victim-centred truth commission with the granting of individual amnesties”. He further argues that for perpetrators that confessed their crimes and this can “be praised as an innovative alternative to the prosecutorial approach of past injustices” that may cause further tensions and conflicts. However, the amnesty system mirrored the apartheid legal order, that is, laws of the apartheid regime were legitimated and recognised as having been laws, which endorsed the way the law was used during apartheid to persecute blacks (Nerlich 2008: 90). In a way, the limit of the SATRC was in partially endorsing apartheid rule, which was a treacherous compromise on part of the SATRC.

The process somehow betrayed the promises and aspirations of reparations that the SATRC carried. According to Du Bois (2008: 117), “this too is evidenced in South Africa, where the transitional legal arrangements also shielded those responsible for gross human rights violations, both the direct perpetrators and the organisations behind them, from civil as well as criminal liability”.

Ineffectively, as a transitional justice tool, the SATRC became an escape route for apartheid criminals and offenders. Barnard-Naude (2008: 172) opines that for justice and reconciliation to come, the promise of reparations must be fulfilled, and the SATRC “archive” must reflect “as complete a picture” as possible of what happened during apartheid and after. Barnard-Naude alleges that memory of apartheid in its brutality has partially been concealed and that the promise of reparations remains a promise as “the TRC lacked the power to order the payment of reparations” to victims. Further, Barnard-Naude (2008: 174) alleges that “in short, the TRC failed to compel the legislature to enact a law that, while it would not even have begun to address the

economic atrocities perpetrated under apartheid, would at least have provided some relief for the inhumane suffering that occurred in the economic sphere during that period". The economic injustices of apartheid went unresolved added to the fact that the reparations that were promised were not delivered, creating a real insufficiency and ineffectiveness on part of the SATRC

### **3.8 Conclusion**

In the main, the chapter accounted for the history and background of the SATRC process. The reasons for its popularity and how it increasingly becomes a global model of transitional justice are indicated. The areas of contention and the debates that surround the SATRC were fleshed out as well as the critical evaluations of its impact or lack thereof. Before the conclusion, some scholarly critiques of the SATRC were fleshed out. The following chapter delves into the results analysis or the main debate of the study, evaluation of the five pillars of transitional justice, namely, Truth-Seeking and Truth-Telling, Trials and Tribunals, Institutional Reform, Reparations and Memorialisation.

## **Chapter Four**

### **An analysis of the five pillars of Transitional Justice**

#### **4.1 Introduction**

Former South African President, Nelson Mandela was released from prison after the unbanning of the liberation movement in 1990. After his release, the negotiations for peace settlement followed and led to the end of the fight against colonialism and apartheid which carried on for more than 300 years. It was then time for the interim Constitution to be passed but the main hurdle was the issue of amnesty. The former government the National Party who were the perpetrators of the apartheid regime did not trust the new government and their new promises completely and therefore demanded to see the promises and agreements in writing (Sooka 2009: 29). One of the National Party's demands was that it should be noted in the interim Constitution before it is passed that they are guaranteed amnesty. The interim Constitution was finally effective and passed into law on the first day of the democratic elections in South Africa on 27 April 1994 (Sooka 2009: 30). However, the new ANC-led government was not all agreeing to the demands made by the former National Party government. They made it a point that there would not be any general amnesty given and amnesty should be tied to truth-telling and reparations for victims (Sooka 2009: 30).

Majority of the South African community was very active in the process of peace building. The civil society, including the victims, lawyers and religious community were of great help as they helped come up with appropriate laws and were led by the then newly elected Minister of Justice, Dullah Omar. They engaged in public discussions trying to establish the best way to make sure the amnesty process was accountable and protected the victims' rights. This whole process of consultation lasted for about a year leading to the establishment of the TRC.

According to Sooka (2009: 31), the TRC was established following the passing of the Promotion of National Unity and Reconciliation Act 34 of 1995 with the main aim being to grant the victims the chance to speak about past abuses and granting amnesty and putting a reparations policy in place. More than 22 000 victims testified and there were more than 7 000 applications for amnesty (Sooka 2009: 32). These testimonies were heard at public hearings and this made the SATRC to be recognised for being open and transparent and this was apparent because most South Africans became aware of the brutal massacre that apartheid was (Sooka 2009: 32). In South Africa, these hearings were held in such a manner to reach as many people as possible and broadcast on radio and television while in other countries these hearings are only limited to high profile individuals only and this normally excludes the victims.

Boraine (2009: 137) concurs with Sooka (2009: 32) that the establishment of the TRC in 1994, which followed the election of Nelson Mandela as president was backed with the aim that the TRC should help steer the country towards democracy and the basis of the TRC was transparency. The TRC was given powers by the Promotion of National Unity and Reconciliation Act 34 of 1995 to give amnesty, search premises, seize evidence, summon witnesses, and have a witness-protection programme in place for them (Doxtader & Salazar 2007: 22).

The five pillars of transitional justice are generally agreed upon by victims, practitioners and academics as elements that constitute fair assessment when evaluating transitional justice mechanisms. They are interpreted differently by different individuals and are sometimes termed differently; however, there is mutual understanding.

Transitional is a very easy to understand word meaning the past is fading away and the future is being prepared or yet to be prepared to look forward to. When talking about transition in terms of a country, it is when a country is in the process of transformation from one state of affairs, which is generally conflict to the next, which usually guarantee peace. However, this new state of affairs is not always clear. This uncertainty means that the country is certain that it needs to move away from the past

state of affairs but still has to find a way to manage in the future state of affairs. It sometimes becomes a challenge for the country to maintain and ensure sustainable peace that can in turn lead to democracy and economic growth to be present in the country (Boraine 2006: 18).

The justice part of transitional justice does not make the challenge of uncertainty in terms of the new state of affairs any better because justice comes in different forms. Justice can be retributive, restorative, distributive or in the form of economic or social transformation. From the breakdown above, the definition of transitional justice can be deduced as the best way for a society to search for peace and move away from an undemocratic, oppressive or violent system. This is done by confronting the perpetrators and addressing the needs of the victims and helping everyone involved to start with reconciliation and transformation (Boraine 2006: 20).

Judging by the grave human rights abuses in countries like South Africa, the hunt for justice is necessary and justifiable. This hunt can sometimes face the challenge of having few prosecutions and not most especially in countries with a large number of human rights violations where it is impossible to prosecute everyone. There is therefore a need for more tools and models to supplement one form of justice. Supporting a holistic approach to transitional justice that tries to balance retributive justice with restorative justice will help in ensuring a fair society.

Boraine (2006: 25) suggests these five pillars which strengthens a holistic approach to transitional justice.

## **4.2 Accountability**

Accountability is very important in the amnesty process because when the applicant tells the whole truth, it shows that he acknowledges the impact of his deeds on the victims and this also helps in the truth documentation because there will be more information to document. In South Africa, not all perpetrators were always willing to tell

the whole truth and mostly only did so when they were offered incentives like they will not be punished even though they deserve the harshest punishment. It was with the help of this incentive that the families of the victims have to learn the truth and the perpetrators also released their sense of guilt while the country as a whole began its journey of healing and reconciliation (Boraine 2006: 21).

It is sometimes questionable whether amnesty applicants are ever held accountable for their actions and it is important to understand the entire process of calling somebody to account in order to clear this confusion. The first step in the accountability process is when the perpetrator is called to account and that is when he will take responsibility for his actions and explain the details of his acts. A person is normally called to account with the general idea that they are accountable for that crime and that is not always true. The perpetrator gets the chance to explain the circumstances. If, for example, a person is called to account for the execution of a number of people in a bomb wired room by pressing a trigger button, he can either agree that he did it and explain why; alternatively, maybe say he was pushed down and he fell on the trigger button causing the bomb to go off but it was not his intention. The act of accounting by the perpetrator is only the first step in the accountability process with the consequences of his actions as the next step (Du Bois-Pedain 2007: 150).

Criminal trials are also accountability drivers where a trial can end in a conviction and the perpetrator is found guilty or acquittal when the defendant cannot be held accountable for anything. In a case where the defendant is convicted and found guilty, he will then be served with a sentence. Once all this is done, the perpetrator then gets to be recognised and treated as a normal member of the community and not as a mere criminal (Du Bois-Pedain 2007: 263).

### **4.3 Truth-Telling**

The truth is one of the main driving forces of the rule of law. With the truth, perpetrators can be identified and the victims can start with the healing process. The TRC is one

mechanism birthed from the notion of truth and it has gained prominence since its inception. It is almost given that in every peace accord a truth commission will be a considered option for transitional justice. During the truth commission, all the truth being told will be filed and analysed to find out all the details and methods used during the human rights abuses. However, it has been criticised that it is impossible for all the truth to be uncovered (Boraine 2006: 26).

The SATRC made a distinction between four kinds of truth. Firstly, the act that oversaw the TRC, which is the Promotion of National Unity and Reconciliation Act had to compile an all-inclusive report analysing the events and it can only be based on factual and unbiased evidence it had. Factual truth was hence the first kind of truth. Everyone has their own version of the truth and therefore an opportunity for victims and perpetrators to tell their sides of the story was granted and personal or narrative truth was the second truth. Social and dialogical truth was the third kind, which meant the kind of truth that cannot be proved and is deduced from interaction or discussions. The final kind of truth allowed the SATRC to look at the past and the future. Moreover, the Commission had to find the kind of truth that will help fix the damage of the past and make sure there is no repetition of the past incidences in the future and there for healing and restorative truth was the last kind of truth (Boraine 2006: 26).

