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Truth vs. Justice: Promoting the Rule of Law in Post-Apartheid South Africa.

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**TRUTH VS. JUSTICE: PROMOTING THE RULE OF LAW IN
POST-APARTHEID SOUTH AFRICA**

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I. INTRODUCTION

In April 1996, Lucas Sekwepere sat before South Africa's Truth and Reconciliation Commission, and recounted the horrible crimes committed against him by state agents under the policy of apartheid.¹ Mr. Sekwepere testified that a decade earlier he was blinded after being shot in the face by a white policeman, and that he was later tortured, nearly suffocated, and then threatened with death by live burial.² Mr. Sekwepere further stated that the police's primary purpose for committing these crimes was to "incite unrest between two black groups" and to extract information.³ After testifying before the Truth Commission, Mr. Sekwepere initially declared that being able to tell his story was as if the light had finally pierced through the darkness.⁴ Mr. Sekwepere's story is just one example of the extreme brutality and lawlessness that occurred during apartheid, and the praise he bestows upon the Truth Commission has been expressed throughout South Africa.⁵

When Nelson Mandela, the head of the African National Congress, was elected President on April 27, 1994,⁶ in South Africa's first nonracial democratic elections, he and his new government faced many challenges.⁷ The most pressing problem confronting the new government was how to reconcile a country that had been torn apart for decades by apartheid.⁸ In the attempt to promote national unity and reconciliation, as well as secure a peaceful transition to democracy, the interim Constitution of 1993 abolished apartheid and provided the possibility of amnesty for

1. See Roger Thurow, *A Blind Man Grows Restless*, WALL ST. J., July 17, 2000, at A1, available at 2000 WL-WSJ 3036688; see also BLACK'S LAW DICTIONARY 92 (7th ed. 1999) (defining apartheid as "racial segregation, specifically a policy of discrimination and segregation against blacks in South Africa").

2. Thurow, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

6. See NELSON MANDELA'S STATEMENT AFTER VOTING IN SOUTH AFRICA'S FIRST DEMOCRATIC ELECTION, at <http://www.anc.org.za/ancdocs/history/mandela/1994/sp940427.html> (last visited Feb. 5, 2003) (stating that votes were cast on April 27, 1994, and Nelson Mandela was elected President of South Africa).

7. See *Only the Truth Can Put the Past to Rest*, TIME FOR KIDS, Mar. 6, 1998, at 4, available at <http://www.timeforkids.com/TFK/magazines/story/0,6277,89921.00.html> (last visited Oct. 29, 2002) [hereinafter *Only the Truth*]; BRUCE FETTER, *South Africa*, in 18 THE WORLD BOOK ENCYCLOPEDIA 608, 621 (Scott Fetzer Co., 2000).

8. See FETTER, *supra* note 7; ANNENBERG/CPB EXHIBITS, *Human Rights for Everyone*, in SOUTH AFRICA: CAN A COUNTRY OVERCOME ITS HISTORY? (1998), at <http://www.learner.org/exhibits/southafrica> (on file with *The Scholar: St. Mary's Law Review on Minority Issues*) (noting that the new constitution was intended to "heal the divisions between South Africa's various communities").

those who committed political crimes under the old regime.⁹ In order to give full effect to the constitutional mandate, Parliament established the Truth and Reconciliation Commission (TRC).¹⁰ One of the TRC's main goals was to obtain a complete accounting of past transgressions in the hopes that they would never be forgotten, and thus never repeated.¹¹

Four years after Mr. Sekwepere testified before the Truth Commission, rather than feeling closure, forgiveness or reconciliation, Mr. Sekwepere continued to see the inequities brought about by apartheid and still felt the anger associated with apartheid's cruelties.¹² The Truth Commission was established to promote and provide national peace and reconciliation, yet the process was complex and the results have been controversial.¹³ Along with many South Africans, Mr. Sekwepere wonders if peace or reconciliation can ever be attained without justice.¹⁴

This comment will first discuss the history of South Africa, how apartheid developed from a customary practice to a government-sanctioned policy, and how the black majority staged its resistance. Section two will briefly define truth commissions, and then focus on the creation and purpose of South Africa's Truth and Reconciliation Commission, including a summary of the TRC's praise and criticism. Section three will contrast the TRC's course of action – truth in exchange for criminal prosecution – with the traditional notions of justice. This comment will then argue that the Truth Commission did not produce its stated goals of national unity and reconciliation. Section five will next contend that retributive justice better promotes the rule of law. In conclusion, this comment will propose several steps South Africa and the international community should take in order to truly achieve reconciliation while promoting the rule of law.

9. Epilogue, Constitution Act 200 of 1993, at http://www.gov.za/constitution/1993/1993_cons.htm (last visited Apr. 3, 2003).

10. Promotion of National Unity and Reconciliation Act 34 of 1995, <http://www.gov.za/gazette/acts/1995/a34-95.htm>. The preamble of the Act discusses the need to meet the objectives of the 1993 Constitution of South Africa. *Id.* at prmb. Chapter Two of the Act provides for the actual creation of a “juristic person” to be known as the Truth and Reconciliation Commission. *Id.* at §2(1).

11. *Id.* (providing that the Act seeks to establish a complete picture of past violations of human rights and to establish preventive measures). The preamble to the Promotion of National Unity and Reconciliation Act provides that “it is deemed necessary to establish the truth in relation to past events as well as the motives for and the circumstances in which gross violations and human rights have occurred and to make the findings known in order to prevent a repetition of such acts in the future.”

12. *See* Thurow, *supra* note 1.

13. *See id.*

14. *See id.*

II. EUROPEAN IMMIGRATION AND CREATION OF APARTHEID

A. *Landscape and History of South Africa*

South Africa is the southern-most country in Africa,¹⁵ sharing its northern border with Namibia, Botswana, Mozambique, Zimbabwe, and Swaziland.¹⁶ On the east and south, it is bordered by the Indian Ocean, and to the west by the Atlantic Ocean.¹⁷ South Africa was originally inhabited by groups of hunters and gatherers and nomadic tribes that herded cattle.¹⁸ In 1652, the Dutch East India Company became the first European company to arrive in South Africa.¹⁹ Between 1680 and 1707, native South Africans witnessed the arrival of Dutch, German and French immigrants who came to be known as *Boers* (Dutch for “farmers”) or *Afrikaners*.²⁰ During the 17th century, these immigrants imported slaves from Asia and other parts of Africa to South Africa.²¹ In the early 19th century, the British began occupying South African territory,²² with occupation came the demands that English law be imposed.²³ These measures were intensely disliked by the early European settlers known as the *Afrikaners*, and many moved northward into the Transvaal territories.²⁴

15. FETTER, *supra* note 7, at 610.

16. *Id.*

17. *See id.*

18. *Id.* at 618.

19. *See id.*; *see also Only the Truth*, *supra* note 7; ANNENBERG/CPB EXHIBITS, *supra* note 8 (asserting that the Afrikaners, descendants of Dutch traders, were one of the main European groups that sought power in South Africa); Guarva Misra, *The Boers*, at <http://www.pvhs.chico.k12.ca.us/~bsilva/projects/scramble/boers.htm> (last visited Feb. 9, 2003) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

20. *See* FETTER, *supra* note 7, at 618-19 (noting that “*Boer* people were Dutch farmers who settled in the southern part of Africa in the 17th century; that they intermingled with other European settlers and established the *Afrikaner* or *Boer* (Dutch for farmer) community; and that although the Boer population was actually a mix of various Europeans, the predominant culture was Dutch Protestant”); ANNENBERG/CPB EXHIBITS, *Europeans in South Africa*, in SOUTH AFRICA, *supra* note 8.

21. *See* FETTER, *supra* note 7, at 618 (stating that the language of European settlers incorporated certain traits from those spoken by Southeast Asian slaves and African servants).

22. *See id.*; ANNENBERG/CPB EXHIBITS, *supra* note 20 (discussing the British colonial presence in South Africa).

23. ANTHONY LEMON ET AL., *South Africa*, in MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA, at <http://encarta.msn.com/encnet/refpages/RefArticle.aspx?refid=761557321&pn=6> (noting that the imposition of English law within South Africa occurred in 1820).

24. *Id.*; *see* FETTER, *supra* note 7, at 618; *see also* ANNENBERG/CPB EXHIBITS, *supra* note 20 (discussing the history of the *Afrikaner* people including the trek north from Cape Town).

