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# Human rights and political transition in South Africa: the case of the Truth and Reconciliation Commission<sup>1</sup>

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This article is dedicated to recounting the main initiative of Nelson Mandela's government to manage the social resentment inherited from the segregationist regime. I conducted interviews with South African intellectuals committed to the theme of transitional justice and with key personalities who played a critical role in this process.

The Truth and Reconciliation Commission is presented as the primary institutional mechanism envisioned for the delicate exercise of redefining social relations inherited from the apartheid regime in South Africa. Its founders declared grandiose political intentions to the detriment of localized more palpable objectives. Thus, there was a marked disparity between the ambitious mandate and the political discourse about the commission, and its actual achievements.

**Keywords:** Human rights, transitional justice, Truth and Reconciliation Commission, South Africa

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## Prologue: ethnographic note

On the same day that I arrived in Johannesburg to start my research about the South African Truth and Reconciliation Commission (TRC), in August 2008, I was invited by my hosts to a dinner with friends. The first night in the city gave me a clear idea of just how alive and controversial my theme of research was, even ten years after the Commission ceased its activities. In a restaurant in a wealthy neighborhood of the city, an unexpected gathering brought together friends of friends. On the long table that

formed, there were only whites, with the exception of a South African born and raised in Soweto, who was sitting opposite me. We started a casual conversation about the city and the weather, which then unfolded into brief narratives about work and profession. On the topic of my visit to the country, I explained the intentions of my research to him, to which he expressed a strong opinion: that the Commission is responsible for a large part of the problems facing the country, even today. This harsh assertion triggered instant reactions from other people in the group, who until that moment had not been part of the conversation. One middle-aged white woman inquired, in a calm manner, “what would be the alternative for the government? Vengeance? Revenge?” This inquiry provoked the fury of my interlocutor. According to him, the granting of amnesty to individuals knowingly involved in brutal crimes against humanity had corroborated a culture of civic irresponsibility in the country. As an example of this, he quoted the case of Winnie Mandela, a case which national television and radio networks accompanied for over eight consecutive years. Mandela’s ex-wife was accused of being involved in the murder of a 14-year-old youth accused of being a police informant, but had persistently denied the crime, in spite of evidence and testimonies that unequivocally implicated her. Desmond Tutu, archbishop of the Anglican Church who presided over the work of the Commission, had encouraged an act of forgiveness in which the mother of the adolescent publically pardoned Winnie for the crime, despite the refusal of a confession. For the black youth of Soweto, that episode would become the symbol of the political mistake of the Commission: adjusted to the political conveniences of the situation, it had left a legacy of impunity for the new democracy. The new era of politics had not established a clear break with the oppressive past.

The end of his indignant speech revealed dramatic information about his origins: “I am tired of pretending that my life started 10 years ago [an imprecise reference to the years of democracy in the country]; my life started 33 years ago with my mother raped by a white policeman”.

## Introduction

The practices of racial segregation in the southernmost part of the African continent were legally formalized when the English, after dominating the old Boer republics, founded the Union of South Africa in 1910. Instituted in 1948, the apartheid regime (or ‘separate lives’, translated from Afrikaans) was a corollary of a model of social hierarchy which ranked whites, coloreds<sup>2</sup>, Asians and blacks, in that order. The distinction between these groups was ensured, for example, through the criminalization of inter-racial marriages and through differentiated policies regarding land access, remuneration and transport. It was the blacks, lowest in the regime’s racial scale, who bore the brunt of the most severe

measures of social control, such as forced removals, strict controls on urban mobility, labor market restrictions to manual work and the restriction of housing to specific regions in national territory, according to ethnic origins ascribed by the regime and in disregard of individual and family histories.

The first free elections in South Africa took place in April 1994, when the election of Nelson Mandela to the national government marked the end of differentiated citizenship as a political principle. Despite the clear sense of rupture involved in the change of regime, the extensive elections resulted from a process of negotiation with the political actors in decline. In the new balance of power, the conservative forces of apartheid did not completely leave the scene: they maintained representation in the government and in parliament. The powerful idea of South African national unity, in contrast to the radically divisive rhetoric of the previous model, precisely envisioned this kind of an inclusive perspective, committed to institutional guarantees for the new role of whites.

In this political paradigm, the harsh principle of retribution was avoided with regard to former rights violators. The adoption of a punitive policy would compromise the negotiated peace process and would add further tension to the uncertain course of democracy in the country. For Alex Boraine, Methodist minister who fought against apartheid and one of the main visionaries behind the Truth and Reconciliation Commission (TRC), the generals of the old regime would not accept proceedings against them (Boraine, 2000: 67). Nahla Nvali, also linked to the defunct TRC, argues, along the same lines that “the threat of criminal proceedings against the old guarding apparatus of apartheid security implicated the very real possibility of an outbreak of bloody civil war” (Nvali, n.d.).

Among those following this cautious perspective, the new government could not disregard the tacit condition put forward by the military, namely, the refusal of criminal proceedings against them. And yet, it had to create a sense of legitimacy for the new democracy. Therefore, it had to find an institutional path distinct from that of international tribunals, which occupied an important place in the political imaginary of the time. Among other reasons, this was due to the experience of the International Tribunal of War Crimes in Rwanda, established in the same year as the free elections in South Africa. The tribunal’s focus on clarifying past events, attributing blame and applying rigorous punishments, ran contrary to the conciliatory intentions of the new government. According to Babu Ayindo, this type of forum was caught up in procedures of excessive formalism, leaving no place for ambiguities in the discourse and for expressing sentiments (Ayindo, 1998). It was a counter-model to what was intended by those in charge of new democracy in South Africa.

If the paradigm of retributive justice, focused on punishing the aggressor, was not suited to the conciliatory character of the transition government, neither was an indiscriminate

amnesty, which suppresses punishment, suited to it. For citizens victimized by the regime, a “national amnesia about the past”, in the words of Nvali (n.d.), “was also unacceptable”. Retribution or unconditional forgiveness, on either extreme of the spectrum of possibilities, directly collided with the political interests and expectations of whites and blacks, respectively. The political ideal of redefining relations between them – and also between other segregated groups – could not neglect any of the parts in question. In this context, the TRC emerged as a “solution of compromise” (Nvali, n.d.).