Truth-telling in the TRC was supposed to culminate in the perpetrators confessing and being punished for their actions in order to bring closure and peace to the survivors. Some of the perpetrators only told the truth for the sake of amnesty and the victims and their families felt that the perpetrators did not deserve to be forgiven because it all seemed like the apology was meant for the state that will grant amnesty and not the victims or their families (Hamber & Wilson 2002: 38).

Truth-telling can be a complicated process, especially if the perpetrators are expected to tell the whole truth and not only the truth relating to their amnesty application. Most perpetrators were not willing to tell the whole truth because it might have negatively affected their application for amnesty and they do not want to risk prosecution. SATRC

advocated for a full disclosure of all the relevant facts only. Therefore, the applicant tended to look at those that will help his case positively only.

The view to only disclose relevant facts was not accepted by all. Some advocates thought that for the TRC to be successful and objective, all truth must be told. When all truth is told, all the facts will be in the open and this will help in finding out the nature and motive of all the crimes. However, the idea of full disclosure was not intended to force individuals to telling the truth. It was merely to put it out there that it will not help the TRC process in any way if for instance a perpetrator applies for amnesty for all the crimes that had no loss of life and then choose to remain silent about other drastic crimes, this would not help in reconciliation (Du Bois-Pedain 2007: 179).

With truth-telling, the participants tell their version of the truth based on their personal experiences during and after the genocide. Truth-hearing has to do with the way the truth is being received and dealt with and both truth-telling and truth-hearing are the main driving forces in truth recovery. Truth-shaping, on the other hand, generally involves external parties. These external parties re-evaluate the truth being heard and come up with their own findings putting them in a historical record detailing what happened during the genocide (Clark 2010: 187).

#### **4.4 Reconciliation and Memorialisation**

One other founding leg of the TRC is reconciliation; it is the next big step to take after truth recovery. Reconciliation can be associated mainly with the Christian religion as a necessary act of forgiveness after learning the truth. It is not always a righteous process though because at times religious representatives align with the perpetrators and further oppress the victims instead of helping them; this in turn gives reconciliation a bad reputation.

The best way to attempt to achieve reconciliation in a society of past injustice would be to find common grounds for the perpetrators, victims and those that claim to have

been spectators. That can be done by reminding everyone about what their society used to be. The process to reconcile is never easy and it can also be dangerous as it sometimes leads to demilitarisation and reintegration of former rebel armies (Boraine 2006: 24).

For the process of reconciliation to begin, one prerequisite is responsibility whereby the perpetrator acknowledges all their wrongdoing. This is vital because the victim cannot be expected to reconcile and be friendly with someone who continues to refuse that they had anything to do with the wrong act. The perpetrator needs to take responsibility for their action but it does not always guarantee that there will be reconciliation (Christodoulidis & Veitch 2008: 12).

An individual's memory is mainly the act of remembering the past, but a countrywide memorial act is a very powerful reconciliation tool that enables a common and shared memory. The common and shared memory in turn creates a sense of unity that result in reconciliation in the community. It is therefore important for the state to prioritise memory because it is a way to avoid future repetitions of violence. South Africa is one country that realised that fact and had the TRC set up to facilitate memory among other things. The most physical and noticeable act to symbolise memory by the state is the erection of monuments and museums, among other interventions (Hamber & Wilson 2002: 38).

It is sometimes difficult for some people to visualise reconciliation as something possible because they cannot forget the past, mainly because they believe that the perpetrators and suspects did not tell the truth and merely told the stories that will convince the public to be true and lead to their release or benefit on the plea bargain. Some survivors and victims are willing to live side-by-side with the people that wronged them but it can largely be possible if it is an issue of mending old relationships between neighbours or relatives (Clark 2010: 230).

#### **4.5 Institutional Reform**

Institutional reform is when focus is shifted from truth-recovery and reconciliation, which focus on individuals to the institution and it is at the heart of transformation. Though TRCs are the best mechanisms to look at the past and analyse the people's needs, most of them focus mainly on individual hearings instead of institutional hearings. The idea of institutional hearings does not suggest that they are more important than the individual hearing. Nevertheless, the institutional hearings focus on the individuals and on the institution, hence making it easy to call on the institutions responsible for the human rights abuses in the state to account. One example is in the SATRC where the representatives of all institutions like the police, military, religious groups, media, and labour were called upon the commission to account for their roles in the past injustice and for them to also state how they saw their roles in the future (Boraine 2006: 25).

In countries where there was little or no institutional reform, whereby the same military general or same police still run the institution, such countries hardly move forward beyond the bloodied or sad past towards a brighter democracy.

South Africa was under excessive financial strain after the 1994 transition to democracy and this made it necessary for the government to take up some institutional reforms regarding finances. The new government of South Africa implemented new structures that changes the way public funds were allocated and was aimed at improving the quality and quantity of service delivery. It was essential to have a new system that will manage the new constitutional structure. The three spheres of government were given functions for each sphere and also shared functions with the main goal of improving service delivery (Cole & Fölscher 2006: 64).

While South Africa was transitioning into democracy, it was in an economic recession and the country was the most unjust country at the time with more than half of the

country's riches being enjoyed by the white minority and the black majority only receiving below 4% of the riches. It was important to respond to the needs of the black majority who, for a long period of time, were discriminated against when coming to service delivery and sharing the country's wealth. This led to the implementation of the GEAR strategy, which was aimed at inviting foreign investment, free trade and sell government assets to the private sector. This initiative driven by GEAR produced a lot of income for the state. Some of the government assets sold to the private sector were Eskom, South African Airways, Telkom and Transnet while other ventures were left for the Black Economic Empowerment (BEE (Previously disadvantaged part of the community)) investors (Pitcher 2012: 54).

#### **4.6 Reparations**

The TRC's investigations were supposed to run from 1 May 1960 up to and including the elections in May 1994 and had about 300 employees in different offices across the country with a budget of about US\$18 million for two and a half years (Boraine 2009: 138). Few months after the release of the final five-volume report of the TRC in October 1998, it was deliberated in Parliament and the President of the African National Congress (ANC) at the time President Thabo Mbeki said the ANC does not fully concur with the recommendations made by the TRC and does not commit itself to fulfilling those recommendations. The reparation policy, which was recommended by the TRC that the victims be given compensation from the government, was one of the few things the ANC was not prepared to fulfil. However, the ANC did pay some of the victims but the reparations they received were lower than the amounts suggested by the TRC, with some of the reparations exclusions including improved housing and medical care. This act by the ANC government laid a foundation for further political tensions though it was supported by good reasons (Boraine 2009: 138).

The history of reparations is very long and reparations have not always been the way they are today. The process of reparations evolved from being an inter-state affair

where the losing state would pay the winning state, to when the reparations payment is made to the individuals who were victims of human rights abuse. The process of reparations is viewed differently by different individuals be it perpetrator, victim or spectator. For the victims, the reparations serve as the last tangible thing from the state that took away something of value from them that cannot be returned. The victims are aware that the process of transitional justice is already overloaded with the cases of the perpetrators who should be brought to book and being consoled cannot go beyond these reparations. It is important to note though that in order to avoid the payment of reparations being informal and therefore being perceived as blood money, it is important to record all the acknowledgments of truth and payments made (Boraine 2006: 20).

The victims can get closure and pleasure from knowing the truth about what happened from truth-telling and from the acknowledgement by the perpetrators. Institutional reform, on the other hand, will not be an easy come process as it will be a long-term project that might even affect the lives of the victims indirectly. Reparations will then be a perfect tool to console the victims as they (reparations) are directed to them (victims).

Hamre and Sullivan (2003: 171) learned that post-conflict states are still to be considered even after conflict. This is done mainly for humanitarian and security reasons because if these states are left alone and not considered by other states they could be home for terrorism, international organised crimes and drug trafficking. This will in turn be a direct threat to the national interest and stability of the neighbouring countries and its region. While in the fight for post-conflict reconstruction, the local society plays a very vital role of nation building and outside actors can also play a role in post-conflict reconstruction and in turn overcome the legacy of conflict.

According to Hamre and Sullivan (2003: 176), post-conflict reconstruction has four distinct and interrelated categories of pillars: Security, Justice and Reconciliation, Social and Economic well-being, as well as, Governance and Participation.

The TRC was the main tool that responded to the concerns of the victims. It was tasked with the restoration of the victims' human dignity by endorsing reparation measures like compensation, voluntary payment, or rehabilitation. To be considered a victim, a person must have suffered human rights abuses like economic loss or physical, emotional, or mental suffering under the apartheid legal order. Nevertheless, it also included some who were not necessarily victims of crimes under the apartheid legal order. There was a reparation mechanism in place that was aimed at compensating the victims by the government. The TRC then put into place a mechanism run by the newly created President's Fund, which was financed mainly by donations.

President Thabo Mbeki recommended a few proposals to Parliament to be authorised. This led to the formulation of the four categories of reparation, namely, community rehabilitation programmes to encourage healing and recovery in the community, symbolic reparation aimed at restoring the victims dignity and helped with memorial gestures like death certificates and street renaming, institutional reform aimed at hindering the reoccurrence of human rights abuses and individual reparations (Du Bois 2008: 130).

#### **4.7 Conclusion**

Strict compliance to the rule of law is very important in every democratic society regardless of dictators and authoritarian societies that do not follow this rule of law. In a democratic society that follows the rule of law, it is important to punish those that violate the law. Though punishing all the perpetrators can be a challenge, it is important to note that obsessing about this punishment can make reaching sustainable peace challenging. Attaining a fair society goes beyond just punishment, truth documentation about the past and dignity restoration for the victims are important too.