By the late 1850s, the Transvaal territories had combined to form the South African Republic.²⁵ The policies of separation between Blacks and Whites, including forced removal of Blacks from their communities, detention without trial, and lengthy imprisonments, became even more pronounced.²⁶ For example, Blacks and Whites were segregated in their living environments, their employment, and their education; political participation by the black majority was forbidden or viciously prevented by the ruling White class; and ownership of real property was becoming a possibility for Whites only.²⁷ Discriminatory practices were “woven throughout the fabric of the South African society,” and reinforced by violent action.²⁸ By the middle of the 19th century, the British had occupied all the major urban centers, and in 1877 the Transvaal territories were annexed by Britain and became colonies of the British crown.²⁹ Thereafter, the British Parliament passed the South Africa Act of 1910,³⁰ which solidified the oppressive racial inequities towards Blacks.³¹ Elections were held that year and the country’s first parliament was formed.³² The new parliament’s first order of business was passing the Natives Land Act of 1913, which prohibited most Blacks from buying or owning land.³³

In 1914, the National Party (NP) was founded, and by the 1920s, the white minority dominated South African politics.³⁴ When the NP came to power in 1948, segregation and inequality between Blacks and Whites

25. See FETTER, *supra* note 7, at 619 (stating the Transvaal was known as the South African Republic).

26. See *id.* J. David Ellwanger & Robert F. Drinan, *American Bar Association Report to the House of Delegates Section of Individual Rights and Responsibilities Standing Committee on World Order Under Law*, 28 How. L. J. 653, 666-68 (1985) (discussing the history of relocation and removal).

27. See FETTER, *supra* note 7, at 609.

28. Ellwanger, *supra* note 26, at 662.

29. See FETTER, *supra* note 7, at 619; ANNENBERG/CPB EXHIBITS, *supra* note 20 (stating that “the British replaced the Dutch as the dominant European power [in South Africa] at the beginning of the 19th century”); ANNENBERG/CPB EXHIBITS, *Diamonds and Gold, in SOUTH AFRICA*, *supra* note 8 (noting that the British were determined to exercise control over the gold and diamond mines in the Transvaal region).

30. See *Only the Truth*, *supra* note 7; FETTER, *supra* note 7, at 619.

31. See LEMON ET AL., *supra* note 23 (noting a provision in the South Africa Act of 1910, wherein change in the policies towards Blacks would require a majority vote of two-thirds by parliament); ANNENBERG/CPB EXHIBITS, *supra* note 29 (stating that after 1910, power was held by white political parties).

32. See LEMON ET AL., *supra* note 23.

33. See *id.*

34. See LEMON ET AL., *supra* note 23; FETTER, *supra* note 7, at 619 (joining forces of the National Party and the Labour Party to gain control of the government in 1924).

transformed from customary practice into written law.³⁵ At the center of the NP's agenda was the institution of apartheid.³⁶ The tenets of apartheid emphasized the promotion of white supremacy, white exploitation, and white political domination.³⁷ These tenets were harshly reinforced by segregation in education and housing, discrimination in employment, and prohibitions on marriage between Whites and Blacks.³⁸ To further entrench the policy of apartheid, the Supreme Court was filled with six pro-apartheid judges;³⁹ and by 1958, apartheid sympathizers made up the majority of the Senate and House of Assembly.⁴⁰ Thus, "South Africa [was] unique [in the sense that it was] the only country in the world with racial discrimination enshrined into its Constitution [and] [i]ts entire governmental, political, economic, social, and legal structure [was] predicated on distinctions based on race or color."⁴¹

B. *The Institution of and Resistance to Apartheid*

Despite the NP's efforts to ingrain the apartheid apparatus into every aspect of society, by 1923 the African National Congress (ANC) had established itself as an anti-apartheid organization.⁴² For almost fifty years

35. See *Only the Truth*, *supra* note 7 (noting the rule of South Africa from 1948-1994 was under a system that kept Black and White citizens separate); FETTER, *supra* note 7, at 620.

36. See *Only the Truth*, *supra* note 7 (noting that South Africa was ruled under apartheid); see also FETTER, *supra* note 7, at 609, 620 (defining apartheid as an *Afrikaans* word meaning separateness); ANNENBERG/CPB EXHIBITS, *Apartheid: The Beginning, in SOUTH AFRICA*, *supra* note 8.

37. See Rasheed Araen, *What is Post-Apartheid South Africa and its Place in the World?*, at <http://sunsite.wits.ac.za/biennale/essays/araeen.htm> (last visited Apr. 3, 2003) (explaining that the separation of people based upon their race under apartheid came from "an ideology of supremacy practiced by a dominant race"); *Only the Truth*, *supra* note 7 (stating that during apartheid none of the 32 million Black citizens had the right to vote or participate in the government).

38. See *Only the Truth*, *supra* note 7 (separating Black and White citizens in terms of schools, neighborhoods, and other basic civil rights); FETTER, *supra* note 7, at 609 (segregating racial groups in housing, education, and employment); ANNENBERG/CPB EXHIBITS, *supra* note 36.

39. See LEMON ET AL., *supra* note 23 (noting that in 1955 the parliament approved appointment of six Supreme Court justices who were sympathetic to apartheid in order to "assure the support for the program").

40. See *id.* (stating that after the 1958 election, the National Party increased its membership and thus its control in the House of Assembly); see also ANNENBERG/CPB EXHIBITS, *Resistance, in SOUTH AFRICA*, *supra* note 8 (noting that by the early 1960s, the apartheid government was consolidating its power and smashing all opposition).

41. Ellwanger, *supra* note 26, at 656 (condemning South Africa's complete contempt for the Rule of Law and abuse of basic human rights).

42. See FETTER, *supra* note 7, at 619.

the ANC pursued a course of peaceful protest within South Africa.⁴³ Other organizations, such as the Pan-Africanist Congress (PAC), did not share the ANC's approach, but instead pursued a more militant strategy.⁴⁴ The strength and size of the anti-apartheid organizations frightened the white power structure, and by April of 1960, both the ANC and the PAC were outlawed.⁴⁵ In the following years, the ANC's commitment to non-violent civil disobedience diminished, and both the ANC and PAC turned to armed resistance.⁴⁶ In response to the increased uprisings, the apartheid government passed legislation granting the police broad powers, such as authorization to arrest without a warrant.⁴⁷ With this new tool, most of the nationalist leadership, including Nelson Mandela, was imprisoned.⁴⁸

At the same time, South Africa's apartheid policies were receiving disapproval from the international community.⁴⁹ Initially, the United Nations General Assembly called upon South Africa to adhere to its obligations under the Universal Declaration of Human Rights, to recognize "the inherent dignity, equality and inalienable rights of all members of the human family," by putting an end to racial discrimination.⁵⁰ The South African leadership chose to disregard these requests even though they knew the acts associated with apartheid, such as torture, rape, and murder, violated domestic and international law.⁵¹ In response, the United Nations imposed sanctions upon South Africa, and in 1974 they suspended the country from the General Assembly.⁵² "By the 1980s, General Assembly resolutions referred to apartheid as a crime against humanity," which could then be prosecuted under the United Nations

43. See FETTER, *supra* note 7, at 619-20 (linking ANC's use of civil disobedience to Mohandas K. Gandhi's struggle to increase the rights of Indians in South Africa).

44. See *id.* at 620 (explaining that PAC opposed ANC cooperation with white groups and that PAC sought an all-black government).

45. See FETTER, *supra* note 7, at 620 (citing the incident on March 12, 1960, when PAC members gathered at police stations without their identification papers; the protest occurred without much incident, except in Sharpeville where police fired at and killed 69 black protesters).

46. See ANNENBERG/CPB EXHIBITS, *supra* note 40; LEMON ET AL., *supra* note 23.

47. See LEMON ET AL., *supra* note 23.

48. See *id.*; FETTER, *supra* note 7 (citing that Nelson Mandela was arrested for sabotage and conspiracy, and was sentenced to life in prison).

49. See FETTER, *supra* note 7, at 620 (noting that the South African government received much criticism from Commonwealth of Nations, prompting South Africa to leave the Commonwealth).

50. Ellwanger, *supra* note 26, at 661.

51. See *Only the Truth*, *supra* note 7; Ellwanger, *supra* note 26, at 661.

52. LEMON ET AL., *supra* note 23; see FETTER, *supra* note 7, at 620-21 (noting that sanctions were imposed on South Africa as an expression of opposition to apartheid).

Charter and international law.⁵³ The United Nations' course of action signaled the "growing international opposition to apartheid."⁵⁴ But instead of instituting criminal prosecutions, the U.N. stopped short at suspension and resolutions, neither of which measures brought apartheid to an end.

By June of 1976, the South African black youth were deeply involved in the struggle towards liberation, and the cycle of violence worsened.⁵⁵ Due to the increased violence during the 1980s and the implementation of stringent economic controls, South Africa's economic growth came to a standstill.⁵⁶ The country's economic decline was also due in part to the United States Congress' enactment of the Comprehensive Anti-Apartheid Act of 1986.⁵⁷ The Act imposed economic sanctions against South Africa, prohibited new investment and loans, and barred importing and exporting agricultural products and raw materials.⁵⁸ Because South Africa was regarded as unstable for investment, in 1987 Congress passed another measure requiring "complete divestment by American citizens and companies of their holdings in South Africa."⁵⁹ This legislative directive resulted in close to three hundred United States companies pulling their investments and businesses out of the country.⁶⁰

53. LEMON ET AL., *supra* note 23; see Michael P. Scharf, *Impunity and Human Rights in International Law and Practice*, 90 AM. J. INT'L L. 173, 174 (1996) (book review) (observing that customary international law allows "permissive jurisdiction over perpetrators of crimes against humanity" and permits their prosecution).