This article is dedicated precisely to recounting this institutional experience, the principal initiative of Nelson Mandela’s government to manage the social resentment inherited from the segregationist regime. Alongside an examination of key works in the diverse literature – which include texts both exalting and strongly criticizing the Commission – I conducted interviews with South African intellectuals committed to the theme of transitional justice and also with key personalities who played a part in this process, and were situated on different points of the political spectrum at the time. The short time of research in situ did not allow me to access and gather the testimonies of Commission deponents. In order to address them, I had to depend on fragments of interviews in works already completed and published, duly referred to throughout this article. Given the decision to take a comprehensive approach towards the Commission and bearing in mind the diverse points of view that exist about it, I was also not able to select my interviewees in a manner that presupposes them to be representative of the social groups they belong to. The interviews which I use in this article therefore form a collection of individual narratives of people who occupied and/or occupy a key place in their respective fields of study and/or activism. Although the narratives of individual personalities do not allow me to generalize about their class contexts, they form an important part of this descriptive and analytical exercise about the symbolic institution of political transition in the country.

With that said, the first section of the article is dedicated to the creation, the structure and the justification of the TRC, based, above all, on the narratives of Desmond Tutu (2000) and Alex Boraine (2000), two of its founding-fathers. The three consecutive sections map out the principal critiques of the Commission, referring to the three different political groups involved in the political transition. The first of these, the military critique, brings in a perspective that is absent in the literature about the Commission, which I sought, in part, to reconstruct based on interviews with Deon Fourier, colonel of the defunct voluntary army of South Africa, and Deon Mortimer, representative of the South African Armed Forces in the Commission. Mortimer (2008) demonstrates his aversion to a production of memory which would be biased in favor of former opponents of the regime. For him, forgiveness on its own would imply an unjust attribution of guilt. Although his personal narrative cannot be taken as the official military perspective it is important to

underline his role as their representative in the Commission hearings. Moreover, it is quite possible that his views reflect widely held views in the military which, generally speaking, were not publically pronounced in the post-apartheid period.

The second body of criticisms directed at the Commission, which this article considers, comes from human rights activists who were dissatisfied with the abandonment of retributive justice as a principle, and with the disregard of racism as a political crime. Subsequently, I will highlight the reactions of the third group, leaders of the African National Congress (ANC), a political party of the new democracy bringing together former anti-apartheid activists. In their view, the Commission had taken on the unjustified practice of assuming ‘moral equivalence’ between former supporters and opponents of the regime. With regard to this disagreement between the ANC and the Commission, I furthermore consider Tutu (2000) and Boraine’s (2000) refusal to make a distinction between good and bad violence, designating violence in itself an object of repudiation. Finally, I will discuss what I consider to be the principal political limitations and achievements of the institutional experience on which a good part of the country’s political efforts during transition was concentrated.

## **The South African Truth and Reconciliation Commission: Foundation and Structure**

In the period of political transition in South Africa, the rigid and impersonal nature of the state bureaucratic apparatus appeared impotent to deal with the kinds of social demands directed at it. For Alex Boraine, it was necessary to go beyond the boundaries of formal politics and to institute a public dimension of dialogue and recognition (Boraine, 2000).

The Truth and Reconciliation Commission of South Africa would serve this purpose. Inspired by models already tested in Latin America, as well as in Eastern Europe, the TRC was the primary institutional expression of South Africa’s transitional paradigm. In the TRC, there was space for mourning and emotion. Through the voluntary testimonies of victims, witnesses and self-confessed aggressors, members of the Commission sought to make progress in the public revelation of the methods and the everyday life of oppression in the segregationist regime. In its testimonial process, the objective of rehabilitating victims overrode the principle of efficiently attributing guilt. According to its founders, attention was directed less at scrutinizing the past than it was on the possibilities of reinventing sociability in a context of profound social antagonism.

The TRC was created by the Promotion of National Unity and Reconciliation Act 34 of 1995 and it began its work in April 1996. Presided over by Desmond Tutu, the

archbishop of the Anglican Church, the commission was given the responsibility of examining politically-motivated human rights abuses, committed between 21<sup>st</sup> March 1960, the day of the Shaperville massacre<sup>3</sup>, and the 10<sup>th</sup> May 1994, the first day of Mandela's term as President of the Republic. The Commission was, above all, the political initiative of the African National Congress. Despite its specific political origins, it reached a diverse composition by having mobilized diverse actors across the political spectrum and across national religions, such as the military and left wing activists, Christians, Muslims and Hindus.

It was in operation for two and a half years, a period established in its founding document, with a six-month extension conceded by parliament. As Boraine observed, the premise of its founders was that the investigation of crimes should not go on for an excessive amount of time at the risk of allowing past experience to condemn the present and future of politics (Boraine, 2000).

Established with four regional offices – Cape Town, Gauteng, Durban and East London – the TRC contracted 438 employees and 17 commissioners in big and small cities across the entire country (Boraine, 2000). With regard to the structure, it included three committees that were dedicated, in principle, to distinct yet complementary functions: the testimonies of victims and witnesses, recommendations for reparation, and regulated concessions of amnesty to self-confessed rights violators. The next section will deal with each one of these in turn.

i. The **Human Rights Violations Committee**, hosted sessions of individual and institutional hearings. Institutional hearings included the testimonies of representatives of civil and state organizations such as police and military officials, religious leaders, lawyers and businesspeople. The premise was that the history of segregation, along with individual narratives of victimization, should also take into consideration the narratives of people who acted due to compulsion, guidance and/or voluntary identification with groups supporting or resisting the regime. The objective was to make clear the links between institutions which committed human rights violations during the apartheid years. In this way, the committee sought to ensure a formal space for the process of collectively holding the influential groups of the former regime responsible; whether they were linked to the state or not, and regardless of their degree of formalization and dedication to the political cause. The institutional hearings were not, however, the primary function of this committee. Its public face was tied, above all, to the testimonies of witnesses and victims of past violence and their specific tragedies. Around twenty-three thousand of them were heard, with more than two thousand held in public hearings, which included translations into the country's eleven official languages and live transmission on national radio and television networks. The committee's sessions reached a significant audience and were even transmitted on television channels abroad. For Hugh Corder<sup>4</sup>, an expert in restorative justice at



the University of Cape Town, the mobilization of broad segments of the population around the Commission's work, was a radical novelty as it enabled traditionally marginalized actors in the national political scene, and those openly excluded from it, to be heard.