Like in any other project, the TRC had its fair share of challenges. Not everyone who took part in the violence accepted or believed in it so much that not all applied for

amnesty. Some thought that they did not commit any human rights abuses and did what needed to be done, and therefore amnesty was not necessary. However, the TRC did not scrutinise the apartheid policies in depth. As a result, the history is still haunting South Africans to this day. The apartheid regime had victims, perpetrators and beneficiaries but the TRC focused mainly on addressing the victims and the perpetrators and the beneficiaries are still beneficiaries to this day. The victims were at the receiving end while the perpetrators did the actual act of human rights abuses and the beneficiaries were watching from a distance enjoying the fruits of this massacre and they are still benefiting.

Like many other countries recovering from past injustices, South Africa made use of a holistic approach and proved that this is the best method that dealt with the legal aspects and also provides incentives. It is now clear that it can be useful for countries recovering from past injustices to make use of both retributive and restorative approaches in their transitional justice quests. SATRC used all the five pillars efficiently though there were few instances where the original pillars' intention was not used accordingly like when the perpetrators would account simply to get amnesty and not to grant their victims healing and knowledge of the truth.

## **Chapter Five**

### **An analysis of TRC using the five pillars of Transitional Justice**

#### **5.1 Introduction**

This chapter analyses the South African Truth and Reconciliation Commission process using the five pillars of transitional justice that were explored in chapter two. The South African TRC is examined for its impact or lack thereof as a transitional justice mechanism in terms of Truth-Seeking and Truth-Telling, Trials, Reparations, Institutional Reform and Memorialisation. This study is interested in assessing the extent to which the TRC dealt with the five pillars of transitional justice in the South African historical, political and even cultural landscape.

The TRC was used an instrument adopted by South Africans in an attempt to seek closure, reconciliation and forgiveness after a long history of racialised violent conflict that pitted the apartheid regime against the liberation movement. The SATRC operated through three committees whose mandate perhaps indicates the key aims and objectives of the Commission. Firstly, there was the Human Rights Violations Committee that was tasked to investigate human rights violations from 1960 to 1994.

Secondly, the Reparations and Rehabilitation Committee was mandated to work on restoring dignity and repairing the losses of victims of violence and human rights abuses. Lastly, the Amnesty Committee dwelt on receiving and considering applications for amnesty and forgiveness from perpetrators of human rights and violence who confessed their crimes before the Commission. This chapter will begin by an explication of the context and the setting of the TRC as a platform of transitional justice. After that, the use of Truth-Seeking and Truth-Telling in the TRC will be examined followed by the use or none use of Trials as a pillar of transitional justice.

The pillar of Reparations as a mechanism of transitional justice will be examined, followed by the pillars of Institutional Reform followed by Memorialisation. This chapter will conclude by offering an evaluation of the TRC process as an attempt at transitional justice in the South African historical, political and cultural context.

## **5.2 The Context and Setting of the South African TRC**

In the discussion concerning the “endgame” and the “secret talks” between the apartheid regime and the liberation movement, Esterhuysen (2012) narrates how politicians in both sides of the dispute clandestinely negotiated the end of apartheid. After the politicians from the apartheid regime and the liberation movement had made their concessions and compromises, and agreed in secrecy, the agreements had to find public acceptance if they were to be implemented. A Convention for a Democratic South Africa (CODESA) was instituted as a public political negotiations and discussion platform. CODESA kicked off its work in 1991 at the World Trade Centre in Kempton Park. According to *Traces of Truth* (2006), an archive of TRC records that is hosted online and is kept at the University of Witwatersrand Library, CODESA collapsed in 1992 after failure to reach agreements on power sharing by the disputants in the apartheid regime and the liberation movement allies. *Traces of Truth* (2006) in its archives indicates that in 1992 a referendum among white South Africans, recorded a two-thirds vote indicating that the majority of whites in South Africa supported political negotiations toward a democratic and non-racial transition. This result of the referendum encouraged formal talks and negotiations. In 1993, a Multiparty Negotiation Forum (MPF) was instituted leading to the Interim Constitution of the Republic of South Africa of 1993.

The Promotion of National Unity and Reconciliation Act 34 of 1995 that was drafted after the ANC formed a Government of National Unity permitted the composition of the TRC that was created to facilitate the telling of the truth, forgiveness, reconciliation, and nation building in the Republic of South Africa (Doxtader & Salazar 2007: 13). The

spirit of the SATRC was represented in the argument of Tutu (1999) that South Africa would have “no future without forgiveness”. As clearly as the political disputants in South Africa, the apartheid regime and the liberation movement, realised that there would be no future without the talks. The populace of South Africa had to see the importance of transitional justice facilitated by the TRC. South Africa had to consciously find “a reckoning” with “apartheid’s criminal governance” and even the “violence and atrocities” committed by the liberation movement in the course of the struggle against apartheid, “reconciliation” had to be found “through truth” (Asmal, Asmal & Suresh 1996).

The process of “the healing” of a historically and culturally wounded “nation” had to be imagined and practicalised (Boraine & Levy 1995). The TRC constituted a platform that involved unmasking a fierce and painful history of oppression, struggle and violence, in the argument of Boraine (2000). According to Traces of Truth archive (2006),

Many in South Africa were fundamentally opposed to any kind of detailed introspection into the past, primarily those who were either functionaries or beneficiaries of the apartheid system,” and even “including the security forces, the atomized right-wing political forces, as well as many of those associated with the homeland and self-governing regimes that complemented the regime articulated this position.

Because of the history of violence and secrecy, truth-seeking and truth-telling, one of the pillars of transitional justice under study becomes the process of “unmasking” the past that Boraine alluded to.

According to the Promotion of National Unity and Reconciliation Act 34 of 1995, the TRC was charged with the task:

To provide for the investigation and the establishment of as complete a picture as possible of the nature and extent of all gross violations of human rights committed within or outside the Republic during the period 1 March 1996 to 5 December 1993,

and emanating from the conflicts of the past, and of the fate or whereabouts of the victims of such violations; the granting of amnesty to certain persons in respect of acts associated with political objectives committed during the said period; the taking of measures aimed at the restoration of human and civil dignity and the rehabilitation of victims of gross violations of human rights; the reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights (Doxtader & Salazar 2007: 14).

Unmasking the past, repairing injuries, forgiving repentant offenders and ensuring a future of forgiveness and unity seem to have been at the centre of the transitional justice agenda of the TRC. The TRC provided a site for the meeting point of fears of perpetrators of apartheid crimes and their guilt with the anger and hope of victims of apartheid. Another political community in South Africa that had interest in the TRC was the ordinary beneficiaries of apartheid and the big business entities that profited from apartheid. For that reason, this study aims at evaluating the uses of the five pillars of transitional justice as applied in the SATRC process. The TRC, importantly, elected restorative instead of retributive justice; retributive justice was pursued by the model of Nuremberg-style trials that privileged punishment of offenders. Also importantly, the TRC emphasised amnesty for those offenders who confessed their crimes before the Commission.

### **5.3 Truth-Seeking and Truth-Telling in the SATRC**

The legislation under which the TRC was formed as seen above pledged that the Commission will aim “to provide for the investigation and the establishment of as complete a picture as possible of the nature and extent of all gross violations of human rights committed within or outside the Republic” (Hayner 2002: 16). The “complete picture” refers to the full truth about violent human right violations that the Commission intended to unmask by interviewing victims and pressing confessions out of the perpetrators in exchange for amnesty and forgiveness. For that reason, truth-seeking and truth-telling became foundationally important for the SATRC.

To all processes of transitional justice, the truth is the principal asset from which forgiveness, reconciliation and healing can begin (Hayner 2002: 16). Remedies to conflict cannot even begin to be imagined in the absence of a full account of what exactly happened during the conflict (Orentlicher 2004: 223).

In the *Preliminary critique of the report of the Truth and Reconciliation Commission of South Africa*, Mamdani (2002: 33) argues that the TRC intended to get “truth for the society, and acknowledgement and reparations for the victims” of apartheid human rights violations. By concentrating on individual victims and individual perpetrators instead of the systemic societal victimisation of blacks by the racist white supremacist apartheid system, Mamdani (2002) argues, “the TRC extended impunity to most perpetrators of apartheid” and “obscured” rather than revealed the true and the bigger picture of apartheid violations. In the argument of Mamdani, the TRC revealed a “diminished truth” by isolating a few victims and a few perpetrators as its centre of investigations and hearings (Mamdani 2000). For violations as systemic as those of the apartheid system, an investigation based on confessions of individual perpetrators and testimonies of individual victims, in the logic of Mamdani (2000), provided only partial truth that is not enough.

Concerning the challenge of Truth-Seeking and Truth-Telling as a mechanism of transitional justice, the SATRC also had the difficulty of time. There was not enough time to allow the truth to be used constructively:

If you have a physical wound, you take off the bandage, clean the wound and re-bandage it. But people take off their clothes in front of the truth commission and do not get an adequate opportunity to put their clothes back on. It is naïve to think that it takes five minutes to heal. We will spend the next 100 years to heal from our history (Hayner 2001: 14).

As stated by Hayner (2001), the TRC attempted to use minutes, a short time, to heal the wounds of a history and a lifetime. What Hayner (2001) means is that the time of Truth-Seeking and Truth-Telling that was provided by the testimonies of victims and the confessions of perpetrators of apartheid atrocities at the TRC hearings was too short for the truth gathered to be used for proper healing purposes. The truth that is gathered in an event such as the TRC hearings cannot be used adequately to heal the violations of a system in a long time.