54. LEMON ET AL., *supra* note 23.

55. See *id.* (discussing riots by Black high school students in protest of a government rule that required certain subjects to be taught in the Afrikaans language); FETTER, *supra* note 7, at 620.

56. See Jennifer Frankel, Note, *The Legal and Regulatory Climate for Investment in Post-Apartheid South Africa: An Historical Overview*, 6 CARDOZO J. INT'L & COMP. L. 183, 184-85 (1998). "South Africa also controlled its people through its economic policies, such as the dual currency system and foreign exchange controls. The government implemented strict foreign exchange controls to regulate the flow of funds in and out of the country. The controls were necessary because of the political instability." *Id.* at 184.

57. See Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (1986), *repealed by* South African Democratic Support Act of 1993, Pub. L. No. 103-149 § 4, 107 Stat. 1503 (1993); Frankel, *supra* note 56, at 189.

58. 22 U.S.C. § 5002; Frankel, *supra* note 56, at 189.

59. Frankel, *supra* note 56, at 190. See generally Henry J. Richardson III, *Current Development: Divestment of the Stock Portfolio of the Society*, 81 AM. J. INT'L L. 744, 745 (1987) (discussing the arguments for and against divestment in South Africa).

60. Frankel, *supra* note 56, at 190.

C. *Apartheid Comes to an End*

In 1989, F.W. de Klerk was elected President of South Africa.⁶¹ He recognized that in order for the country to survive, change was necessary.⁶² Having observed the growing chaos, de Klerk aligned himself with both sides of his party - the conservatives and the ultra-conservatives.⁶³ The direction de Klerk was to take was unclear until he was elected president. "From that point on, his approach could not have been more different from that of his predecessor, P.W. Botha."⁶⁴

Due to international pressure, increased violence, internal turmoil, and de Klerk's own opposition to his party's racist legislation, in 1990 he began to implement some sweeping changes.⁶⁵ De Klerk allowed open protest against apartheid, ordered the release of numerous Black political prisoners, and lifted bans on the ANC and the PAC.⁶⁶ The combination of global sanctions and political instability weakened the apartheid apparatus and led to the disintegration of one of its necessary components - white cohesiveness.⁶⁷ Thus, de Klerk's decision to release Nelson Mandela from prison and pursue negotiations with the black majority regarding the transition to a free South Africa was a strategic attempt to keep the white machinery in power.⁶⁸ However, in 1994, the first non-racial democratic election was held, wherein twenty million votes were cast,⁶⁹ and South Africa witnessed a truly historical event as Nelson Mandela ascended to the presidency.⁷⁰

61. LEMON ET AL., *supra* note 23; FETTER, *supra* note 7.

62. BBC News, *FW de Klerk: Overseer of Transition* (Oct. 30, 1998), at http://news.bbc.co.uk/2/hi/special_report/1998/10/98/truth_and_reconciliation/202388.stm (last visited Apr. 3, 2002) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

63. *Id.*

64. *Id.*

65. *Id.*; LEMON ET AL., *supra* note 23 (noting that de Klerk authorized and ordered sweeping changes).

66. See LEMON ET AL., *supra* note 23; BBC News, *supra* note 62.

67. Lorna McGregor, *Individual Accountability in South Africa: Cultural Optimum or Political Facade*, 95 AM. J. INT'L L. 32, 33 (2001) (arguing that the apartheid regime resulted from the "internal and international pressure that was systematically corroding apartheid."); G. Marcus Cole, *Towards a Post-Apartheid Future: Political & Economical Relations in Southern Africa*, 13 NW. J. INT'L L. & BUS. 711, 713 (1993) (reviewing Robert Schrire, *White Politics and Strategies in the 1990's* (1992)).

68. *Id.* at 714; see Emily H. McCarthy, Note, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation*, 3 MICH. J. RACE & L. 183, 184 (1997) (stating that de Klerk's government entered into negotiations with the ANC to determine the release of political prisoners); FETTER, *supra* note 7, at 620 (discussing de Klerk's release of Mandela from prison and the negotiations between de Klerk and the ANC).

69. LEMON ET AL., *supra* note 23.

70. See *Only the Truth*, *supra* note 7; FETTER, *supra* note 7.

III. A NEW SOUTH AFRICA

A. *Political Negotiations & The Government of National Unity*

After the dismantling of apartheid, the white minority still controlled the economy and the military,⁷¹ and as such had the might and money to topple the fragile democracy if harsh concessions were exacted upon them for the vicious cruelties committed during their reign.⁷² Mandela's new government recognized this very real possibility. In order to avoid renewed expressions of civil unrest, armed resistance and apartheid-style violence, amnesty was politically negotiated and then constitutionally proscribed for murderers, torturers, rapists, and thieves.⁷³ Thus, a delicate compromise between a cover-up and an exhaustive attempt to investigate every allegation of government sanctioned brutality was struck.⁷⁴

As President of a newly developing democratic state, Mandela's Government of National Unity (GNU) faced the challenges of reconciling a nation victimized by apartheid,⁷⁵ responding to the allegations of gross human rights violations committed during apartheid, and reassuring the white minority that the black majority would not seek vengeance for the atrocities of apartheid.⁷⁶ In efforts to address these problems, the interim

71. Peter Storey, *A Different Kind of Justice: Truth and Reconciliation in South Africa*, NEW WORLD OUTLOOK, July-Aug. 1999, available at <http://gbgm-umc.org/nwo/99ja/different2.html> (last visited Oct. 24, 2002) (stating that "apartheid may have been defeated, but its minions still dominated the police, the army, and the civil service"); McCarthy, *supra* note 68 (recognizing that the economic and military powers remained with the National Party).

72. See McCarthy, *supra* note 68.

73. See *id.* at 183 n.1, 184-85 (listing statistical information regarding incidents of politically motivated violence and the desire of anti-apartheid groups to end that violence); Thurow, *supra* note 1 (providing detailed examples of politically motivated violence).

74. Theodore J. Piccone, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1: *General Considerations*; Vol. 2: *Country Studies*; Vol. 3: *Laws, Rulings, and Reports*, 90 AM. J. INT'L L. 540, 541 (1996) (book review); Cyrille Hugon, *In South Africa 20 Years After Steven Biko's Death, the Truth Commission Grapples with the Meaning of Justice*, SLANT, Spring 1997, <http://www.columbia.edu/cu/sipa/PUBS/SLANT/SPRING97/hugon.html> (last visited Apr. 7, 2003) (quoting Desmond Tutu as admitting that the Truth and Reconciliation Commission was "the only alternative to Nuremberg on the one hand, and amnesia on the other").

75. Frankel, *supra* note 56, at 195-96 (discussing the emergence of the GNU during a time of economic and political uncertainty caused by the lingering effects of apartheid).

76. See *Only the Truth*, *supra* note 7. "As white rule came to an end, many Whites feared that Blacks would seek revenge for the cruelties of apartheid. So the white government and Mandela's new government made a deal. People who had committed crimes for or against apartheid could receive amnesty. . . if they did one thing: tell the truth about their crimes." *Id.*

Constitution, assented to on January 25, 1994, abolished apartheid.⁷⁷ Furthermore, it provided under the provision entitled “National Unity and Reconciliation” that:

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respects of acts, omissions and offenses associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.⁷⁸

This constitutional directive was implemented with the passage of the Promotion of National Unity and Reconciliation Act of 1995;⁷⁹ it was then reinforced within the provisions of the permanent Constitution of 1996.⁸⁰ The Act’s main purpose was to establish a Truth and Reconciliation Commission.⁸¹

B. *Truth Commissions*

Truth commissions are not novel, and have been utilized by countries such as Argentina and Chile.⁸² A truth commission’s main purpose is to investigate and address human rights abuses that occurred under tyrannical regimes.⁸³ The goal of the truth commission is to promote democratic justice by way of a non-adversarial, truth-telling process.⁸⁴ Truth commissions concentrate on what has been termed the “truth phase,” wherein revelation of the truth about former regimes is the primary purpose.⁸⁵ The success of truth commissions in achieving their goal for social recon-

77. § 8 of Constitution Act 200 of 1993, <http://www.gov.za/constitution/1993/1993cons.htm#SECTION8> (providing the legislative requirements of equality regardless of race, thus effectively ending apartheid).

78. *Id.* § 251.

79. Promotion of National Unity and Reconciliation Act 34 of 1995, at <http://www.gov.za/gazette/acts/1995/a34-95.htm> (last visited Apr. 7, 2003).

80. Schedule 6, § 22 of Constitution Act 108 of 1996, <http://www.gov.za/constitution/1996/96conssec.6htm#22> (last visited Apr. 7, 2003).

81. Pmb. of Promotion of National Unity and Reconciliation Act.

82. Karen Cavanaugh, Note, *Emerging South Africa: Human Rights Responses in the Post-Apartheid Era*, 5 *CARDOZO J. INT’L & COMP.* 291, 321-24 (1997).

83. *See id.*; Peter A. Schey, et. al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 *WHITTIER L. REV.* 325, 332-33 (1997).