Although linked to a secular state, the Commission adopted a language and practices that were openly religious. The sessions of the victims' committee were punctuated with prayers, candle-lighting ceremonies, religious hymns and readings from the Bible, the "most subversive instrument in a context of injustice and oppression", in Desmond Tutu's view (Tutu, 2000: 31). For Villa-Vicencio and Du Toit, the objective was to create an atmosphere favorable to forgiveness that would benefit from the religiosity of South Africans (Villa-Vicencio and Du Toit, 2006: 120). As the 1991 census revealed, more than 70% of the population had active links with one of the Christian denominations, creating conditions for the "extraordinary capacity of the people to forgive", according to Tutu (Tutu, 2000: 31).

The expectation at the time was that the cathartic ritual of testifying would lead to the abandonment of punitive demands. One of the testimonies quoted by Tutu relates:

I feel what...has brought my sight back, my eyesight back, is to come here and tell the story. I feel what has been making me sick all the time is the fact that I couldn't tell my story. But now... it feels like I have got my sight back by coming here and telling you the story. (Tutu, 2000: 167).

In the committee's sessions, victims were to feel part of a community of pain and to escape the solitude of trauma. In Tutu's politico-religious rhetoric, beyond an openness to forgiveness, South Africans would be particularly sensitive to the *ubuntu* spirit, a concept of *bantu* origin to denote the sentiment that a person only achieves self-realization through others. It is an identity constructed in opposition to the Western principle of the self, self sufficient and removed from collective needs. In this uniquely African consciousness with respect to the self, there would be a possibility for a peaceful transition, inseparable from the Christian motivation.

The religious perspective was therefore predominant in the rhetoric justifying the Commission. Without apparent tension, it accommodated, moreover, arguments inspired by psychoanalysis, well formulated in the essay by Chris van der Merwe and Pumla Gobodo-Madikizela entitled *Narrating our Healing*. In this essay, the authors address three possible reactions to trauma, an event which extinguishes the original meaning of life and which sets up an insurmountable hiatus between past and present experience (van der Merwe and Gobodo-Madikizela, 2008). For the authors, the first reaction of the self shattered and disoriented by trauma is the annihilation of the subject<sup>5</sup>. In this case, the authors argue that the sentiment of impotence could lead to suicide. In the second reaction



indicated, the subject, incapable of recovering any sense of purpose in life, relives the trauma by inverting the places of the agents in conflict – that is, turning the self into the aggressor and the original aggressor into the victim. The fiction of retribution tends to satisfy the vindictive impulse and creates a sense of relief for the original victim. For the individual and for society, the consequence of this path is a repetition of the cycle of violence.

Finally, the third possible reaction, which is based on an incomplete and imprecise narrative of trauma, is precisely what the founders of the Commission aimed to make possible in South Africa. This consists of testimony as a therapeutic resource, capable of enabling freedom from trauma and reconstituting the possibility of life. In this path, the interests of the traumatized subject and the society that he/she is a part of would coincide. Committed to the ideal of national reconciliation, the authors affirm that, despite the essential (and even insurmountable) tension between trauma and language, the very effort of communicating has a curative effect on the self. The narrative which results from it, very possibly disordered and beneath the emotional complexity of the event, is superior by definition to the scenario of silence, in which there does not exist the possibility of a cure or liberation, but rather the vicious reproduction of the cycle of violence.

In South Africa's transitional context, the psychoanalytic perspective therefore patterns itself after the religious one, around a method, a value, a counter-value and an objective, which are: testimony, forgiveness, revenge and reconciliation. In this system, the purpose of these testimonies is not simply to create a random collection of personal tragedies, but rather to elucidate a common sense of suffering. The objective was to reshape the pain of individuals as the pain of the nation, and thus to create a singular national narrative, in spite of the division of its parts.

ii. The **Reparation Committee** had two principal tasks. The first of them was to select deponents for the Human Rights Violations Committee among volunteers who put themselves forward as candidates<sup>6</sup>. Its second task was to recommend to the government reparations to be granted to victim deponents, with the objective of symbolically breaking with the organizational principles of previous governments. One of the modalities of reparation was monetary. The other assumed the form of public tributes to anti-apartheid figures with the construction of monuments, parks and museums and the renaming of roads, schools and other public spaces.

This committee was the focal point of a significant part of the victims' dissatisfaction, both from those who had their status recognized, and from those whose application to the victims' committee had been denied. Both experienced a sense of re-victimization: those who could not testify were hurt by the state once again and those who achieved recognition as victims suffered with this principle and with the terms involved with placing monetary value on their suffering. Firstly, they were disappointed with the value recommended

by the government committee: in reports published in 1998, this consisted of an approximate sum of three thousand dollars per year, to be paid for six consecutive years. Next, they were surprised by the decision made by President Thabo Mbeki, Mandela's successor, to give victim deponents a one-off payment of about four hundred dollars. The low level of commitment demonstrated by the Mbeki government with regard to the committee's recommendations was made even more evident when he refused to tax companies knowingly involved in sustaining the politics and the economy of apartheid<sup>7</sup>. This negligence would endanger two important objectives of the committee: holding responsible sectors of civil society which collaborated in the political reproduction of an oppressive regime, and the creation of a reparations fund for victims, especially bearing in mind the lack of available funds for this purpose. By arguing that a compulsory charge would threaten the principle of reconciliation, Mbeki made voluntary the contribution of companies and individuals that had benefited from the regime.