Furthermore, concerning the truth, Kagee (2006: 10) argues that from an expert psychological point of view, there was no connection at all between the truth that was told during the hearings and any observable signs of healing for the people involved, the victims and the perpetrators. Kagee (2006) argues that the claim that the truth gathered during the TRC hearings was important for healing and national unity remains an untested claim of just a political statement. Most importantly, Kagee (2006) contends that the commissioners who listened to the testimonies of victims and the confessions of perpetrators of violence were not trained psychologists or therapists. They were not trained or qualified to facilitate any process of healing, and in such instances, "truth can do more harm than good in that the victims may relive the trauma," that they went through during the violations (Kagee 2006: 11).

However, Lodge (2002: 176) believes that Truth-Seeking and Truth-Telling empowered and rehabilitated the victims of apartheid injustices. In the view of Lodge (2002), an agreement about amnesty based on truth telling by perpetrators, was an indispensable condition for a peaceful transition to democracy in South Africa. Lodge (2002) believes that through public Truth-Telling and Truth-Seeking humble victims were hence socially ennobled as communal martyrs. The TRC public hearings caused further damage "by transforming private grief into public sorrow, communal approval could be won ... the rites of closure, in which the commissioners sought to elicit expressions of forgiveness" (Lodge 2002: 183).

According to Tutu (1999: 87), the TRC was “charged to unearth the truth about our dark past, to lay the ghosts of that past so that they will not return to haunt us”. And most importantly, Tutu (1999) indicated that “we will thereby contribute to the healing of a traumatised and wounded people—for all of us in South Africa are wounded people — and in this manner promote national unity and reconciliation”. In the views of Mamdani (2000) and Kagee (2006) above, the TRC may as well have used the truth to achieve the unintended opposite of what it aimed. Slabbert (2000: 62) concludes that “the TRC’s assumption that truth leads to reconciliation is demonstrably nonsense”.

For that reason, the TRC, in the view of the present study may not have adequately benefitted in full from the value of Truth-Seeking and Truth-Telling as Transitional Justice mechanisms. Ramphela (2008) reached the same conclusion that counsels caution on the wide description of the South African political transition from apartheid to democracy as a ‘miracle’ on the grounds that the ghosts of the South African past are not yet at rest as the truth in the TRC served to conceal rather than reveal knowledge and understanding of South Africa’s past, leading to little or no forgiveness and reconciliation. Gibson (2006) also raises some doubts that the truth can heal or reconcile a truly divided people; rather, Gibson argues that more is needed than the naked truth that may further bleed than heal the wounds of a painful history.

#### **5.4 Trials in the SATRC Process**

Although the TRC hearings were staged and structured in the form of a court or tribunal, the hearings and indeed the entire process placed emphasis on amnesty and reconciliation instead of retributive justice. Prosecuting the guilty and putting on trial suspect in the perpetration of human rights violations during conflicts may do more harm than good by putting people into their defences, forcing them to conceal the truth and evidence for fear of punishment. Trials and tribunals also pose the danger that the guilty or those who were suspected of perpetrating atrocities may commit further crimes such as eliminating witnesses or revenging on victims (Askin 2003: 288).

Because of the emphasis on amnesty and reconciliation, the TRC deliberately avoided criminal trials of apartheid offenders (TRC report 5: 1799, 45, 43). Commissioner Malan said, "The Act does not put apartheid on trial. It accepts that apartheid has been convicted by the negotiations at Kempton Park and executed by the adoption of our new constitution." For that reason, it can be argued that the TRC concentrated on amnesty for offenders and reconciliation and national unity rather than vengeance and punishment.

In the compelling thesis on the subject of "when victims become killers," after conflict, Mamdani (2001) notes that within the network of justice systems, three forms of justice are important. There is "victor's justice" when the winner in a conflict punishes the loser. There is also "victim's justice," when the loser or the victim of a conflict gets the opportunity to punish the perpetrator. "Survivor's justice" is when both victims and perpetrators of a conflict decide to reconcile and rebuild their community for the future. In the view of Mamdani (2001), trials are either on the side of the "victor's justice" or that of the "victim's justice". For that reason, trials are punitive and less constructive of a united future.

In his argument, Mamdani (2013) on the "logic of Nuremberg" trials may not be suitable in a country like South Africa where both victims and perpetrators of the conflict were to continue living together in one country. A much more conciliatory form of dispensing justice than the trials was needed. While Mamdani (1996) critiques the TRC for prioritizing "reconciliation without justice", he does not express faith in the justice of trials and tribunals which he considers further divisive and a threat to national unity and reconciliation. In the logic of Mamdani (1996), victims become killers, in a way, when they use trials and justice to revenge or get back to their victimisers. The SATRC seems to have been aware of this danger in its avoidance of trials and tribunals in pursuit of transitional justice.

Although the TRC hearings themselves were structured in the fashion of trials, they did more than just try the perpetrators and to solicit the testimonies of victims. Beitler (2012) notes that “normal judges do not cry, but Archbishop Tutu cried” during the hearings and “prayed and sang Christian hymns”. Tutu added religious faith and fervour to the hearings, and even “preached.” For that reason, the TRC became more of a Christianized platform of therapy and forgiveness than a site of punishment and retributive justice. Cole (2007) refers to the TRC as having been a staged performance, and ritualized drama that sought to encourage reconciliation by simulating it. The injection of Christianity and Christian performance made the TRC something more than a trial. In explicating this assertion, Ramphela (2008: 47) postulates as follows:

The TRC could not have succeeded to the extent it did without Tutu at the helm. Some objected to the imposition of Christian rituals on a society whose citizens include adherents of many different faiths as well as atheists. But in the end almost everyone acknowledged the importance of rituals in healing the wounds, of the past. Christian rituals did not hurt.

Instead of focusing on convicting the perpetrators of apartheid violations, the TRC sought to convert, in a way, all South Africans to a Christian way of handling conflict by forgiving one another and reconciling as a nation. As a result, the TRC became a call to faith more than a call to justice.

Even if there were intentions to prosecute perpetrators of apartheid atrocities and violations, Lodge (2002) argues that there would not have been enough resources and time to gather the evidence that was needed to convict the offenders criminally. Furthermore, the people who would have been put on trial are the people who had been in charge of the apartheid system and knew how to conceal evidence and would not co-operate in the trials. In addition, many records and evidence had already been destroyed or concealed. Tutu (2006) said:

I have to say I have my doubts. I mean these guys were very adept at hiding evidence, incriminating evidence. And you have got all these years that have

gone...there is a lot of documentation that disappeared. I worry that we...could quite easily set ourselves up where you have cases that go on for a long time, that evoke all kinds of emotion, then the people are acquitted.

In a way, from what Tutu (2006) was saying, the trials or prosecutions of perpetrators of apartheid atrocities had become something that was not feasible, even if there was keen intention to carry them out. Time and the unavailability of critical evidence made it next to impossible to successfully prosecute and convict the offenders. The trial, prosecution and conviction of Eugene de Kock, and his sentencing to 212 years for apartheid violations have not seemed to encourage the belief that trials and tribunals would have been any viable option for the TRC.

People like Tutu, however, feel that “by and large, the Commission failed to achieve reconciliation in the larger society by denying the role of punishment as a form of redress in the healing process”. According to Graybill (2002: 47), “Emphasis on restorative rather than retributive justice is attractive to many societies.” However, punishment of offenders seems to offer “closure and settlement for some victims.” Levinson (2000: 211) argues that, prevalently, truth commissions tend to prefer the morality of forgiveness, amnesty and reconciliation rather than the justice of retributive trials and punishment. This study argues here that, the TRC did not deploy, in a meaningful way, the approach and model of trials as a means of transitional justice.

## **5.5 Reparations as a means of Transitional Justice in the SATRC**

Reparations in the SATRC were mainly monetary and the government was responsible for issuing all reparations to the deserving victims. Because South Africa was transitioning from apartheid, it was only obvious to think of the finances of the apartheid government in order for the new government to move forward and have an idea of how it will afford anything that requires financial reparations included. In 1994, the apartheid government had a debt of R300 billion owing to numerous entities like the Reserve Bank, commercial banks, insurers, and wealthy individuals. The new government had

to budget for a yearly R40 billion that was interest of the entire debt. The interest payment alone was more than money budgeted for education, social and health services, housing or water (TRC report vol. 4, 1998. Ch. 2).

In international law, there is a dogma called odious debt. This dogma is about the responsibility by the new government on the debts acquired by the former government. There is an exception in the dogma where the new government is allowed to reject the debt from leaderships such as the apartheid.

When coming to reparations, the apartheid creditors were in a predicament; insisting in the payment of the money would dim the creditors' supporters of the apartheid regime while cancelling the loans and losing the money meant they contributed positively to the truth and reconciliation of the country (TRC report vol. 4, 1998. Ch. 2). In South Africa, unfortunately, the debt was too high and cancelling it would have severe consequences on economic growth in general, the cancellation of the loans would also mean that the creditors lose a large stake of their asset base and possibly affect shareholders and employees (TRC report vol. 4, 1998. Ch. 2).

The South Africa government accepted the moral obligation to carry the debt of the apartheid government and be equally responsible for the payment of reparations (TRC report vol. 5, 1998. Ch. 5). The Reparation and Rehabilitation policy formulated its own policy with the help of other bodies like the Chilean Commission and the Skweyiya and Motsuenyane Commissions.