84. *See* Kirsty Sangster, Comment, *Truth Commissions: The Usefulness of Truth-telling*, 5 *AUSTRALIAN J. OF HUM. RTS.*, at <http://www.austlii.edu.au/au/other/ahric/ajhr/V5N1/ajhr515.html> (last visited Sept. 25, 2002).

85. *See id.*

ciliation is determined in part by their structure, membership, power to compel, and support from all components of the social spectrum.⁸⁶ The truths that are revealed to the commissions are then used to rewrite the former regime's version of history,⁸⁷ and thereafter provide a better understanding of the brutality and devastation, a more accurate account of the victims who suffered as a result, and a clearer picture of those who were responsible.⁸⁸

C. *South Africa's Truth and Reconciliation Commission*

Similarly, the ANC sponsored truth commissions in South Africa in 1992 and again in 1993.⁸⁹ Yet, the Truth and Reconciliation Commission that emerged in 1995 as the creation of political negotiations and compromise between the defeated NP pro-apartheid party and Mandela's GNU seemed ideally appropriate for the tasks confronting the new South Africa.⁹⁰ The primary objective of South Africa's TRC was:

[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights. . . [and to grant] amnesty to persons who make full disclosure of all the relevant facts relating to the acts associated with a political objective committed in the course of the conflicts of the past.⁹¹

The TRC's mandate called for understanding, reparation, and *ubuntu*,⁹² rather than vengeance and retaliation.⁹³ The President appointed eighteen commissioners to the TRC; those appointed had to be

86. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 331-32 (1999).

87. See Kirsty Sangster, *supra* note 84.

88. See Schey et al., *supra* note 83, at 326.

89. See Marianne Geula, Note, *South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 63 (2000) (explaining how South Africa demonstrated it had the experience in investigative processes before the creation of the TRC by sponsoring prior truth commissions).

90. See McCarthy, *supra* note 68, at 183 n.1, 184-85 (1997); Thurow, *supra* note 1.

91. Pmb. of Promotion of National Unity and Reconciliation Act 34 of 1995, <http://www.gov.za/gazette/acts/1995/txt/a34-95txt> (last visited on Apr. 7, 2003).

92. Justice Pius Langa, *South Africa's Truth and Reconciliation Commission*, 34 INT'L LAW. 347, 352 (2000) (defining *ubuntu* as being "an African concept that simply means 'a humanness' – being human as distinct from being an animal"); McGregor, *supra* note 67, at 38.

93. Pmb. of Promotion of National Unity and Reconciliation Act; see *A Reconciliation Without Vengeance*, LONDON INDEP., Aug. 1, 1998, at 3, available at LEXIS, News Library, Indpnt File.

capable of impartiality and have proven integrity.⁹⁴ To further facilitate the investigation and reparation process, the TRC was equipped with a Committee on Human Rights Violations, a Committee on Reparations and Rehabilitation, and a Committee on Amnesty.⁹⁵ Subsequently, the TRC began conducting investigations and hearings whereby truth telling was promoted in order to reconstruct the soul of South Africa and reconcile the wounds of the past.⁹⁶

1. The TRC's Committee on Human Rights & Committee on Reparation and Rehabilitation

The Committee on Human Rights was directed to “take into account the gross violations of human rights. . .[and] record allegations and complaints of gross violations of human rights.”⁹⁷ The committee was armed with the authority to conduct inquiries, take evidence, and make recommendations to the Commission.⁹⁸ If after finding that gross violations of human rights had been committed, the Committee on Human Rights referred the matter to the Committee on Reparations and Rehabilitation.⁹⁹

The Committee on Reparations and Rehabilitation was designed so that “[a]ny person who is of the opinion that he or she has suffered harm as a result of a gross violation of human rights may apply to the Committee for reparations.”¹⁰⁰ The Reparations Committee possessed the power of recommending the basis and conditions upon which reparations would be granted, as well as when reparations would be reduced or discontinued.¹⁰¹

The TRC's Human Rights and Reparation and Rehabilitation Committees added a modicum of humanity to the desperate and complex situation facing the new South Africa, and allowed a semblance of justice to be done. However, neither committee received as much attention or denigrated the TRC's objectives as the Amnesty Committee.

94. Storey, *supra* note 71.

95. PmbL., § 5(c) of Promotion of National Unity and Reconciliation Act (providing the Commission with the power to “establish sub-committees to exercise, carry out or perform any of the powers, duties and functions assigned to them by the Commission”).

96. See Geula, *supra* note 89, at 81; see Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 212 (2000).

97. § 14(1)(a) of Promotion of National Unity and Reconciliation Act.

98. *Id.* § 14(1)(a)-(b).

99. *Id.* § 15(1).

100. *Id.* § 26(1).

101. *Id.* § 27(1)-(3).

2. The TRC's Amnesty Committee

The opportunity to come forward and possibly receive amnesty was available to all South Africans – black and white supporters and opponents of apartheid.¹⁰² The TRC's Amnesty Committee was charged with the task of deciding whether the “act, omission, or offense to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past.”¹⁰³ After making the initial determination that the act was associated with a political objective, the applicant was required to make a full disclosure of all the relevant facts concerning the act.¹⁰⁴ If all the requirements under the Promotion of National Unity and Reconciliation Act were satisfactorily met, then amnesty would be granted.¹⁰⁵

Receiving a grant of amnesty from the TRC had significant effects. First, a grant of amnesty shielded the applicant from further criminal prosecution.¹⁰⁶ For example, if the applicant faced criminal prosecution at the time his application was submitted to the TRC, the criminal prosecution was normally postponed until the TRC concluded its investigation and reached a decision. If amnesty was granted, the prosecution was abandoned entirely.¹⁰⁷ Second, the TRC's grant of amnesty had the effect of eliminating a criminal judgment rendered by a court of law.¹⁰⁸ For instance, if the applicant had been previously convicted and sentenced for a crime, upon a grant of amnesty, the applicant was released from imprisonment and the conviction was expunged from the offender's record.¹⁰⁹

102. See McCarthy, *supra* note 68, at 190 (noting that amnesty was available for leaders of both the apartheid and anti-apartheid movements).

103. § 20(1)(b) of Promotion of National Unity and Reconciliation Act; *South Africa Looks Back*, ECONOMIST, Apr. 20, 1996, at 13, available at LEXIS, News Library, Econ File.

104. § 20(1)(c) of Promotion of National Unity and Reconciliation Act; Elizabeth T. Stewart, *The Proportionality Principle in Post-Apartheid South Africa*, 8 TEMP. POL. & CIV. RTS. L. REV. 113, 124 (1998); see *Only the Truth*, *supra* note 7 (noting that “people who had committed crimes for or against apartheid could receive amnesty – or protection from punishment – if they did one thing: tell the truth about their crimes”).

105. § 20(1)(c) of Promotion of National Unity and Reconciliation Act.

106. *Id.* § 20(7)(a) (lifting criminal liability for private acts covered by a grant of amnesty); McCarthy, *supra* note 68, at 185 (discussing the marginal prerequisites for amnesty exempting applicants from criminal liability).

107. § 20(8) of Promotion of National Unity and Reconciliation Act (voiding pending trials and sentences upon publication of a grant of amnesty); McCarthy, *supra* note 68, at 189 (acknowledging that a grant of amnesty stopped prosecutions and erased convictions).

108. § 20(8) of Promotion of National Unity and Reconciliation Act (stating that a grant of amnesty voids convictions and lapses sentences).

109. § 20(10) of Promotion of National Unity and Reconciliation Act; McCarthy, *supra* note 68, at 198 (noting that if amnesty is granted, the conviction is erased from the record and the amnesty recipient is immediately release from jail).

The grant of amnesty also shielded an applicant from further civil liability.¹¹⁰ So if a civil suit was instituted, the proceeding was postponed awaiting the TRC's decision, and if amnesty was granted, the civil suit would be dismissed and the victim would be barred from obtaining any recovery, pecuniary or otherwise.¹¹¹ Thus, the TRC's Amnesty Committee was armed with valuable incentives to motivate both supporters and opponents of apartheid to come forward and disclose the truth.¹¹²

D. *Praise for the TRC*

Learning to forgive is much more useful than merely picking up a stone and throwing it at the object of one's anger, more so when the provocation is extreme.¹¹³

Supporters maintain that the goals of national unity and reconciliation were best served by the TRC.¹¹⁴ They assert that the disclosure of the truth and the opportunity to forgive benefitted "the victim more effectively than judicial proceedings."¹¹⁵ It is their argument that the purpose of the TRC was to understand and to account for the past, and that admitting the truth was punishment enough.¹¹⁶ In addition, proponents of the TRC allege that initiating criminal prosecutions against apartheid wrongdoers would have not only been too difficult, too costly, and too impractical for the fragile democracy, but also too inadequate to do justice.¹¹⁷ These same proponents praise the TRC's decision to prioritize

110. § 20(7)(a) of Promotion of National Unity and Reconciliation Act. The provision regarding amnesty from civil liability had no effect on judgments entered prior to the proclamation of amnesty. Judgments rendered before amnesty was granted continued to be binding. *Id.* § 20(9).