A strong and general sentiment of disappointment was therefore directed at the commission and the government. The contrast with how readily the amnesty committee (described next) conceded amnesties created the feeling that self-confessed aggressors were being privileged, to the detriment of victims.

iii. The **Amnesty Committee** was an important mark of distinction in the Commission in relation to similar experiences in the world. Dedicated to the reports of self-confessed ex-aggressors who pleaded for civil and criminal amnesty, it initiated its activities six months after the establishment of the Commission. To receive this benefit, which was conceded on an individual basis, the solicitant had to fulfill three requirements: provide proof of the political motivation behind their act, tell the "complete truth" about the crime reported (which could imply denouncing criminal networks associated with it) and prove that their actions had been proportional to their stated objective. If solicitants failed to comply with any of these demands, they would become subject to traditional judicial procedures as with aggressors who did not volunteer themselves to the committee and who could have their names implicated by other deponents.

The amnesty committee had statutes and procedures that were very different when compared to the other committees, which were rigidly inscribed within the limits of the Commission<sup>8</sup>. Firstly, it had a hybrid composition: among its five members, just two, with degrees in law, were a part of the body of commissioners. The other three were judges directly appointed by Mandela as a guarantee of political neutrality (Boraine, 2000: 116). Secondly, its mandate permitted that plaintiffs could appeal to lawyers to speak in their name. And finally, it was absolutely sovereign in relation to its decisions, without the need to be subjected to the other committees. It functioned, therefore, as an autonomous cell in relation to the wider body of the commission.

With quasi-judicial procedures, the committee distanced itself from the Commission's emotional style. In the committee, there was no need for a public demonstration of remorse and pleas for forgiveness. The necessary exchange was between truth and amnesty. According to Hugh Corder,

During the transition years, security forces destroyed much of the incriminating evidence against the apartheid-era aggressors. Because of this, it was very difficult to locate witnesses and gather evidence to press criminal charges against those who did not volunteer to testify at the TRC. (Corder, 2008, verbal information).

With the recourse to amnesty, there was therefore a hope to generate revelations that would have been less likely to emerge in regular judicial procedures, especially in a context where material proof was scarce.

In practice, however, as Nahla Nvali (n.d.) reveals, this objective was in great measure a disappointment. The majority of requests for amnesty, around seven thousand in the whole country, saw ordinary prisoners representing their crimes as political ones, with the intention of being freed. They had nothing to lose. In the remaining cases, the accounts of political crimes were not as revealing as they were intended to be. The deponents tended to blame, in a diffuse manner, the state violence of the period, implicating people who had already died and exempting themselves from providing a comprehensive account of their participation. As it became clear that the government was incapable of investigating the cases of solicitants who did not follow procedures according to committee guidelines, there was less and less incentive to collaborate with the committee. Few amnesty requests complied with the conditions of the agreement and less than 17% of the total number of solicitants received the benefit (Nvali, n.d.). Finally, the information which resulted from this experience was insufficient to expose the reality of state violence during apartheid.

The controversy surrounding amnesty mobilized large segments of South African civil society. The families of Steve Biko and other icons of the anti-apartheid struggle, associated with a wide network of NGOs, attempted to create judicial obstacles to the committee's prerogative to arbitrate civil and criminal forgiveness to self-confessed aggressors (Boraine, 2000: 117). They alleged that the amnesty agreement hurt their constitutional rights, and thwarted civil and criminal justice. The Constitutional Tribunal nevertheless understood that the exception was justified by the need to guarantee the general objectives of the transition and also by the fact that the law which created the TRC envisioned the right to reparation in place of the right to justice. The judicial decision was therefore aligned with an understanding of amnesty as a condition for a new political era.

According to Boraine, the judicial threat to the committee, which called into question the key recourse to amnesty, ultimately benefited the Commission because it gave judicial

powers the opportunity to corroborate the political decision, which was at the heart of the transition process negotiated in the country (Boraine, 2000: 119). For Hugh Corder (2008), this convergence of powers was crucial for the maintenance of political peace in the country. As the Constitutional Court was the highest judicial court in the country, its decision meant that questioning the constitutionality of the amnesty committee was no longer possible, allowing it to continue its work without the threat of being shut down.

## The Military Critique

The paradigm of forgiveness provoked the criticism of actors situated on antagonistic points of the political spectrum. For Deon Mortimer<sup>9</sup>, spokesperson of the now defunct South African Defence Force (SADF), in the institutional sessions of the TCR victims' committee, the notion of forgiveness presupposed an illegitimate attribution of guilt to the military. In his view, the actors of the new political regime, under the guise of religious generosity, would take an arbitrary and unjust judgment of the police and the military to be true. The commission's search for the truth would be rhetorical and sensationalist. For Mortimer (2008), "members of the commission wanted evidence that would prove their point of view that the old regime was the devil". To this end, inquisitory methods had been used in a manner that would guarantee that the final version of the facts coincided with the Commission's *a priori* narratives about the national reality. This forum did not have a genuine interest in the facts. In the words of Mortimer:

They demanded to hear from SADF only what they thought would guarantee the condemnation of the military. They wanted us to say, "we killed people". They did not believe in the truth. They wanted us to tell them all the bad things we had done. In our opinion, we hadn't done anything wrong. The members of the SADF had no reason to take part in the Commission. Nothing that we did was illegal. (Mortimer, 2008, verbal information).

Deon Fourier<sup>10</sup>, retired general of the South African voluntary army<sup>11</sup>, presented a different version, referring to the non-collaboration of members of the defunct SADF with the TRC. According to him, lawyers for the military had instructed their clients not to testify in the Commission, fearing accusations in international tribunals which were independent of official decisions in national territory. The public confession of guilt for crimes against humanity could be used in cases that would escape the jurisdiction of the South African government.