In the policy formulation stage, the Reparation and Rehabilitation policy had to make a vital decision of whether reparations should be monetary or in a form of a service package, and if monetary they had to come up with a fair proposed amount. The service package option had a number of disadvantages like the following:

- The administration cost might decrease the amount the victims will receive;

- A service package is fixed and specific and with the needs of the victims and/or dependants changing over time a service package might be useless to the victims at some point;
- There might be more tension looming from selected few individuals or communities getting privileged services while others don't; and
- An organisation's decision of how to render services might not be what that recipient individual would have preferred.

The SATRC therefore rejected the service package and supported monetary payments instead. The Commission also rejected a pension plan formulated for victims of human rights violations (Daly 2003: 379).

It was therefore decided that a well-thought-out monetary grant was better than a service package provided there is access to vital basic services and that the grant enhance a better standard of life (TRC report vol. 5, 1998. Ch. 5). It was best to choose monetary grants because then the beneficiary had the freedom to choose how they wanted to spend their money and monetary grants meant less spending for the government because the only money that was spent was that which was budgeted for. Urgent interim reparations and individual reparation grants were therefore in the form of money.

This study noted that scholars like Thorvaldsen (1980: 28) hold the view that reparations are part of the important process of acknowledging the suffering and the loss by victims of conflict. In their nature, reparations are supposed to effect restoration and or repair of what has been lost by victims of conflict or what has been damaged. In international law, governments are charged to take responsibility for reparations in cases of national conflicts (Van Zyl 1999: 650). Scholars have also stressed that in actuality, there is a difference between reparations and compensation, which is direct payment for losses incurred (Boxil 1972: 115).

Reparations are paid even in case of such losses as psychological injuries and emotional injuries and pains. In the case of the South African apartheid conflict, scholars have noted that the loss that was suffered by black people on account of the racialised apartheid system was difficult to quantify (Mamdani 1992: 1056). Other scholars have argued that those who benefitted economically from apartheid, such as big business, were supposed to pay reparations to society (Ramphele 2008: 64).

Mamdani has prominently argued that reparations for apartheid were supposed to be communal and not individual because apartheid deprivation and dispossession was systemic and societal. Other scholarly voices have noted that, whenever the payment of reparations delays, victims and survivors tend to become discouraged and cynical, losing faith in the transitional justice process (Laplante & Theidon 2007: 230). An emphatic argument which arose was that reparations should be accompanied with truth-telling and acknowledgement of wrongs; otherwise reparations are reduced to the act of bribing and silencing victims of conflict (Boraine 2006).

The Promotion of National Unity and Reconciliation Act 34 of 1995 directly refer to reparations when it states that the Commission has a mandate to cater for “rehabilitation and the restoration of the human and civil dignity of victims of violations of human rights”. The Reparations and Rehabilitations Committee was directly responsible for recommending victims and survivors for reparations, and the Committee, according to *Traces of Truth*, noted that “reconciliation was not possible”. In South Africa, “[it] was not possible without reparations.” Azanian People’s Organisation (AZAPO), a political party, also secured a Constitutional Court judgement to the effect that reparations had to be “comprehensively” given to deserving survivors, lest the entire transitional justice project is minimised to nothing (Doxtader & Salazar 2007: 17).

Mamdani (2000) observes that the TRC did not put equal emphasis on reparations as it did amnesty. Even the Reparations and Rehabilitation Committee only had powers of recommendation, whereas the Amnesty Committee had powers to implement its

decisions. This was in spite of evidence that victims and survivors expected “material benefits” for their troubles during apartheid. Ramphela (2008: 65) notes that “10 years after the TRC, the victims have yet to receive the promised reparations,” which is a show of lack of commitment on part of the government. Ramphela (2008: 65) insists that the economic and social inequalities that mark South African society today are a result of “the exclusion from the TRC process of violations of socio-economic rights underlies much of the persistent inequalities in our society”.

In the view of Ramphela (2008), “the majority of the population is trapped in structural poverty. The legacy of systemic socio-economic neglect is at the core of the unfinished agenda of acknowledging the impact of colonialism and apartheid”. Bray (2008) concurs with Ramphela (2008) in that, “reparations are the unfinished business of the TRC” because of the “long delay” in dispensing the promised reparations. Another writer, Andrews (2004) states that reparations belong to the “legacy of broken promises” in South African history and the record of the TRC, which she believes has failed.

Lodge (2002) observes that politics was the cause of reluctance in the dispensing of reparations in so far as the ANC put faith more in its electoral campaign promises of RDP more than the recommendations of the TRC. In that logic, the ANC government believed that its developmental projects would cater for society wide deprivation and act as the reparations for long years of apartheid. Meintjies (2013) who notes that it was time South Africans openly debated the failure of the TRC and that of CODESA share the belief that as far as reparations are concerned the TRC failed.

At this juncture, this study notes that the intention for reparations to be dispensed to victims and the survivors of apartheid was there in the TRC. The final TRC report of 1998 clearly states the following recommendations:

- Redress;
- Restitution;

- Rehabilitation;
- Restoration of dignity; and
- Re-assurance of non-repetition (TRC report, 1998).

The Report further noted the need for “interim reparations” that were to be followed by “individual reparations in form of grants” and symbolic reparations” in shape of monuments and memorialisation. There was also a recommendation for “legal and administrative measures” of redress and “institutional reform” in terms of ensuring that those institutions that participated in apartheid violations were reformed. In light of the clear recommendations that the Reparations and Rehabilitation Committee put forward, the belief that politicians and political will on part of the government prevented the use of reparations as a means of transitional justice is justified.

## **5.6 Institutional Reform as a means of Transitional Justice in the SATRC**

In countries that are emerging from violent conflicts, it is important to change or reform judicial and security organisations that participated in the conflict or those that failed to prevent or stop the conflict when it was in their power to do so (Beitzel & Castle 2013: 14). In South Africa’s case, Boraine (2006: 23) has argued that it was of importance to remove from public office those politicians, security official and justice system officials who were linked to apartheid atrocities.

The trouble with the South African intelligence is that it is still managed by officials from the apartheid regime intelligence agencies who have sinister agendas. The South African intelligence retained official from the apartheid state in the process of amalgamating security service in 1994. Institutions are central in the realization of transitional justice, their reform or lack thereof can decide between success and failure in nations finding closure for conflicts and violence (March & Olsen 1984). When the South African National Intelligence Agency was embroiled in scandalous and illegal spying on citizens in the 2005, in a project called “operation avani”, the Minister

responsible invoked the need for institutional reform as a possible solution (Van Rensburg 2006: 161).

Using the case study of the transformation of the South African police force to the police service, Rauch (2004) argues that without having transformed the apartheid police force to a democratic South African Police Service (SAPS), “transformation” would not have taken place. The police had to shed off their institutional image as a “force” to assume a new brand as a democratic “service” to the Republic. In addition, Rauch (2004) states that the transformation of the police from a force to a service was not only a change of name, but it involved re-training, and international experts and consultants were brought in to inject experience in the democratisation of security services and “change management.”

In a strong way, “institutional reform is linked to guarantees of non-repetition, reparations” and other means that assure societies that atrocities will not be repeated (Filippini, Sandoval & Vidal 2013: 9). Reforming state institutions that were associated with atrocities and abuse during conflict, closure and healing may not be achieved.

In an emphatic argument, Kisiangani (2007) notes that ahead of truth, reparations and even trials and tribunals, institutional reform is one surest way of assuring communities that violence and abuse of the past will not be repeated.

In other words, Kisiangani (2007) indicates that other pillars of transitional justice that are the subject of the present study may come to naught if they are not applied alongside institutional reform. In the South African case, Mpofu (2013) argues that the first institutional change to be noticed was the creation of the TRC itself and its constitutionalisation as a body that was charged with fostering national healing and unity. In Mpofu’s (2013) argument, the Promotion of National Unity and Reconciliation Act 34 of 1995 was itself an attempt at institutional change and creation in so far as it made constitutional the national quest for national unity and reconciliation. Furthermore, Mpofu (2013) notes that from the TRC, the Institute for Justice and

Reconciliation (IJR) was created. This is a non-governmental institution whose patron is Archbishop Tutu. The institution specialises in being a think tank on reconciliation and national unity, and such other projects as “justice and reconciliation, building an inclusive society, research and public communication”.

The observation that organisations were created and they still exist is meant to turn unity and reconciliation into a culture in South Africa and indicates the commitment or awareness in the TRC that institutional reform and institutional creation are fundamental ingredients of transitional justice. Following Mpofu's (2013) argument, this study can observe that even the creation of a new democratic Constitution in South Africa in 1993 and ultimately in 1996 contributed to institutional change. This was done by inaugurating a new legal regime in South Africa that was a departure from the era of the apartheid regime where apartheid itself was legalized in the Constitution.

### **5.7 Memorialisation as a means of Transitional Justice in the SATRC**

Memorialisation as part of the effort at transitional justice involves honouring the living and the dead after conflicts have ended (Heeke et al. 2015: 60). To keep the memory of suffering and pain alive is considered an act of honour for the victims and the survivors of violence and trauma. Monuments and museums, including statues and murals act as ritualistic and symbolic means of memorializing and remembrance (Schmidt 1994). Most of them are made of bronze and stone, or in form of architecture and ceremonies, memorializing cast in stone and put beyond forgetfulness the record of a people's history of pain and suffering (Ross & Sriram 2012: 27).