111. McCarthy, *supra* note 68, at 198.

112. *See* § 20(7)(a) of Promotion of National Unity and Reconciliation Act; *Only the Truth*, *supra* note 7 (observing that since the Commission's first hearing in April 1996, more than 7,000 people volunteered to tell the truth about past crimes).

113. McGregor, *supra* note 67, at 38.

114. *See id.* at 36-37.

115. *Id.* at 38.

116. *See* Elliot Abrams, *Truth Without Justice?*, POL'Y REV., Feb. 1, 2001, available at 2001 WL 16903033 (reviewing TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., Princeton University Press, 2000)) (elevating "reconciliation over retribution, focuses on permitting victims to tell their stories and regain their dignity rather than on punishing the perpetrators' actions"); McCarthy, *supra* note 68, at 188 (stating that the commission's processes "offer a better prospect of promoting the truth about South Africa's past than criminal trials").

117. McGregor, *supra* note 67, at 36 (quoting Judge Goldstone as stating "[t]here would be too many accused and adequate punishment too costly in human, political, as well as financial terms"); Abrams, *supra* note 116; John F. Murphy, Book Note, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, 93 AM.

reconciliation over retribution, which in turn allowed the “victims to tell their stories and regain their dignity.”¹¹⁸ The supporters emphasize that the TRC was the only feasible way to reconciliation.¹¹⁹ And these sentiments continue to gain ground when reiterated by Archbishop Desmond Tutu, the head of the TRC and one of its most influential and widely known advocates.¹²⁰

E. *Criticism of the TRC*

“[A] scorpion under a stone.”¹²¹

Critics of the TRC argue that victims cannot reconcile with the perpetrators of such brutal atrocities in the absence of criminal prosecution and punishment.¹²² Opponents maintain that the offer of amnesty in exchange for the truth did not awaken the conscience of the guilty, compel their truthful disclosure, and thus result in forgiveness and reconciliation.¹²³ Rather, opponents of the TRC submit that the systematic torture, maiming, and killing associated with apartheid went completely unpunished.¹²⁴ It is their position that criminal prosecutions were adequate to do justice, and that the TRC’s truth process did not foster national unity or reconstruction, but instead “hardened racial relations between blacks and whites.”¹²⁵

IV. THE TRC’S TRUTH VS. THE TRADITIONAL NOTIONS OF JUSTICE

A. *The TRC and Restorative Justice*

The TRC received over 7,000 applications for amnesty, and after five years of conducting hearings and receiving testimony from over 21,000

J. INT’L L. 752, 754 (1999); Stewart, *supra* note 104, at 118-19 (noting that both the new and old governments had “much more to gain from the amnesty process than from criminal prosecution”).

118. Abrams, *supra* note 116.

119. *See id.*

120. *Profile: South Africa’s Truth and Reconciliation Commission to Shut Down* (NPR broadcast, May 30, 2001), available at 2001 WL 9434963 (interviewing Archbishop Desmond Tutu who asserted that “in the long run things would have been much worse without the TRC”).

121. *South Africa: Why the M&G Matters*, AFR. NEWS, Sept. 7, 2001, available at LEXIS, News Library, Afrnws File.

122. *See* Thurow, *supra* note 1; *see also* Editorial, *More Work Left, South Africa’s Truth Commission Has Only Begun Healing Process*, POST-STANDARD, June 1, 2001, at A12, available at 2001 WL 5546674.

123. *See* Thurow, *supra* note 1; Abrams, *supra* note 116.

124. *See* Storey, *supra* note 71.

125. Thurow, *supra* note 1.

victims,¹²⁶ the TRC was officially dissolved on May 23, 2001.¹²⁷ The TRC's efforts at confronting the outrageous and gruesome atrocities committed during apartheid demonstrate that both white and black South Africans found the apartheid-era abuses completely unacceptable and wholly undeniable.¹²⁸

Truth was seen as a prerequisite to reconciliation,¹²⁹ and in trying to foster national unity, the TRC took advantage of the concept of restorative justice.¹³⁰ Restorative justice aims to re-unite the perpetrator and the victim, and restore the status quo within society.¹³¹ Because the main goal of a truth commission is to uncover and document the truth of the past, reconcile and unify the country, and bring a sense of closure to all the victims,¹³² the birth of the TRC was the means to "confront the past with restorative justice but without the bloodbath that a policy of retribution might bring about."¹³³ The TRC reasoned that "knowledge of the truth would itself promote social healing and reconciliation."¹³⁴ By choosing a restorative justice model underscored with a full disclosure of the truth, the TRC aligned itself with South Africa's cultural value of oral tradition.¹³⁵ Thus, the TRC squarely set forth truth as the paramount goal and the most practical solution for achieving reconciliation and securing a peaceful and successful transition to democracy for all South Africans.¹³⁶

126. See *More Work Left*, *supra* note 122.

127. Proc R32/2001 (reconvening the Truth and Reconciliation Commission on June 2001 and dissolving it on December 31, 2001).

128. See Jennifer Widner, *Courts and Democracy in Post-conflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 67 (2001) (illustrating that the South African community found the abuses wholly unacceptable).

129. Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 368 (1999).

130. Villa-Vicencio, *supra* note 96, at 214.

131. *Id.* at 214-15.

132. See Jeanne M. Woods, *Reconciling Reconciliation*, 3 UCLA J. INT'L L. & FOREIGN AFF. 81, 82-84 (1998) (introducing the basic elements of Truth Commission mechanisms).

133. JUSTICE CTR., UNIV. OF ALASKA ANCHORAGE, TRUTH AND RECONCILIATION IN SOUTH AFRICA (2001), at <http://www.uaa.alaska.edu/just/just490/truth/truth.html> (last visited Apr. 9, 2002).

134. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 391 (1999).

135. See Geula, *supra* note 89, at 82-83 (concluding that the TRC's promotion of public dialogue is consistent with the notion of citizenship); Villa-Vicencio, *supra* note 19, at 212 (contrasting truth commissions with the criminal trials to illustrate that criminal trials are ill-equipped to deal with the larger needs of society).

136. See Villa-Vicencio, *supra* note 19, at 212-13 (arguing that protecting vital national interests and national stability requires a balancing of human rights in favor of societal peace as opposed to individual retribution).

B. *Traditional Notions of Justice*

“Indeed, there can be no peace in South Africa, or anywhere, without justice.”¹³⁷

Under the traditional notions of justice, crimes such as torture, rape, murder, and theft, are to be prosecuted in a court of law, and the offenders are to receive sentences of punishment for the crimes committed.¹³⁸ In order for any country to fairly promote and fiercely protect the basic principles of “equal treatment of all people before the law,” that country must create and maintain a strong legal system based upon the rule of law.¹³⁹

The rule of law seeks to keep nations free from tyranny, to prevent gross violations of human rights, and to give a voice to the voiceless.¹⁴⁰ It is a crucial precondition for political, economic, and social development;¹⁴¹ and absent the rule of law, a nation-state does not have the necessary legal framework for a civil society to prosper.¹⁴²

Criminal prosecutions resulting in proportional punishments are well-established components of the rule of law because they provide legitimacy and adherence to the over-arching purpose of establishing and maintaining civilized, flourishing societies.¹⁴³ “The goal of building a democracy under the rule of law counts heavily in favor of justice, fairly administered, for past violations.”¹⁴⁴

137. *More Work Left*, *supra* note 122.

138. *See* Geula, *supra* note 90, at 82 (noting that the goal of the traditional criminal tribunal is to seek redress for injustice); Sangster, *supra* note 84 (noting that traditional prosecutorial forms of justice, as evidenced by the Nuremberg trials, require “that the punishment of human rights crimes must be through traditional legal processes”); Thurow, *supra* note 1, (quoting a woman who was informed of the circumstances of her husband’s death during testimony before the TRC as stating, “[y]ou are raised with a sense of justice that if someone does such gruesome acts, the person faces the law”).

139. U.S. AGENCY FOR INT’L DEV., AGENCY OBJECTIVES: RULE OF LAW, at <http://www.usaid.gov/democracy/rol.html> (last visited Apr. 9, 2003).

140. *See* Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, available at 1998 WL 12052522 .

141. *See* Jaime Malamud Goti, Book Note, *Silencing the Guns in Haiti: The Promise of Deliberative Democracy*, 92 AM. J. INT’L L. 604, 605 (1998) (praising the author Irwin Stotzky for “outlin[ing] a political, social and economic order in which disagreements over the direction of that order can be socially addressed through a process of free, equal, and collective deliberation”).

142. U.S. AGENCY FOR INT’L DEV., *supra* note 139; Press Release, Madeline Albright, Secretary of State, Statement on the Rule of Law (Sept. 19, 2000), at <http://secretary.state.gov/www/statements/2000/000919.html> (last visited Apr. 9, 2002).

143. *See* Sangster, *supra* note 84.

144. Douglass Cassel, Book Note, *Transitional Justice and the Rule of Law in New Democracies*, 92 AM. J. INT’L L. 601, 602 (1998).