Contrary to this version of military self-protection, Mortimer (2008) claimed that the "actions of the SADF were legal. The excessive actions were residual. Few thought that

it was necessary to request amnesty. Very few". For him, what was at stake was the fundamental misunderstanding between the military and the commissioners. In addition to being against apartheid, members of the commission were, in general, incapable of understanding the military point of view: "how can Tutu and Boraine, who are pacifists, understand the soldier's point of view?" asked Mortimer. There was no possibility for dialogue. "I too could never understand them", the retired general concluded. In his perspective, the commission, without actually incorporating the perspective of apartheid supporters, could not sincerely aspire to the truth. For Mortimer (2008), in dispensing with one side of the story, the narrative that the commission developed produced a biased version of collective memory.

The general lamented, furthermore, the non-recognition of military virtue in "freeing the country from the clutches of the communists" and, moreover, in the process of a peaceful political transition to democracy. In his words:

Indeed, we prevented an outbreak of chaos in this country, from a legal and security perspective. We guaranteed peace and the elections, which was not our function. Communism was defeated through our efforts. We guaranteed that South Africa would not become a one party state. We also helped Namibia and Zimbabwe. If the communists had seized power in Angola and Zimbabwe, this would have extended towards us. We did a good job for this country and for the region. When I am told that communism was not a threat, I say "of course communism was a threat! Ask the Hungarians. How long did they fight that bloody war? They were a subjugated country. The Soviet government fell because it spent too much on defense, especially in Africa. (Mortimer, 2008, verbal information).

In Mortimer's (2008) testimony, the theme of forgiveness appears to be essentially incompatible with the military self-understanding of their place in history. His narrative however does not reflect the entirety of the military perspective on the commission. Deon Fourier's (2008) version about the pragmatic motivation among members of the defense force to not participate illustrates this. Yet, it seems reasonable to suppose that Mortimer's testimony is representative of a key sector of his class, considering that the general was elected to speak in the name of the military in the Commission's institutional sessions. The limited availability of military officials to discuss the theme of repression made it difficult to ascertain the levels of agreement and disagreement with other versions from the military on the same topic.

## The TRC and the Human Rights Activists' Critique

Forgiveness as a metaphor of political transition also provoked, for radically different reasons, the reactions of human rights activists, linked to a wide network of non-governmental organizations which emerged in South Africa's post-apartheid. Hugo van der Merwe<sup>12</sup>, director of the Transitional Justice Programme of the Centre for the Study of Violence and Recognition in South Africa<sup>13</sup>, agrees with Tutu (2000) and Boraine (2000) on the theory that religion had inspired people "to be more understanding with their aggressors and to have more tolerance and compassion", but highlights the high cost for people who were not "ready to forgive". For him, "openness to forgiveness was not unconditional". Many deponents would have been compelled to publically declare forgiveness, due to the perceived and unspoken moral obligation to do so. In the environment of testimony, van der Merwe (2008) suggests, all demands for retribution were dealt with as inopportune individualism, incompatible with the principle of reconciliation. This philosophy would have created unfulfilled expectations of punishment and would have driven away potential deponents: one notable group of people directly violated by the former regime had decided not to seek recognition as victims by the Commission. For them the participation in the processes of the Commission would not bring benefits in proportion to the level of sacrifice implicated by testifying.

Oupa Makhalemele<sup>14</sup>, also from the Centre for the Study of Violence and Reconciliation in South Africa, highlights this criticism: "the assumption that people who lived through years of conflict would be able to reconcile was extremely optimistic. The emphasis on reconciliation was excessive. This can not happen instantaneously". For him, the paradigm of reconciliation clashed with the principles of "taking responsibility" and "justice as accountability". The notion of *ubuntu* that "has to do with a certain myth about African culture, taken as an indistinctive whole", would be "used in a undifferentiated way"<sup>15</sup>. The refusal to apply of the punitive principle would be the result of a romantic and undifferentiated view of African culture, which valorizes expressions of social harmony instead of conflict.

Richard Wilson (2001), author of the *Politics of Truth and Reconciliation in South Africa* reiterates this critique of *ubuntu* as an unfortunate political category. For him, the idealization of an African soul inclined towards forgiveness and to common life would had been convenient for the rhetoric of amnesty, but inadequate for the redefinition of political life on new terms. Based on the pan-Africanist fiction of reconciliation, the Commission neglected the punitive principle of international treaties on human rights in favor of a heterodox understanding of this topic, which envisioned tolerance towards torturers and murderers as a precondition of democracy. According to Wilson, in Desmond Tutu's



unrealistic narrative, the vague allusion to an African jurisprudence was based on the assumption that the expectations of justice were of a restorative, rather than a retributive nature (Wilson, 2001: 152).

For Wilson (2001), *ubuntu* corresponds to a static and ahistorical image of African nations. The government discourse, which purported to be sensitive to popular values, established a fictitious and irreconcilable duality between, on the one hand, a conciliatory African soul and, on the other, a vengeful Western disposition. In this perspective, all punitive action would be antithetic to reconciliation. There was no possibility of combining the two principles.

In a study of South African townships, Wilson devotes his argument precisely to *ubuntu*'s lack of importance, in the face of the very real prevalence of demands for punishment in poor communities in the country. In popular South African tribunals, even death was given as a sentence for offenders. In these improvised spaces of justice, the expectation of conciliation between offenders and victims was secondary in the face of demands for retribution. In many cases, according to Wilson, the punishment of aggressors was taken as a prerequisite for restoring the dignity of victims. In this context, the political principle of amnesty seemed to run counter to the priorities of social expectations (Wilson, 2001: 170).

Among human rights activists, the criticism of the forgiveness-reconciliation-amnesty formula amounted to a widespread dissatisfaction with the Commission's negligence of the racial question, which was the foundation of social distinction in the former regime. The organization's mandate did not identify the political motivation behind racial crimes and excluded it from the scope of investigation. For Madeleine Fullard<sup>16</sup>, ex-member of the reparation committee of the TCR and director of the Missing Persons Task Team<sup>17</sup>:

The TRC ignored the issue of race and discrimination, which took an economic and social form. Race was an ugly word. Five million people were forcibly removed from their homes because they were black. These people had limited mobility and we failed to address that. (Fullard, 2008, verbal information).