One of the most prominent sites of memory and monument in South Africa after the TRC is the Constitutional Hill in Johannesburg. This monument was previously called Old Fort Prison, and it is where Nelson Mandela and Mahatma Gandhi were once prisoners of the racist apartheid establishment. Another monument and museum of note is Freedom Park in Pretoria. At Freedom Park, there is a list of names of those who fell during South Africa's wars and those who died of apartheid atrocities.

Prominent among the local and international heroes that are honoured at Freedom Park are Steve Biko, Hellen Joseph, Albert Luthuli, Bram Fischer, Samora Machel, Amilca Cabral and Che Guevara. In Naidu's argument (2004: 14), monuments, museums and statues operate as "symbolic reparations" that "keep memory alive" and constitute "negotiations between a painful past and hopeful future".

Statues, monuments and museums constitute national founding myths that help to formulate and shape a people's identity and destiny as a community or nation. Myths are constructions of faith and hope that give violated communities the optimism to approach the future with new hope after a history of suffering, pain and trauma. Coetzee and Nuttal (eds. 1998) indicate that monuments and memorials are an important part of negotiating the past, and in a way of laying the haunting ghosts of the past to rest.

The South African transition from apartheid to democracy became located in symbolism and rituals that preserved and conveyed a strong message on the importance of reconciliation and national unity. Sparks (2003: 129) notes how Nelson Mandela consciously worked on keeping Afrikaners assured by preserving their memorials and their symbols:

As President Mandela made reconciliation the central theme of his leadership, becoming the master of both the intimate personal touch and the symbolic public gesture aimed at winning the hearts and minds of those who feared him most. He was acutely sensitive not to trample on Afrikaner symbols. Statues and monuments remained untouched, street names commemorating events and heroes in the saga of Afrikaner history were not changed.

Evidently, the language of monuments, statues and memorials talks to hearts and to minds of the people. The memorials constitute a symbolic grammar that addresses the fears and concerns of a people that are emerging from a past of violence and trauma. History and identity are also preserved and protected in this symbolic grammar of memory and record. Nelson Mandela and his government understood well that for

Afrikaners to feel assured in the new South Africa, their symbols and other signifiers had to be protected and preserved. In that way, the monument and memorials stood for reconciliation itself (Kgalema 1999). The suffering of the people and their triumph becomes frozen and stored for prosperity in statues and other memorial figurines (Duffy 2004: 118). Memorialising becomes a way of casting memory and remembrance in stone and bronze (Levinson 1998: 23).

Recent history has proven that statues and other memoriums in South Africa's contested history are not always sites of unity but they can as much divide people as they unite and reconcile them. The debate around the calls for the statue of Cecil John Rhodes to be removed exhibits the intense emotions that symbols and memoriums can arouse in a contested history and contesting memories. Soyinka (2000: 14) distinguishes between the "burden of memory" and the "muse of forgiveness".

Memories of past suffering bring pain and anger. Yet the inspiration to forgive and to reconcile belongs to the imagination and creativity of those victims and survivors of conflict who remain behind to construct new futures. Remembering becomes part of clinging to hope and to life (Connerton 1989: 23).

This study can argue here that the remembrance that is encouraged by statues and monuments constitutes also the remembering, and putting together again of that which conflict had dismembered and divided. Perhaps another vivid symbolization that became associated with the SATRC is the metaphor of the "rainbow nation" that was popularized by Tutu. The metaphor became a poetic way of imagining South Africans of different colours and creeds co-existing under one nation and one flag. The rainbow metaphor is symbolic as much as it is imaginative of a colourful future of reconciliation and peace in South Africa.

However, at another level memorials, statues and monuments are exactly what they are symbols and signs that may represent certain wishes and aspirations and not reality. In the absence of reparations as tangible efforts, Institutional Reforms as

practical measures, Trials and Tribunal as visible justice and Truth-Telling as witnessing, this study doubts if Memorialisation may mean anything much. Ramphela (2006) refers to the survivors of apartheid atrocities as “these people, who were materially poor, but spiritually rich, had given so much to the TRC process”. Nevertheless, sadly “we can’t even say thank you by providing dignified reparations” to them in return. Memorialising without tangible efforts at restorative justice may be an effort but an insufficient one at transitional justice and settlement after conflict.

### **5.8 Evaluation of the TRC as Transitional Justice Mechanism**

From the above, Truth-Seeking and Truth-Telling became an important pillar of the SATRC process. The truth might liberate and acknowledge the victims while earning amnesty for the perpetrators of atrocities. Nevertheless, it may not necessarily repair the physical and psychological damage of trauma, injury, death, and loss of opportunities in the lives of victims. Furthermore, if not managed well, the truth may lead to more anger and fear that can lead to revenge, repeat offending and more atrocities.

At a certain level, trials and tribunals may be a satisfactory way of making justice not only accessible to the violated but also making it to be seen to be done. However, trial also leans more towards retributive justice and can endanger reconciliation and national unity that was and is at the heart of the TRC project in South Africa. Trials may not be suitable in such a setting as South Africa where victims and perpetrators were to continue leaving together in one country as fellow citizens. Furthermore, in South Africa, the feasibility of successful prosecutions of apartheid offenders is doubtful.

Institutional Reform, the destruction of institutional structures of past violence and the removal of individual perpetrators from public office may offer assurance to victims that the past is a closed chapter. However, in the South African case, some officials of the

judiciary and the security forces had to be kept in office for reconciliation purposes and also to retain scarce skills and the experience that they held over years.

A new national dispensation may not be led by entirely new staffers without the risk of collapse through inexperience. Memorialisation constitutes a powerful symbolic grammar of honour and remembrance. However, it remains as symbolism that may not achieve much in the absence of other pillars of transitional justice that occupy the attention of the present study. In the view of this study, it was a failure of the TRC not to prioritise reparations as tangible gestures of acknowledging victims and their suffering and anger. TRC was partially successful in Institutional Reform, understandably not all institutions and individuals of the apartheid past could be discarded for practical governance reasons and the importance of national unity and reconciliation.

Truth-Seeking and Truth-Telling were important, but limited in that the perpetrators and the victims were a selection and not the entire society of South Africa. The TRC largely became a symbolic gesture of Truth-Telling and Truth-Seeking, leading to what scholars has called a “diminished truth.” As noted above, Memorialisation is only powerful symbolism that may not sustain transitional justice alone but may effectively complement other pillars such as Reparations, Institutional Reform and Truth-Seeking and Truth-Telling.

## **5.9 Conclusion**

This chapter has evaluated the uses of the five pillars of transitional justice in the SATRC process. The importance of Truth-Seeking and Truth-Telling has been analysed and the study has observed that while it is important, the truth needs to be complete truth and to be managed well, lest it leads to the opposite of healing by worsening trauma and causing anger that can provoke revenge. Trials and Tribunals were deployed by the TRC in a modified form in that the TRC hearings became more

than a court but also a platform of Christianised counselling and therapy that included preaching for forgiveness.

The researcher observed that trials are not to be suitable for the purposes of reconciliation and national healing in that they magnify tensions and frictions between victims and their perpetrators. Institutional Reform has been observed to be very important in dismantling the infrastructure of past violence and assuring the victims and survivors that atrocities may not be easily repeated. Reparations, as tangible and meaningful efforts at transitional justice, were not implemented or taken seriously by the TRC, even the Rehabilitations and Reparations Committee did not have as much powers as other committees such as the Amnesty Committee.

The non-implementation of reparations is to this study a major failure of the TRC. Memorialisation plays a significant but symbolic role, and therefore is complimentary to other pillars of transitional justice. Alone Memorialisation may not deliver tangible repair to victimhood and damage such as can be delivered by Reparations and Institutional Reform. The TRC, was, to this study a compelling attempt at the pursuit of Transitional Justice.

## **Chapter Six**

### **Conclusion**

This chapter seeks to provide a summation of the observations, arguments and conclusions of the study. The gist of the study is the use of the five pillars of transitional justice as a theoretical and conceptual frame of evaluating the effectiveness of the SATRC process as a transitional justice mechanism. Furthermore, the study has noted that there is no scholarly consensus, in the first place, on what these five pillars of transitional justice exactly are. For its immediate purposes, the present study regards Truth-Seeking and Truth-Telling, Trials and Tribunals, Reparations, Institutional Reform and Memorialisation as the pillars of transitional justice.

Transitional justice itself has been taken in this study to be the collection of mechanism of justice, traditional and modern. These are designed, mobilised and deployed to enable societies that are emerging from conflict, violence and human rights abuses to find closure and seek to move on in a life of law, peace, order and stability. The present study has also noted that the SATRC has achieved popularity and the status of an exemplary process mainly outside South Africa where its shortcomings and possible failures have not been felt or dispassionately observed and analysed. In a word, in the view of this study, the SATRC process has been of debatable success, and possibly, authoritative evaluations of it may be premature as some of its failures and successes might need many more years or even decades to manifest sufficiently to allow reliable observations.

This study elected the five pillars of transitional justice as named above as its theoretical and conceptual equipment of evaluating the SATRC. In terms of methodology, the study adopted a qualitative and conceptual analytical posture. The qualitative and analytical posture benefitted from interpretation, description, exploration, and deconstruction and construction of texts that are a tool of literature study and a tool of analysis.

Views of a multiplicity of scholars that have written on transitional justice have been used to illuminate the study, namely, Truth-Seeking and Truth-Telling, Trials, Reparations, Institutional Reform and Memorialisation as critical pillars of transitional justice have been deliberated. The conclusion of this study is that the five pillars are each not exhaustive as they may not be an answer to transitional justice when applied in isolation. It appears to this study that the five pillars of transitional justice become effective when used and applied together in complementarity. The study has sought to survey the popularity of TRCs in the world and as such to locate the SATRC in that tradition.