V. NATIONAL UNITY AND RECONCILIATION IN RETROSPECT

A. *The TRC Misses Its Mark*

It has been argued that unless there is something that compels an individual to confess, he will not do so voluntarily, for such an action goes against human nature.¹⁴⁵ The TRC continues to be lauded for its efforts in attempting to reconcile all South Africans with the painful effects of apartheid.¹⁴⁶ Yet, the concepts of forgiveness and reconciliation are not universal,¹⁴⁷ and for many South Africans, the TRC fell short of reaching its stated goals of national unity and reconciliation.¹⁴⁸ South Africa, as a sovereign nation, created the TRC as the main mechanism through which the horrors of apartheid would be addressed. The political creators of the TRC, pursued a course of social restorative justice for many reasons. Yet, the strength of these reasons seem inadequate after thoughtful examination.

One rationale that has been put forth for utilizing the truth commission model instead of pursuing criminal prosecutions is that the latter would have been too costly.¹⁴⁹ Yet, this reason is wholly unsatisfactory, considering the atrocities associated with apartheid. Both supporters and opponents of apartheid, as well as innocent victims were tortured, burned, maimed, and killed.¹⁵⁰ And while human life is deemed to be priceless, murderers were permitted to go free under the premise that prosecuting them would be too expensive.¹⁵¹ Arguing that price will be determinative of whether an offender is prosecuted for his crime is antithetical to a strong legal system based upon the rule of law.¹⁵²

145. *Truth Essential to Reconciliation*, KOREA TIMES, Mar. 31, 2001, available at 2001 WL 3285879.

146. Michael Battle, *The Theology of Community: The Ubuntu Theology of Desmond Tutu*, INTERPRETATION, April 1, 2000, available at 2000 WL 12220737 (praising Archbishop Tutu for raising the voices of apartheid victims and revealing the names of torturers so that history may be corrected and dignity restored).

147. Clive McFarlane, *Conference Offers Philosophies on Forgiving Terrorists*, TELEGRAM & GAZETTE, Sept. 17, 2001, at A8.

148. See *South Africa Looks Back*, ECONOMIST, Apr. 20, 1996, available at LEXIS, News Library, Econ File (observing that many South Africans, including the family of slain Black Conscious leader Steven Biko, feel that amnesty does not promote reconciliation); Thurow, *supra* note 1.

149. McGregor, *supra* note 67, at 36; McCarthy, *supra* note 68, at 189.

150. See Guela, *supra* note 89.

151. See generally Stephen Landsman, *Those Who Remember the Past May Not be Condemned to Repeat it*, 100 MICH. L. REV. 1564, 1590 (2000) (discussing alternatives to criminal trials).

152. McGregor, *supra* note 67, at 36 (citing to cost considerations will surely thwart the adjudicative system).

Another reason that has been articulated for choosing a truthful disclosure policy is that achieving successful criminal prosecutions and convictions in a transitional democracy like South Africa would have been too difficult, and could have potentially torn the country further apart.¹⁵³ The combination of South Africa's political instability and the threat of renewed violence led to the absence of legal tribunals charged with the authority to prosecute criminal apartheid offenders.¹⁵⁴ Yet, in light of previous successful prosecution of similar human rights violators, the ease with which this rationale was accepted is intolerable.¹⁵⁵

In addition, both sides of the political spectrum reasoned that all of the apartheid victims would benefit more from forgiveness than retribution.¹⁵⁶ However, this rationale assumes that the victims of apartheid would be ready or willing to forgive the wrongdoers; that the revelation of the truth would bring about reconciliation; and that the offer of amnesty would compel individuals to disclose the truth, in turn fostering and furthering the TRC's objectives.¹⁵⁷ Claiming that forgiveness would be the better choice arrogantly presumes that the victim would have picked truth and forgiveness instead of criminal prosecution and punishment.¹⁵⁸ Essentially, Mandela's Government of National Unity, in a political compromise with the defeated apartheid regime, precluded the victims from exercising their right to seek redress in a court of law.¹⁵⁹ The reasons for

153. See Susanna Braun, *Forgiveness, South Africa's Truth Commission, and Military Trials: America's Options in Dealing with Crimes Against Humanity in Light of the Terrorist Attacks on September 11, 2001*, 23 *HAMLIN J. PUB. L. & POL'Y* 493, 509-10 (2002) (arguing that "methods for dealing with the crimes committed against humanity during the existence of apartheid needed to assign accountability, while at the same time avoiding methods that would continue to divide the nation making it difficult for its citizens to move beyond the past" and noting that Nuremberg type tribunals could have led to a coup).

154. See Stewart, *supra* note 104, at 118. The political instability within South Africa after the fall of apartheid, plus a mere threat by the defeated, pro-apartheid Nationalist Party that criminal prosecutions would lead to renewed violence, provided the needed justification for the absence of adequate legal tribunals with the specific duty of prosecuting apartheid offenders.

155. See Sangster, *supra* note 84 (considering the Nuremberg trials in their historical context).

156. See Julie Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post Apartheid Age*, 15 *ARIZ. J. INT'L & COMP. L.* 753, 761 (1998) (noting that the goals of the TRC were the result of a compromise between the anti-apartheid ANC and pro-apartheid NP).

157. See *Truth Essential to Reconciliation*, *supra* note 145.

158. David A. Hill, *National Sovereignty: Must it be Sacrificed to the International Criminal Court?* 14 *BYU J. PUB. L.* 119, 148 (1999).

159. Lansing & King, *supra* note 156, at 759, 761; Karen Gallagher, *No Justice No Peace: The Legalties and Realities of Amnesty in Sierra Leone*, 23 *T. JEFFERSON L. REV.* 149, 169 (2000).

such action are not only flawed, but insufficiently justify the trading away of citizens' legal rights.

The South African government and the TRC presupposed that many of the apartheid perpetrators would come forward and disclose the truth.¹⁶⁰ Yet, many of these perpetrators had no desire to confess their crimes because they believed they had not committed any crimes.¹⁶¹ Furthermore, the offenders were at little risk of being prosecuted in a court of law since the TRC lacked prosecutorial authority, and the judiciary's role of prosecuting criminals had been constitutionally trumped by the TRC.¹⁶² The perpetrators of the violent atrocities had the best of both worlds – either refuse to willingly come forward and confess the truth thereby suffering negligible consequences; or come forward, provide a full and truthful disclosure and escape ultimate criminal and civil liability.¹⁶³ While the TRC was designed to foster reconciliation, in a country as delicate as the new South Africa, truthful confessions based upon voluntary disclosure could not equalize the overarching economic, social, and political disparities needed for reconciliation to take root and grow.¹⁶⁴

B. *Things Could Have Been Different*

It is important to note that nothing in the language of the interim Constitution required that such a shield against criminal or civil liability be attached to the grant of amnesty.¹⁶⁵ In drafting the Promotion of National Unity and Reconciliation Act, Parliament chose to interpret their constitutional mandate liberally and thus enacted provisions to afford

160. See Lansing & King, *supra* note 156, at 780 (stating that the Truth Commission believed that it could induce more people to tell truth about their crimes by offering possible amnesty); Llewellyn, *supra* note 129, at 361 (stating that perpetrators must apply for amnesty).

161. See Stephen Laufer, *Truth and Apartheid*, NATION 5 (1998), available at LEXIS, News Library, Nation file (providing an example of resisting the TRC by refusing to appear before it against warnings from Nelson Mandela); see also Battle, *supra* note 148 (regretting that there are still both victims and perpetrators who are not coming forward).

162. See Schey et al., *supra* note 83, at 327 (noting that the TRC had no authority to prosecute); Battle, *supra* note 146 (stating that “those who established the TRC chose truth above prosecution”).

163. See Llewellyn, *supra* note 129, at 382; *Only the Truth*, *supra* note 7 (stating that amnesty would be granted for those who told the truth about their crimes); *Truth Essential to Reconciliation*, *supra* note 145.

164. See Rasheed Aareen, *What is Post-Apartheid South Africa and Its Place in the World?*, at <http://sunsite.wits.ac.za/biennale/essays/aareen.htm> (last visited Nov. 18, 2002).