In the same vein, van der Merwe (2008) reaffirms the misalignment of the Commission in relation to the specific South African social and political context: "the theme of reconciliation should not be between victims and torturers. The question is racial; it is beyond individual agents". Reconciliation on an individual basis would tend to obfuscate the force of the collective question which underlay the overwhelming majority of cases taken to the commission: racism. In a complementary perspective, Deborah Posel and Graeme Simpson draw attention to the commission's negligence of violence against women. To



omit this in the face of marked patterns of rights' violations, the commission would have ignored "structural violence, based on race and gender" (Posel and Simpson, 2002: 63).

In spite of having different goals, the criticisms of the Commission were all directed against a common fundamental characteristic: the individualist paradigm. In this perspective, the moral emphasis on the idea of peace had led to a depoliticization of the Commission's procedures, the result of which was a strict consideration of individual cases removed from their social and political foundations.

## The African National Congress and the Dispute over Moral Equivalence

In addition to the disagreement about the legitimate interpretation of human rights (disputed in large part by commissioners and human rights activists), another, more basic, level of disagreement divided those in charge of the political transition. This had to do with the adoption of human rights as a political category and as a paradigm of transition. In the post-cold war political scene, the notion of inviolable universal rights collided with the radical language of the anti-apartheid movement and led to open protests based on misunderstandings and frustrations in the first years of South African democracy. The abandonment of a socialist vocabulary in favor of the language of human rights, more palatable for the transition period's white elite and attuned with the expectations of the international community, constituted an important rupture with the kinds of political expectations developed over the long and heterogeneous transition towards democracy in the country.

In spite of originally agreeing with the commission's principles of action, party members of the African National Congress (ANC) demonstrated dissatisfaction with the universalist paradigm of the Commission and with the supposed "moral equivalence" of activists who resisted the regime and those who were part of it. For Kader Asmal, one of the most important representatives of the ANC in the process of managing the commission, the "decriminalization of resistance" was an imperative of the new democratic era. (Asmal, Asmal and Roberts, 1997).

In the activist perspective, the struggle outside of the legal framework of the former regime was absolutely necessary: revolutionary activities were justified in the context of the former regime's illegitimacy. In an interview for this research, Asmal (2008) affirms that there were no doubts with regard to the judgment of political actors of that era: the moral quality of men who dedicated their lives to surmounting the "immoral, unjust and intolerable" order was superior to those who were in charge of maintaining it. Asmal (2008) did not contest the reconciliation paradigm, but vigorously opposed the premise of

moral equivalence between past opponents. For him, it was possible to reconcile without neglecting evidence of moral asymmetry.

In Tutu (2000) and Boraine's (2000) political formula, the universalism of human rights and of religion combined to form a discourse of peace and aversion to conflict. For them, it was not reasonable to suppose moral distinctions among criminals: the violence of the resistance movements should be an object of investigation and accountability in the same manner as that of state agents. In this perspective, the just cause of freedom could not welcome unjust procedures; the attainment of revolutionary ends could not be different to its means (Tutu, 2000: 108).

In Alex Boraine's terms, the objective of the TRC was to "hold up a mirror to reflect the complete picture" of violence in South African society. From that, it would be possible to identify "all victims in the conflict and to confront all perpetrators of gross human rights violations" (Boraine, 2000: 326). It would therefore not be suitable for the Commission to decide about good and bad violence. The moral decision shifted from the ends to the very means of political action, that is, violence in itself. For Boraine, the moral choice for one side of the conflict would simply prolong the authoritarian paradigm which they wanted to refute. The novelty of democracy would consist precisely in the collective refusal of using violence as a political instrument.

In Tutu's narrative, this premise is associated with the skill demonstrated in relativizing the categories of victim and aggressor. For him, South Africa was a nation of victims and survivors, affected by the common misfortune of apartheid (Tutu, 2000: 102). Among the 25,000 violent homicides committed during the regime, it is estimated that 16,000 had been the result of conflicts between rival segments in the political struggle (Fullard, 2008). Many individuals therefore oscillated between the status of aggressor and victim. The identities constituted themselves in an ambiguous manner, incomprehensible through rigid moral categories. Not unusually, and moved by the desire for retribution, the original victims mimicked their aggressors and made themselves executioners, as seen in the van de Merwe and Godobo-Madizikela's (2008) description of the possible psychological processes that the traumatized subject experiences. Paul Verryn, implicated in the Winnie Mandela scandal, summarizes this scenario:

The primary cancer was and will always be the oppression of apartheid, but the secondary infection touched many of apartheid's opponents and eroded their knowledge of good and evil. One of the tragedies of life is that it is possible to become like those who we hate most and I have a feeling that this drama is an example of that. (*apud* Boraine, 2000: 222).

In addressing the question of identities constructed in a context of violent sociability, Alex Boraine (2000) identifies P.W. Botha, the last president of the regime, and Winnie

Mandela, ex-wife of Mandela and anti-apartheid activist, as personalities that symbolized the “madness of apartheid”. On opposite ends of the political spectrum – with differences in origin, ideology, gender, age and the experience of power – both had been victims of the “South African tragedy”, even as they were also – knowingly – agents of violence. In this perspective, suffering has a singular and shared nature: treating others inhumanely results in the dehumanization of the self. The role of agency does not therefore extinguish the experience of pain. To illustrate this idea, Tutu brings up the testimony of a confessed torturer, who committed suicide after testifying in the amnesty committee:

They can give me amnesty a thousand times. Even if God and everyone else forgives me a thousand times – I have to live with this hell. The problem is in my head, my conscience. There’s only one way to be free of it. Blow my own brains out. Because that’s where my hell is. (Tutu, 2000: 53-54).

For Tutu (2000), the human soul does not have *a priori* substance. Intrinsically good or bad people do not exist: we all have the potential to act in every way, depending on the environment that surrounds us. Goodness and evil therefore acquire an unexpected dimension of chance and opportunity. Tutu asserts that “none of us could predict that if we had been subjected to the same influences, the same conditioning, we should not have turned out like these perpetrators”<sup>18</sup>. In his view, “we cannot underestimate the power of circumstantial conditioning”. Men who “trod on the right path” should rehabilitate the “sons of God who act as animals” and awaken them to the dormant potential of goodness (Tutu, 2000: 85). Moral condemnation, on its own, does not take into consideration the difficulties of the aggressor. In this perspective, evil is described as an absence of good; it does not exist in and of itself. And, once triggered, it is not an inexorable path.