In the main, the present study has accounted for the history and background of the SATRC process. The reasons for its popularity and how it increasingly becomes a global model of transitional justice are indicated. The areas of contention and the debates that surround the SATRC are fleshed out as well as the critical evaluations of its impact or lack thereof. It has appeared to this study that Truth Commissions as transitional justice mechanisms are preferred in the world ahead of retributive justice and other forms that seem not to guarantee durable post-conflict peace and justice.

This study has evaluated the uses of the five pillars of transitional justice in the SATRC process. The importance of Truth-Seeking and Truth-Telling has been analysed and the study has observed that while it is important, the truth needs to be complete truth and to be managed well, lest it leads to the opposite of healing by worsening trauma and causing anger that can provoke revenge. Trials and Tribunals were deployed by the TRC in a modified form in that the TRC hearings became more than a court but also a platform of Christianised counselling and therapy that included preaching for forgiveness. Trials have been observed by the study not to be suitable for the purposes of reconciliation and national healing in that they magnify tensions and frictions between victims and their perpetrators. Institutional Reform has been observed to be very important in dismantling the infrastructure of past violence and assuring the victims and survivors that atrocities may not be easily repeated.

Reparations, as tangible and meaningful efforts at transitional justice were not implemented or taken seriously by the TRC, even the Rehabilitations and Reparations Committee did not have as much powers as other committees such as the Amnesty Committee. To reiterate, the non-implementation of reparations is to this study a major failure of the TRC. Memorialisation plays a significant but symbolic role, and therefore is complimentary to other pillars of transitional justice. Alone, Memorialisation may not deliver tangible repair to victimhood and damage such as can be delivered by Reparations and Institutional Reform. The TRC, was, to this study a compelling attempt at the pursuit of Transitional Justice.

More time, and possibly further studies might be needed to provide deeper and more nuanced views of the SATRC in light of the fact that it also became hostage to political expediency. Moreover, it happened at a time when it was feared that South Africa might relapse into racialised conflict. Furthermore, the SATRC achieved in its Christianised model, personified by Tutu, what possibly politicians and lawyers operating in secular terms and modes would not have achieved.

## **ADDENDUM**

### **Definition of major terms used in the study**

This section will define other terms used in the study. As with the definition of the TRC above, these definitions are intended to contextualise the study.

#### **Truth**

The truth means different things for different people. It is interpreted differently based on the story of each individual or victim. For the victim's family, the truth might or might not mean possibility for justice and healing from the knowledge of what happened to their loved ones. For other victims, the truth might mean a possibility for reparations and general accountability (O'Malley 2009). Some of the victims believed that an apology is not an apology unless it is true and sincere; some of the victims at the hearings rejected the perpetrators' apologies because they did not seem truthful. Generally, the victims based their decision to accept or reject an apology on the truth and the show of remorse by the perpetrators.

Tutu (1999), in arguing that South Africa would not have any future without forgiveness, emphasised that forgiveness itself was only possible when perpetrators of injustices told the truth. For that reason, it appears that forgiveness and reconciliation may be conditional to the important factor of truth. Amnesty itself that was awarded by the SATRC to perpetrators of human rights violations during apartheid was awarded on the condition that they confessed the truth about what happened and their role in the happenings, which spells out the importance of the truth in the success or failure of truth commissions.

## **Accountability**

According to Chitsike (2012: 6), the term accountability is often used interchangeably with other terms such as liability, responsibility, answerability and blameworthiness. Accountability denotes the process of holding answerable those accused of carrying out human rights abuses. It is believed that the process of accountability is central to transitional justice as it will stop future human rights abuses.

Du Bois-Pedain (2008: 67) describes accountability as responsibility and the ability to own up to wrongs that one individual, groups or an institution has done. Du Bois-Pedain gives the example that the apartheid regime was a government that was in charge of the state and national security in South Africa. For that reason, the government was responsible for a climate that permitted human rights violations, making the government and the state at the time responsible and therefore accountable for the violation of human rights that took place.

## **Amnesty**

The process of amnesty denotes the pardoning of a perpetrator convicted of human rights abuses by an officially recognised body such as the court of law or a truth commission. According to Doxter (cited in Benyera 2014: 18), 'an amnesty is a legislative or executive act that prohibits or prevents the prosecution of an individual or group of individuals for one or more (named or unnamed) crimes'. There are three broad classes or forms of amnesties. These are blanket amnesties, compromise amnesties and accountable amnesties. Normally, amnesties are given in exchange of telling the truth. To show the importance that the SATRC place on amnesty, a specific committee was created to deal with issues of recommending or not recommending amnesty for those human rights offenders that came forward to confess their offences in front of the SATRC (Du Bois-Pedain 2008:75).

## **Compensation**

The term compensation refers to the process of providing victims with some form of reparation for the losses they suffered because of the violation of their human rights. This reparation is usually in monetary terms for damages, suffering and losses. Compensation can take one of the following forms; payments to help victims address the physical or mental harm that they have suffered, loss of economic means of survival, loss of educational and social opportunities, damage to their one's and or dignity, and the costs related to obtaining relevant legal, medical, psychological or social assistance (Kritz 1995). In 2005, the United Nations General Assembly (UNGA) published a detailed Report in which it clearly stated that, "financial compensation is not sufficient in itself and should be normally associated with other forms of reparation" (UNGA 2005). In that logic, compensation is seen as important under the United Nations' understanding of Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims Gross Violations of International Human Rights Law.

The UN emphasises that "compensations should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case" (UNGA 2005). Furthermore, the UN notes that "physical or mental harm, lost opportunities, including employment and education, and social benefits, moral damage" and "costs required for legal or expert assistance, medicine and medical services, and psychological and social services" are all provisions that can be issued as part of compensation (UNGA 2005). For this study, it will be important to note how far the SATRC process went in the depth and width of attending to such elements of transitional justice as compensation in its phases and facets that are being discussed here.

## **Five pillars of transitional justice**

The five pillars of transitional justice are considered to be accountability, truth recovery, reconciliation, institutional reform, and reparation (Chitsike 2012). These pillars will be used as the analytical framework for accessing the effectiveness of the SATRC.

### **Forgiveness**

The notion of forgiveness is mainly borrowed from religious studies. It implies the process in which the victim of gross violations of human rights decides to stop feeling angry or resentment towards the perpetrators for the offence which they committed against them or their family or community member(s) (Gallagher 2001: 980). Gubin, Hagengimana, Pearlman & Staub (2005: 298) associate forgiveness with letting go of the past pain and resentment. This makes forgiveness possible but does not necessarily make reconciliation or living together in peace with the perpetrator likely. Forgiveness is interconnected and cannot be separated with reconciliation, which is possible when there is mutual commitment to an improved ethical future; forgiveness is the first step towards reconciliation.

### **Healing**

The process of healing involves the processes of overcoming the grief and emotional suffering inflicted by past human rights abuses. It restores the victim's dignity and humanity in the community. The process of forgiveness is usually enhanced if the perpetrators tell the truth about what exactly happened when they committed the human rights abuses. This constitutes the process of acknowledgement, which is an integral part of forgiveness. It is important to note that healing is not an event but a process that often takes a long time (Gallagher 2001: 981).

## **Human rights violations**

The term 'human rights violation' is central to this study. It is a term with wide application, especially in genocide studies. The term means planned or haphazard of law killing, disappearances, torture or other gross physical abuses, which amount to the deprivation of one's liberty (Human Rights Watch, Special Issue 2: 1989). Gross human rights violation entails a situation when human rights abuses become advanced, i.e., when numbers of victims increase, and the suffering of the victims is prolonged, such is termed (Gallagher 2001: 999).

## **Institutional reform**

The process of institutional reform entails the taking of a series of measures to improve governance of the country. The main act in the process of institutional reform is the setting up of institutions that are meant to address the roots causes and legacy of gross historical human rights abuses. A number of such processes are used in institutional reform. They include the following measure:

- restructuring the institutions of governance;
- security-sector reform;
- reforming the judiciary systems;
- strengthening institutions means to support the processes of broader democratisation; and
- having institutions that support the upholding of fundamental human rights.

In order for the process of institutional reform to be effective, there is need for it to be undertaken in an inclusive manner that takes uses broad public consultations which include victims, their families, the affected communities and the perpetrators. The promise of institutional reform is that new institutions are built or old ones are reformed in order to ensure that violations and atrocities of the past may not be repeated (Gallagher 2001: 990). In the view of the UNGA (2005), Institutional Reform belongs

to the important activity of ensuring victims “satisfaction and guarantee of non-repetition”. In measuring the effectiveness of the SATRC and gauging how far it went to address the expectation of transitional justice, it will be important for a study such as this to establish the guarantees of non-repetition of violations in terms of Institutional Reform and others.

## **Justice**

Justice is generally understood to mean that which is right, fair, appropriate and deserved (Pearce 2012: 161). In transitional justice, it is achieved when victims are made to feel ‘whole’ again and when offenders are held accountable for their wrongdoings. According to Villa-Vicencio (2004: 33), there are different kinds of justice, namely, retributive justice, deterrent justice, compensatory justice, rehabilitative justice, exonerative justice, and restorative justice. Villa-Vicencio (2004: 33) argues that each type of justice has its time and place in a given situation and that no one model of justice covers all the needs of the victims or the offenders.