165. See Epilogue of Constitution Act 200 of 1993 (noting that to advance reconciliation “amnesty shall be granted in respect of acts, omissions, and offenses associated with political objectives”); McCarthy, *supra* note 68, at 198 (citing that victims of apartheid challenged the civil and criminal provisions of the Truth and Reconciliation Act as violations of the interim constitution).

criminal and civil indemnity as part of the amnesty package.¹⁶⁶ Subsequently, these provisions were challenged by victims of apartheid, claiming the Truth Commission Act violated the Constitution.¹⁶⁷

In the *AZAPO*¹⁶⁸ case, the petitioners asserted that the Truth and Reconciliation Act violated sections 22 and 35(1) of the interim Constitution, which provides that every person shall have the right “to have justiciable disputes settled by a court of law, or other independent or other independent and impartial forum,”¹⁶⁹ and that “all South African courts [must] consult applicable international law when interpreting the Bill of Rights,” including section 22.¹⁷⁰ It was the petitioner’s contention that the “amnesty committee created by the Act was neither a court of law nor an independent or impartial forum,” and was in any event not authorized to settle “justiciable disputes.”¹⁷¹ The Constitutional Court however, felt otherwise, and concluded that the amnesty provisions did not violate the Constitution, and thus paved the way for the most heinous of criminals to go free.¹⁷²

VI. TRUTH VS. JUSTICE: PROPOSALS FOR PROMOTING THE RULE OF LAW

A. *Justice Better Serves the Rule of Law*

The South African government desired national reconciliation, and a smooth transition to democracy.¹⁷³ In effectuating these goals, criminal prosecutions were exchanged for social restorative justice typified by the Truth and Reconciliation Commission.¹⁷⁴ Under the traditional notions of justice, however, the laws are enforced by the judiciary and the criminals are punished for their crimes committed in violation of either

166. See McCarthy, *supra* note 68, at 198-201 (discussing a 1996 case, [Azanian Peoples Org. (AZAPO) v. President of Republic of South Africa, 1996 (4) SA 671 (CC)], in which the court found the inclusion of criminal and civil indemnities as part of the amnesty package acceptable on the basis of “the diversity of approaches” other nations have used to reconcile their past).

167. Azanian Peoples Org. (AZAPO) v. President of the Republic of South Africa, 1996 (4) SA 671 (CC), 1996 SACL R LEXIS 20, at *1; McCarthy, *supra* note 68, at 198-99.

168. 1996 (4) SA 671 (CC), 1996 SACL R LEXIS 20.

169. *Azanian Peoples Org.*, 1996 SACL R LEXIS 20, at *1.

170. McCarthy, *supra* note 68, at 199.

171. *Azanian Peoples Org.*, 1996 SACL R LEXIS 20, at *6; McCarthy, *supra* note 68, at 199.

172. See *Azanian Peoples Org.*, 1996 SACL R LEXIS 20, at *77-8; McCarthy, *supra* note 68, at 200.

173. See generally Pmb. of Constitution Act 200 of 1993, at <http://www.gov.za/constitution/1993/1993cons.htm> (last visited Apr. 11, 2003).

174. See Villa-Vicencio, *supra* note 96, at 214.

domestic or international law.¹⁷⁵ A stable and efficient legal system must be based upon the rule of law, and that foundation must encompass criminal and civil proceedings in an open court of law.¹⁷⁶ The rule of law is critical to a country's economic, social, and political existence and survival; and it is best served when apartheid-like crimes are prosecuted in an impartial court of law that gives discretion to the trier of fact during the guilt and punishment phases of the trial.¹⁷⁷ The rule of law is for the benefit and protection of all people throughout the world; and by exercising the rule of law through strong legal mechanisms, criminals will be punished and victims will have a more satisfying sense of the truth.¹⁷⁸

B. *Reaching Reconciliation in South Africa*

Admittedly, truth and justice are two of the most powerful motives leading to reconciliation, and without justice, reconciliation may never become a reality.¹⁷⁹ South Africa first focused on disclosure of the truth as a way of attaining national reconciliation, and in essence relegated criminal prosecutions and proportional punishments to a subordinate position.¹⁸⁰ Despite the cathartic results truth commissions seemingly provide, the "truth phase" is frequently the only phase, rendering truth commissions considerably deficient since their inception.¹⁸¹ The TRC

175. *See id.* at 215 (noting that conventional forms of criminal justice are often used to punish); Schey et al., *supra* note 83, at 330 (stating that the modern trend in international law is to prosecute and punish violations of human rights).

176. *See generally* Carothers, *supra* note 140, at 95 (discussing the rule of law and its correlation to a stable government); Sangster, *supra* note 84 (observing that the "punishment of human rights crimes should be punished by traditional legal processes in order to uphold the rule of law and to ensure that the law is given the proper respect accorded to it").

177. *See* Carothers, *supra*, note 140, at 95, 96 (defining the rule of law as "a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone"); *see also*, Llewellyn, *supra* note 129, at 369-71 (noting the Truth and Reconciliation Commission does not provide "retributive justice" because it "robs victims of their right to seek their own justice through either the criminal or civil courts").

178. *See Only the Truth*, *supra* note 7 (expressing a desire for people who committed crimes during apartheid to be punished); *see also* Jerelyn Eddings, *The Shield of Truth*, U.S. NEWS & WORLD REP., Feb. 10, 1997, at 13 (stating that one side in the amnesty compromise favored unrelenting punishment for political criminals); Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. LAW 753, 771; Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach*, 11 CARDOZO J. INT'L & COMP. L. 89, 112-13 (2003) (arguing that the prosecution of perpetrators will reinforce a "commitment to the rule of law").

179. Long, *Winding Road to Reconciliation*, JAKARTA POST, April 17, 2000, available at 2000 WL 4787979.

180. *See* Schey, *supra* note 83, 326-27 (1997).

181. *See* Sangster, *supra* note 84.

maintains that truth, as a restorative mechanism, will be the only way to bring about the reconciliation and reconstruction that the interim Constitution and President Mandela's Government of National Unity envisioned.¹⁸² Yet, the people of South Africa continue to insist that only through trials and punishment of the wrongdoers can the country truly reach reconciliation.¹⁸³

The TRC has concluded its constitutional mandate and its efforts have not produced the desired and articulated goals.¹⁸⁴ Since the truth of apartheid has been revealed and well-documented, it is now incumbent upon the government to provide the people of South Africa with justice, irrespective of the allegations that initiating criminal prosecutions of apartheid criminals would be too difficult, too costly, too impractical, or too inadequate to do justice in the fragile democracy. South Africans must demand that a strong legal system underscored by the rule of law be immediately implemented and then constantly and carefully maintained; that the South African government review and reform its policies regarding the criminal and civil indemnity applicant's received upon a grant of amnesty from the TRC; and that the South African government actively pursue and prosecute those apartheid offenders who refused to engage in the TRC's truth-telling process. If national reconciliation and unity is to be achieved, these steps are imperative.

Admittedly, the South African government may be incapable of implementing legal tribunals with the full authority to administer efficient and swift justice by way of prosecuting and punishing apartheid criminals. And if that is the case, then the GNU must appeal to the United Nations and request that the Security Council, together with the International Court of Justice create a separate tribunal specifically designed to investigate, prosecute, and render proportional punishments to the offenders of crimes committed during apartheid.

Although this proposed course of action may be quickly dismissed as too difficult, the TRC's involvement could lend considerable support to this unique undertaking and minimize the complexities facing the International Court of Justice. For example, most of the amnesty applicants were intermediaries, and their testimony alone did not provide the TRC with sufficient evidence to link apartheid murders, tortures, and other horrendous crimes to top-ranking, decision-making officials. Moreover,

182. See Villa-Vicencio, *supra* note 96, at 214 (indicating that South Africa's TRC used restorative justice to establish a more complete and better understanding of justice).

183. See *Only the Truth*, *supra* note 7 (expressing a desire for people who committed crimes during apartheid to be punished).

184. See Tinyiko Sam Maluleke, *Can Lions and Rabbits Reconcile? The South African TRC as an Instrument for Peace-Building*, ECUMENICAL REV., Apr. 1, 2001, at 190, available at 2001 WL 16615054.

due to its constitutional mandate, the TRC was unable to use its subpoena power and compel apartheid leaders to come forward.¹⁸⁵ However, the evidence collected during the TRC's investigations and hearings could be utilized by the International Court of Justice to initiate prosecutions and obtain convictions in accordance with international law.¹⁸⁶ The collaborative efforts between the TRC and the International Court of Justice would further legitimize the TRC'S purported desires of achieving national unity and reconciliation by ensuring that the criminals of apartheid are prosecuted and punished. Only with this necessary course of action will the victims of apartheid finally be provided with a modicum of justice. If the rule of law is to be restored in South Africa, and in turn fostered throughout the world, now is the time for change.

C. *Considerations for the International Community*

The United Nations, of which South Africa was and still is a member, proclaims under Article 1(3) of the U.N. Charter that "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"¹⁸⁷ is one of the purposes of the United Nations.¹⁸⁸ In other words, every signatory Member of the U.N. Charter pledged to promote and protect human rights.¹⁸⁹ Yet, at the height of the apartheid regime, the United Nations chose to ignore the gravity of the situation in South Africa, and allowed the Member States to turn a blind eye to atrocities that have been likened to crimes against humanity.¹⁹⁰

185. See *South Africa, Search for Truth*, ECONOMIST, Sept. 28, 1996, at 50, LEXIS, News Library, Econ File (noting that apartheid leaders are reluctant to appear before the truth commission because amnesty was not guaranteed, but that those that did apply are already in prison for their apartheid crimes and that they may use the truth commission for amnesty).

186. Sangster, *supra* note 84 (noting that under the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (the Principles) and the Declaration on the Protection of all Persons from Enforced Disappearance (the Declaration), which are legal instruments Amnesty International uses to determine amnesty questions, those who commit international crimes are not immune from prosecution).