For Boraine, the tacit expectation among members of the new democratic party was that, going against its neutral mandate, the Commission would condemn the National Party<sup>19</sup> and its allies for their dehumanizing policies and would make the ANC emerge as the “hero that had stopped the villain in its tracks and ushered in a new democracy with a human face” (Boraine, 2000: 326).

The disagreement between commissioners and members of the ANC reached its peak in October 1998, the date of the Commission’s closure. At the beginning of that year, the ANC had asked for a hearing with the TRC. Boraine and Tutu thought that an exclusive hearing for the party would constitute an unjustified privilege and given the impossibility of extending this recourse to other organizations included in the report, they decided to refuse the request. As a reaction to this, the ANC, through a judicial appeal, tried to impede the publication of the Commission’s final report.

The appeal was denied and the report was published on schedule. In spite of this, the episode left deep scars in the memory about the commission. Mandela declared public support for it but protested disapprovingly in seeing that its report was guilty of “an artificial even-handedness that seemed to place those fighting a just war alongside those whom they opposed and who defended an inhuman system” (Boraine, 2000: 319).

## Concluding Notes

The context of democratic transition coexists with a great sense of uncertainty over the political future ahead. In addition to the lack of clarity over the new terms of public life, and the establishment of new everyday routines, there is controversy and little clarity with respect to the way in which cases of violence, which took place under repressive regimes, will be dealt with. Will criminals – self-confessed or not – be held accountable for their actions? In what manner? Will judgments on them take into consideration new or old laws?

The question of how to seek justice for past crimes is central to new democracies. Generally speaking, this goal can be pursued through three strategies, which are neither clear-cut, nor entirely mutually exclusive, and which can thus substantially overlap. The first of them is retributive in nature, tied to the objective of retaliating against past aggressors and in line with a perspective that sees retribution for suffering as necessary. International war tribunals are the key examples of this strategy. The second strategy, in stark contrast with the first, dispenses with a punitive logic and bases itself instead on a broad and unrestrained principle of amnesty. This model is based on the assumption that the institutional framework of democracy, in itself, establishes sufficient conditions for a new social pact. The underlying presumption is that it is possible to erase the past, creating a new blank slate on which a new society can be founded. This was the case, for example, in the first decades of political transition in Brazil.

Finally, in the third strategy, we return to South Africa, whose experience of transition is situated somewhere between the harsh principle of retribution and “blanket amnesty”. For the architects of the South African transition, regulated amnesty should serve the objective of shedding light on the conditions and agents of past violence. The punishment of aggressors is de-emphasized in order to establish favorable conditions for the emergence of a new political scene. In the presumed moral context, victims would receive the truth imbued in a spirit of forgiveness.

In this article, I presented the TRC as the primary institutional mechanism envisioned for the delicate exercise of redefining social relations inherited from apartheid in South Africa. Its founders declared grandiose political intentions – further elevated by

religious inspiration – to the detriment of localized, more palpable objectives. Thus, there was a marked disparity between the ambitious mandate and the political discourse about the commission, and its actual achievements. One of the important criticisms of the Commission emerged precisely because of the disjuncture between the objectives of national truth and reconciliation, on the one hand, and the practices and actual results of the experience, on the other, namely the induced routines of forgiveness, the minimal reparations paid to deponent victims and the unsatisfactory levels of clarification about past crimes and of holding accountable individuals and groups knowingly involved in human rights violations.

In fact, the disparity between expectations about the Commission and the actual results it achieved is salient. In part, this contrast is the effect of the paradox of success. If it is reasonable to suppose that one's capacity to reveal and make public the atrocities of the former regime through the words of victims, is indicative of success, it was precisely this event that instigated and encouraged the rejection of amnesty as an appropriate recourse for dealing with those responsible for the violence. This means that the knowledge of the truth about the victims advanced in inverse proportion to the stimulus of reconciliation on the terms of the Commission, that is, the terms of forgiveness. The Commission shifted trauma and pain from private circles (of family, of friends and neighbors) to the public agenda. In doing so, it created expectations it could not fulfill about its capacity to produce closure with regard to this question that the Commission itself had brought up and instigated.

If it, in part, circumvented the boundaries of the tribunals' actions – and was praised for this – it also created its own set of frustrations. In South Africa, the Commission gave rise to a sense of discontent which is inherent in political transitions – for despite the ruptures which they institute, they do not restore the period prior to the violence and they coexist with sentiments of injustice and social rivalry. In the Commission, there was a convergence of expectations which did not strictly fit within its confines. Thus, to a large extent, the frustration that emerged in relation to it was relevant to the wider political context, both past and present.

Its capacity to shed light on crimes, for example, was limited by the scarcity of material proof, a result of the long-standing negligence of the former regime. It had to do with restrictions that were beyond the reach of the Commission, but whose effects were projected on it. With regard to the political obstacles of the new democracy, it is worth underlining the low level of commitment to the objective of reparation demonstrated by the Mbeki government and its dismissal of the Commission's recommendations. The government's actions generated a feeling of injustice and disproportion in the treatment given to rights violators, who benefitted from the amnesty, and victims who deserved minimum

compensation after exposing their stories during painful testimonial sessions. The actual competence of the Commission was therefore clearly below its capacity to complete the stated objectives - ambitious even for a government agenda.

If the Commission is seen, nevertheless, as a short-term institutional experience, without having the expectation of national redemption falling upon it, its achievements transcend its shortcomings. When adjusted to the scale of this experience, the critique loses much of its force. If, on the one hand, the case-by-case approach towards brutal episodes by and against the regime neglected the question of everyday racial violence against the black population, on the other hand, it established a concrete and palpable dimension for the Commission's actions. Through the means of testimony, it was capable of reconstituting the terms of the former regime's political reproduction. In the place of an agglomeration of random narratives, confined to the tragedies of their individual parts, the Commission delineated the contours of the national tragedy, inapprehensible in its extent and complexity.