A few scholars identified some types of justice. Deutsch (1975: 140) identifies distributive justice that is predominantly about the fairness of the decision made. Maiese (2004) mentioned procedural justice that is mainly focused on the fairness of the decision process. Interpersonal justice was identified by Greenberg (1986: 48) and it has to do with the respect and dignity that is afforded to individuals during the decision making process. According to Colquitt et al. (2001: 440), informational justice is the extent to which individuals perceive adequate explanations for decisions to have been given in a timely manner.

## **Memorialisation**

According to Impunity Watch (2012), memorialisation is about a number of activities and their possible material outputs. These outputs aim at keeping up or restoring the memory related to something past, in this case, a past of gross human rights violations.

These include deliberate memorialisation activities such as public gatherings to commemorate the struggle for independence, church services, funerals, exhumations, and reburials for those who died in this struggle or at the hands of a repressive government. As aptly stated by Villa-Vicencio (2004: 32), memorialisation must be integrated into rituals since activities such as the erection of monuments alone is not a significant enough act to bring healing and closure to the victims of human rights abuses. It needs to be integrated into some sort of process such as, but not limited to, educational programmes and ritual ceremonies.

In Zimbabwe, for instance, memorials for the deceased are erected through a series of ceremonies and rituals which are meant to bring closure to families and communities, and are held approximately a month after the burial ceremony. There are a number of memorials in South Africa meant to commemorate the lives of the victims of apartheid, one such memorial is the Umkhonto (MK) memorial better known as the Solomon Mahlangu memorial. The Solomon Mahlangu memorial is in Mamelodi outside Pretoria CBD and was unveiled at the Solomon Mahlangu square on 6 April 1991 commemorating the MK forces that lost their lives during apartheid (Marschall 2010: 41).

Memorialisation entails attending ceremonies and rituals, and adopts and deploys symbolism in its uses for transitional justice. The UNGA (2005) stresses that it should be conducted in a culturally sensitive manner that responds to the cultural peace and comfort of the victims. This means that memorialisation cannot be a broadly compatible approach, but it should be conducted in line with how the victims in their specific cultural location understand memorialisation. For that reason, this study will observe how effectively, as an attempt at transitional justice, the South African TRC observed cultural sensitivity, if it did.

## Reconciliation

Reconciliation involves the re-normalisation of relations between two parties, namely, the victims and the offenders (Bothe 2007: 251). It heralds the beginning of cordial relations, trust and the willingness to talk to each other and is accompanied by a mutual capacity to listen and a readiness to take cautious risks (Mbeki 2004: 4). It regards justice as an essential ingredient in any settlement while recognising that there are different ways of achieving and understanding justice. For Villa-Vicencio (2004: 33), genuine reconciliation does not involve outsiders to the conflict but is an internal process that culminates in the breaking of established patterns of violence. It requires time and space for mourning, anger and hurt as well as for healing (Villa-Vicencio 2004: 37).

In order to enhance the possibilities of reconciliation, these processes must be accompanied by truth telling, justice and, where applicable, the paying of reparations by the offender to the victims. In Tutu's (1999) argument, reconciliation does not only provide for nation building after long years of conflict; it also guarantees a future for a people that were previously opposed as perpetrators and victim. For that reason, the truth is told, confessions are made by human rights offenders, the victims forgive and amnesty is granted to those who have told the whole truth so that reconciliation can then take place, that is how central reconciliation is in the case of the SATRC.

The types of reconciliation according to Strupinskienė (2016) are as follows:

- Social reconciliation – this type of reconciliation applies when the victims and the perpetrators are from the same community and it is only practical for them to live side-by-side in peace after conflict. It has the thin and the thick levels. The thin level includes peaceful cohabitation, seizing the violence and inter-ethnic tolerance. The thick reconciliation, on the other

hand, includes forgiveness, empathy, building of new relationship, truly accepting with no denial what has happened in the community.

- Economic reconciliation – this type of reconciliation is dependent on profit and can happen at individual, communal or national level. Examples of this type of reconciliation are victim compensation, return of stolen property, reparations or equal employment in state institutions.
- Political reconciliation – this type of reconciliation can also occur at individual or communal or national level. It happens after conflict where individuals and communities politically cohabit and are able to trust their government and its institutions; these individuals or communities are able to respect the rule of law and human rights. Individuals are able to participate in democratic elections and can depend on the government to provide services regardless of ethnicity. In Barnard-Naude's (2008: 172) argument, the SATRC process did not deliver economic reconciliation in South Africa, as it did not compel big business that benefited from apartheid to pay material reparations to the victims of apartheid. Without economic reconciliation, Barnard-Naude (2008) argues, even political and social reconciliation are compromised and cannot be fulfilled where social inequalities continue to mark the difference between the former oppressor and the former oppressed.

In 1999, then South African Deputy President Thabo Mbeki delivered the South Africa: Two Nations speech that decried the social inequalities between black and whites that continued after apartheid had been politically dethroned Mbeki (2002: 11), making South Africa not one but two nations that are not reconciled. Similar to the Christian understanding of the fall of man from grace, reconciliation entails that conflict was a fall from grace that separated one people into two or more separate feuding camps. Reconciliation then becomes a recovery from the fall where people find each other again and seek to bury the conflictual past behind them and pave a new future.

## **Redress**

In most literature, the process of redress is defined more or less just like reparations. However, the difference between redress and reparations is that the former involves attempting to return victims to the position they were prior to their abuse or violation. This also differs drastically from compensating because compensation places more emphasis on the financial aspect at the expense of the emotional and other needs of the victims.

After every massacre or human rights violations, there is great loss suffered, redress of the loss generally does not produce abundant profit and sometimes there is no profit at all. The apartheid regime in South Africa was a type of atrocity that gave perpetrators and their descendants' long-term benefits, mainly because blacks and most non-whites were segregated from enjoying certain benefits (Vernon 2012: 42).

To highlight the importance of redress, Norval (2009: 317) states that the Charter of Redress was created self-consciously as it was nearly similar to the Freedom Charter. In the same way that the Freedom Charter shapes the political imagination of South African generations, the Charter of Redress was thought to be a document that will define the need for reparations for marginalised communities in post-conflict situations. In the Charter of Redress, it is clear that reconciliation has a price; it details all the wrongs committed to individual victims like torture or abductions, to communities like lack of basic services such as electricity and also records the limited action in the wake of the TRC report. Therefore, redress becomes a process of restorations of what was lost. If life is irreplaceable, it becomes the closest process to repair of the damage caused by human rights violations during a period of violent conflict such as the apartheid era in South Africa.

## **Rehabilitation**

The process of rehabilitation is borrowed from the field of psychology. It denotes a number of activities aimed at either the individual or the wider community that experienced human rights abuses. Some of the processes that form part of individual or community rehabilitation are counselling, medical care, legal assistance, job training, and education. The main characteristic of these processes are that they are aimed at minimising the long-term impact of the human rights abuses on both the individual and the community (Office of the United Nations High Commissioner for Human Rights 2008) (OHCHR).

## **Reparations**

Reparation and compensation are also often used interchangeably. The process of reparation is the payment, in financial or other terms for the wrongdoing that the perpetrator inflicted on the victims. However, it differs from normal compensation in that reparations are also a promise never again to repeat the same actions (Mbeki 2004: 25). They are an advanced form of compensation and restorative in nature. While predominantly financial, progressively, reparations have also become symbolic.

OHCHR (2008) lists the basic principles and guidelines to classify measures of reparations:

- Restitution – measures to ensure the victims' original situation before human rights violations is restored like the return of property or previous employment.
- Compensation – it is necessary to offer compensation if there was any kind of loss or damage from gross human rights violations that can be assessed economically like loss of income or moral damage.

- Rehabilitation – this caters for psychological and medical needs and also legal and social amenities.
- Satisfaction – the aim here is satisfaction of the end of the violence, recovery and reburial of the deceased, truth-seeking, commemoration and memorialisation and public apologies to name a few.
- Guarantees of non-repetition – this includes institutional reform in the protection of human rights workers, the strengthening of judicial independence, law enforcement and psychological and social services.

In the case of the SATRC, Du Bois (2008: 118) argues that reparations were originally angled towards being a way of restoring the dignity of those that experienced violation and humiliation during the apartheid human rights violations and atrocities.

## **Restitution**

Restitutions are remedies that are aimed to restore a victim to their previous position before they experienced the human rights abuses (Mullins 2010: 193). The aim of restitutions is to put the victims in more or less the same position they would have been had the violations not occurred. Mostly, restitution is paid for the loss of loss or injury. The process of restitution can occur in one of the following ways:

- resettlement in one's place of prior residence;
- returning of confiscated property; and
- restoration of liberty, employment, family unity, legal rights and citizenship (Mullins 2010: 194).

The payment of restitution differs with other forms of repairing past harms in that the state is the one which carries out the processes of restitution (OHCHR 2008). UNGA (2005) notes that:

Restitution, as far as it refers to the attempt at redress that seeks to restore the victim or victims to their condition before the violation happened, is normally difficult to achieve in full, and tends to remain an attempt and an effort, especially where death or disappearance of individuals has taken place.

### **Transitional justice**

Broadly defined, transitional justice is a response that refers to a set of judicial and non-judicial measures implemented by post-conflict communities in different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparation programmes, and various kinds of institutional reforms (Cassel 1996: 200). Mullins (2010: 192) argues that transitional justice privileges restorative justice ahead of corrective or punitive justice most of the times, especially in cases such as South Africa where the need for both former perpetrators and victims of human rights violations are to continue living together as citizens of one country. Corrective or punitive justice in such a case is seen as corrosive to fragile nationhood and potentially harmful to the goal of reconciliation and nation building.

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