187. U.N. CHARTER art. 1, para. 3; THOMAS BUERGENTAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL § 2-3, at 23 (2d ed. 1995).

188. U.N. CHARTER art. 1, para. 3; BUERGENTAL, *supra* note 187, § 2-3, at 25.

189. See U.N. CHARTER arts. 55-56. Article 56 states "[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." Article 55 reads in part "the United Nations shall promote. . . universal respect for, and observance of, human rights. . . ."

190. See LEMON ET AL., *supra* note 23. The UN "regretted" the refusal of South Africa to end apartheid in the early years and it was not until the Sharpeville Massacre of 1960 that the UN successfully voted to sanction South Africa.

Under the U.N. Charter and the doctrine of humanitarian intervention, the lawful use of force to stop a state's mistreatment of its citizens has been allowed when this mistreatment is "so brutal and large-scale as to shock the conscience of the community of nations."¹⁹¹ The brutality of apartheid shocked the conscience of the international community, as evidenced by various economic sanctions and the eventual expulsion of South Africa from the United Nations General Assembly.¹⁹² However, the oppression continued for decades without any direct intervention by the United Nations' Security Council or the International Court of Justice.¹⁹³ The doctrine of humanitarian intervention is gaining international acceptance¹⁹⁴ and has come to mean that a nation state can no longer claim that the maltreatment of its citizenry is a matter within its exclusive jurisdiction.¹⁹⁵ Thus, under the auspices of the United Nations Charter, in conjunction with the doctrine of humanitarian intervention, the International Bill of Human Rights, and other various human rights instruments, the legal framework for putting an end to apartheid was available to the international community.¹⁹⁶ Yet, none of the human rights instruments in place at the time were utilized to stop the apartheid brutalities. Simply because the powers under the human rights instruments were not exercised during apartheid does not mean that the United Nations Charter, the International Bill of Human Rights, and the concept of humanitarian intervention have no place in the reconciliation process in South Africa today. The language of the United Nations Charter does not place time limitations upon when crimes that violate international law will be barred from prosecution.¹⁹⁷ Therefore, it is not too late for the international community to address apartheid in a legal forum that is authorized to prosecute, apportion criminal responsibility, and issue proportional punishments in accordance with the rule of law.

191. BUERGENTAL, *supra* 187, § 1-3, at 3.

192. *See* FETTER, *supra* note 7, at 620; LEMON ET AL., *supra* note 23.

193. *See* LEMON ET AL., *supra* note 23 (indicating that South Africa was not removed from the General Assembly until 1974 and apartheid was not considered a crime against humanity by the UN until the 1980s).

194. *See* BUERGENTAL, *supra* note 187, § 1-3, at 4-5 (stating that the recent decisions of the United Nations suggest it is moving towards adopting a "modern version of the doctrine of collective humanitarian intervention").

195. BUERGENTAL, *supra* note 187, § 2-3, at 26 (noting that "although the validity of this proposition has been frequently challenged. . .today the issue is no longer open to doubt").

196. *See* BUERGENTAL, *supra* note 187, § 2-3, at 27 (asserting that the various human rights instruments clarify the obligations imposed by Art. 55 and 56 of the U.N. Charter).

197. *See generally* U.N. CHARTER, Ch. I-IX (showing no specific provision which indicates a time limitation).

In addition, the United Nations Charter could be expanded by amendment allowing individual citizens (as opposed to Member States) to file complaints with the International Court of Justice. Individuals are “deemed to have internationally guaranteed rights as individuals,” rather than as “nationals of a particular state.”¹⁹⁸ This proposal would allow the victims of apartheid to initiate criminal prosecutions and attain justice, rather than being forced to choke down the injustice of a perpetrator’s truthful disclosure in front of the TRC that could result in an unqualified grant of freedom from punishment.

There is wide-ranging agreement that customary international law does not favor amnesty, and in some instances prohibits it for crimes against humanity.¹⁹⁹ Customary international law imposes a general and consistent practice, based upon principles of *opinio juris*,²⁰⁰ that is followed by nation states out of a sense of legal obligation.²⁰¹ Customary international law not only allows permissive jurisdiction over perpetrators of crimes against humanity, but also permits their prosecution and prohibits the granting of amnesty to such wrongdoers.²⁰² But because the jurisdiction that is granted is only permissive, rather than mandatory, Member States may not be bound to it and this illuminates another obstacle in the way of bringing apartheid offenders into a court of law empowered to assess their criminal responsibility. By allowing the South African government to use countervailing considerations like national reconciliation, and thus overlook its obligation to customary international law and fail to prosecute the criminals of apartheid,²⁰³ the international community sent out alarming and significant signals to other nation states searching for a way to reconcile their countries that have been similarly ravaged by oppressive regimes and systemic human rights abuses.²⁰⁴

When world leaders speak of bringing criminals to justice, they mean retributive justice exercised by a court of law in which sentences of pun-

198. BUERGENTAL, *supra* note 187, § 1-8, at 19.

199. See Schey, *supra* note 83, at 330. BLACK’S LAW DICTIONARY 378 (7th ed. 1999) (defining crime against humanity as “a brutal crime that is not an isolated incident but that involves large and systematic actions, often cloaked with official authority, and that shocks the conscience of humankind,” i.e. “mass murder, extermination, enslavement”).

200. BLACK’S LAW DICTIONARY, *supra* note 1, at 1119 (defining the principle of *opinio juris* as “[t]he principle that for a country’s conduct to rise to the level of international customary law, it must be shown that the conduct stems from the country’s belief that international law rather than the moral obligation mandates the conduct”).

201. See Scharf, *supra* note 53, at 175.

202. See *id.* at 174-75.

203. *Id.*

204. See Ed O’Loughlin, *Guilty Can Evade Truth Commission*, AUSTRALASIAN BUS. INTELLIGENCE: THE AGE, Feb. 2, 2000, at 7, available at 2000 WL 11128344.

ishment are handed down.²⁰⁵ Moreover, “there is a moral cost when justice is subordinated to truth, history, or reconciliation.”²⁰⁶ And the negotiated settlement made by Mandela’s government, which materialized in the TRC, secured a vehicle for criminals to go unpunished, and for crimes against humanity to go un-adjudicated. As mass human rights abuses come to light, future violence will only be avoided by rejecting blanket amnesty or impunity, establishing and maintaining the rule of law through strong legal systems, and determining accountability for crimes against humanity through judicial mechanisms.²⁰⁷ If gross human rights violations are to be eradicated, the international community must recognize, adhere to, and vigorously reinforce treaty obligations premised upon the rule of law.

VII. CONCLUSION

Despite the TRC’s efforts at achieving peace and reconciliation during South Africa’s transition from apartheid to democracy,²⁰⁸ the disclosure of the truth denied justice from being done, demonstrating that truth and justice may be incompatible after all, and that truth alone can never be adequate.²⁰⁹ International human rights norms can and have had an influential effect on the behavior of nation states,²¹⁰ and the protection of human rights has become one of the most significant issues facing the world community today. The laws necessary to deal with gross violations of human rights are already in place, but until those laws are constantly and unconditionally adhered to, and until the institutions charged with enforcing those laws are substantially strengthened, the protection they offer now and in the future will continue to be minimal.²¹¹

Reconciliation and national unity was what the country of South Africa wanted and needed. Yet, exchanging truth for justice and avoiding adherence to international law harmed and continues to harm the true victims of apartheid because their basic constitutional right to have “justiciable disputes settled by a court of law” was precluded.²¹² Furthermore, the rule of law was dealt a serious blow when the international community

205. See Llewellyn, *supra* note 129, at 369.

206. Abrams, *supra* note 116.

207. Neil J. Kritz, Book Note, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*, 93 AM. J. INT’L L. 983, 985 (1999).

208. *Truth Essential to Reconciliation*, *supra* note 145.

209. See Kritz, *supra* note 207, at 986.

210. See Stewart, *supra* note 104, at 115.

211. See BUERGENTAL, *supra* note 187, § 1-8, at 20.

212. Judith Hippler Bello & Daniel F. Wilhelm, *South Africa – Promotion of National Unity and Reconciliation Act of 1995, Amnesty, Truth Commissions, Constitutional Interpretation, Human Rights*, 91 AM. J. INT’L L. 360, 361-62 (1997).

allowed apartheid and all its atrocities to transpire in South Africa.²¹³ And when the chance to revive and reinforce the rule of law came about, South Africa's Government of National Unity further destabilized it by allowing criminals to escape all liability.²¹⁴ The rule of law is the foundation upon which every civilized society rests, and it is this foundation that keeps the fabric of all societies tightly woven and allows them to prosper and endure.²¹⁵ It must not be further diluted, disregarded, or traded away under any circumstance - not again, not ever.

213. See Woods, *supra* note 132, at 86-88.

214. See Llewellyn, *supra* note 129, at 369-71 (noting the Truth and Reconciliation Commission does not provide "retributive justice" because it "robs victims of their right to seek their own justice through either the criminal or civil courts.").

215. Carothers, *supra* note 140, at 95, 96.