Therefore, far from filling the gaps of information about events and agents of past violence, the Commission, even so, brought in sufficient elements to invalidate the denial or the allegations of ignorance about apartheid. The agency of groups of society, which had until then been forced into a situation of invisibility or political and social marginality, established foundations for the new social memory of the country.

## Interviews Conducted

André Du Toit, Emeritus Professor at the University of Cape Town, specialist in transitional justice.

Deon Fourier, colonel of the former voluntary army of South Africa.

Deon Mortimer, colonel representative of the South African Defense Force in the human rights' violations committee of the Truth and Reconciliation Commission.

Fanie Du Toit, executive director of the Institute for Justice and Reconciliation.

Hugh Corder, Professor at the University of Cape Town, specialist in restorative justice.

Hugo van der Merwe, director of the Transitional Justice Programme of the Centre for the Study of Violence and Reconciliation in South Africa.

Kader Asmal, deceased June 2011, was a key personality in the anti-Apartheid struggle. Professor of Human Rights at the University of Western Cape at the time of interview.

Madeleine Fullard, ex-member of the reparation committee of the Truth and Reconciliation Commission. Director of the Missing Persons Task Team, linked to The National Prosecuting Authority of South Africa, at the time of interview.

Oupa Makhalemele, researcher at the Centre for the Study of Violence and Reconciliation in South Africa.

Thapelo Mokushane, director of the Department of Information and Research, Post-Truth and Reconciliation Commission (TRC Unit), at the time of interview.

Two mothers, unidentified, in the group Mamelodi mothers, a group of activist mothers whose sons were killed by the Apartheid regime in 1986.

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- DU TOIT, Fanie: interview [in August 2008] to Cristina Buarque de Hollanda at the Institute for Justice and Reconciliation, in Cape Town.
- FOURIER, Deon: interview [in August 2008] to Cristina Buarque de Hollanda at home, in Pretoria.
- FULLARD, Madeleine: interview [in August 2008] to Cristina Buarque de Hollanda at the headquarter of the Missing Persons Task Team, in Pretória.
- MAKHALEMELE, Oupa: interview [in August 2008] to Cristina Buarque de Hollanda at office in the Centre for the Study of Violence and Reconciliation in South Africa, in Cape Town.
- MOKUSHANE, Thapelo: interview [in August 2008] to Cristina Buarque de Hollanda at office in the Post-Truth and Reconciliation Commission, in Pretória.
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## Notes

- 1 This article is the result of research which began in March 2008, with a research grant from the Ford Foundation, and ended in July 2012, during a postdoctoral fellowship in the Department of Social Science of New York University, Abu Dhabi.
- 2 The term used in Southern African countries to refer to the mixed population, with varying European, *bantu* and *khoisan* influences.
- 3 On March 21st 1960, in the city of Shaperville on the outskirts of Johannesburg, there was a violent repression of a peaceful protest against the pass laws. The latter obliged black South Africans to carry with them a document authorizing them access to designated areas in the country. This confrontation resulted in 69 deaths and injured hundreds.
- 4 Interview of Hugh Corder with the author, in Cape Town, 2008.
- 5 Important: van der Merwe and Godobo-Madikizela do not imply a hierarchy of importance or incidence among the three reactions indicated.
- 6 Candidates were people who claimed to be victims or witnesses of serious rights violations during the period covered by the Commission. The distinction between one and the other is tenuous or even nonexistent, since witnessing violence is also a form of victimization.
- 7 With respect to the contribution of private companies to the apartheid regime, Nvali cites the case of Swiss banks who pulled the Botha government out of its financial crisis, deferring the repayment of loans and buying more than half of the gold produced by the country (Nvali, n.d.).

- 8 Deon Mortimer, representative of the defunct South African Defense Force in the institutional hearings of the victims' committee, referred to the Amnesty Committee as an organization distinct from the TRC. He directed his harsh critique specifically against the Commission, which he identified as synonymous with the Victims' Committee. With regard to the Amnesty Committee, he referred to it, if not in a flattering manner, neutrally. He said that they had done "their work".
- 9 Interview of Deon Mortimer to the author, in Pretoria, 2008.
- 10 Interview of Deon Fourier to the author, in Pretoria, 2008.
- 11 At the time of Apartheid, South Africa had a voluntary army, with the same ranks and promotions as the regular army. Its members had military education, and over the year, dedicated one month to military activities, within and outside the country. Public and private enterprises were under legal obligation to release their employees to this purpose, without compromising the regular leave period to which they were entitled. According to what I was told, participating in this military corps was very common among white men.
- 12 Interview of Hugo Van Der Merwe, Hugo to the author, in August 2008.
- 13 An important South African non-governmental organization formed in 1989, before the election of Nelson Mandela.
- 14 Interview of Oupa Makhalemele to the author in August 2008, in Cape Town.
- 15 For him, "there existed a disposition towards forgiveness among the victims who participated in the TCR's process. But this topic is a dangerous and controversial topic because it is necessary to eliminate impunity". (Makhalemele, 2008, verbal information).
- 16 Interview of Madeleine Fullard in August 2008 to the author, in Pretoria.
- 17 The Missing Persons Task Team is linked to The National Prosecuting Authority of South Africa. It was created after the closure of the commission to give proceedings to the search of politicians who disappeared during the Apartheid regime.
- 18 A tacit reference to soldiers and police of lower rank, who were put under pressure to comply with orders. The commission's procedure to attribute individual blame, to the detriment of institutional responsibility, gave rise to, among other things, formal opposition among members of the South African Police. According to Alex Boraine, representatives of the military corps argued that "there should have been collective responsibility for acts of violence". If the focus was to be on the individual, this would privilege "political leaders who gave orders to the police and who refused to acknowledge their responsibility" (Boraine, 2000: 126).
- 19 Founded in 1915, it was an apartheid party which governed the country from June 1948 to May 1994.