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DEDICATION

TO THE LOVING AND DELIGHTFUL MEMORIES OF

JOSEPH SUNDAY AJOMO

AND

MATTHEW AND THERESA OLOWO

Never to be forgotten!

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INTRODUCTION

I. Background of Study

Africa as a continent has witnessed different forms of injustices and varying repressive governments before and after colonialism which have subjugated many people to different cruel acts and exposed them to social ills such as: slavery, bad leadership, ethnic and religious conflicts, civil wars, labour and other forms of economic repressions, and exploitation leading to human rights abuses, repressive and brutal acts against human dignity and sexual abuse and other violations. Such events leave many victims in the wake of the inhuman and unjust treatments. Some victims don't live to seek justice. While some are killed immediately, some others are tortured to death and they die leaving behind dependants, family members and loved ones, who suffer because of the loss of a dear one. Some are lucky to survive but some survivors bear ugly scars to remind them in perpetuity of their abuse, many are left disabled and can no longer fend for themselves, thereby becoming liabilities to their families. Efforts have been made in the past to bring perpetrators to justice and heal the wounds of the survivors, who are able to participate in this process. The process of healing the wounds, harms and hurts of these victims have varied.

There have been various efforts to heal the wounds of victims and bring perpetrators to justice. The conventional way to punish perpetrators for their crimes is to prosecute them through criminal trials; another is the constitution of truth (and reconciliation) commissions. The truth (and reconciliation) commissions are generally associated with regime transitions and understood to be "bodies set up to investigate a past history of violations of human rights in a particular country -- which can include violations by the military or other government forces or armed opposition forces."[1] Such transitional justice could be traced back to the post WWII Nuremberg and Tokyo tribunals, which were aimed at bringing war criminals to justice. In Africa however, a trend seems to favour the establishment of truth (and reconciliation) commissions to investigate the violations mentioned above. This trend shows that the continent has established more commissions than any other part of the world, portending that the continent finds the approach more suitable to its societies than the conventional judicial approach. This presumption forms the basis of this research, which seeks to find out why the truth (and reconciliation) commission approach is well embraced by the people in Africa, what

[1] Eric Brahm, 'Truth Commission' Beyond Intractability, June 2004, 1 [http://www.beyondintractability.org/essay/truth-commissions] accessed on April 4, 2017

the African culture possesses that helps the people in Africa to embrace this approach and how different commissions have operated in different countries, particularly in South Africa.

II. Hypothesis and Research Questions

The paper postulates that Africa has a special value in the notion of *Ubuntu,* which could be developed and emulated in other climes and that culture and the prevailing ideological orientation have roles to play to make TRCs successful in the task of societal cohesion.

The research work will therefore endeavour to answer the following pertinent questions: What is the notion of *Ubuntu* vis-à-vis the African concept of Justice? What influence this African philosophy or cultural affinity has on the TRC? What role does the African culture play in making the TRC approach acceptable in Africa? What is the definition of a TRC? What are the general features of the TRCs? What common features do they share and what distinguishes one TRC from another TRC? What is the history of the TRC in Africa? Which countries have adopted the TRC approach in Africa and how effective were these commissions? What the South African TRC was designed to achieve? Were these objectives achieved or not? Was the South African TRC a success? To what extent were recommendations of the Commission implemented? How effective is the TRC approach in comparison to the judicial approach?

III. Aim and Significance of Study

This study seeks to decipher why the truth and reconciliation commission approach appears to be on a familiar terrain in Africa. The first chapter of this research will show how the African concept of *Ubuntu* lays a foundation for the proper ideological orientation and adoption of this restorative approach in Africa. It will try to articulate the African cultural role in the concept of justice and reconciliation and how this plays a role in making the truth (and reconciliation) commission (TRC) satisfactory to many in Africa.

An academic sojourn into the general understanding of the TRC and the establishment of various TRCs in the world will be embarked upon. This academic excursion will seek to clarify the concept of the TRC; highlight the general futures that bind them together; and examine their various common elements, which vary in practice from one TRC to another. It will eventually distinguish the TRCs from other commissions or human rights investigations.

The research will go a step further to explore the history of the TRC in Africa, highlighting the different countries where the TRCs have been established and worked. In this way, the study will give a synopsis of each of the commissions chosen from different sub-regions in the

continent. This historical contextualisation will enrich the investigation and findings on the African perspective of the concept of justice and its adoption of the TRC approach.

The investigation will further reveal in chapter four what the South African TRC was intended to achieve and what the real consequences are. This enquiry will unravel if the objectives of the South African TRC were achieved or not. It will carry out a critique of the activities of the Commission. Significantly, it will evaluate the implementation of the recommendations of the final report of the South African Truth and Reconciliation Commission.

The research work will ultimately in chapter five make a comparison between the truth (and reconciliation) commission approach and the judicial approach, highlighting areas of divergence and convergence, advantages and disadvantages of both approaches.

Finally, it will have a separate subsection to articulate the conclusion of the work and recommendations of the writer. This will set out to illustrate some findings and suggest ways, based on the views of the writer, to cover gaps noticed about the truth (and reconciliation) commission approach as revealed from the findings. The suggestions will possibly improve ways of making the approach better to deliver on its promise, while also proffering ways to prevent conflicts in Africa.

The intention to highlight the importance of both the judicial approach and the truth (and reconciliation) approach and essentially bringing to the fore an approach which aids the process of reconciliation in the society underscores the significance of this study. In exploring the notion of *Ubuntu* and the role of the African culture in dispute settlement, it is significant to understand the perception of a group of people of an ideology and their behavioural pattern (in this case the connection between the TRC and the African), and in addition the rationale behind such thoughts and actions.

In bringing to the fore the role the African cultures plays in making the TRC approach more acceptable on the continent, it is also important to compare the two approaches and find out what both approaches offer. Revenge keeps the circle of violence going. This is evident in our contemporary society as we see the rise of terrorism despite the concerted efforts at fighting terrorism. It then appears that the more the fight rages, the more terrorism multiplies. A change of approach is needed to assuage some feelings and determine the needs of the individual and the society. It is therefore important to study another alternative to highlight its importance. The import of highlighting this will enhance world peace by seeking to develop this alternative approach and seeing other regions adopting it.

Ultimately, the significance of the study will not only seek to highlight the African values, the importance of cultural values which need to be protected, and the goods inherent in the TRC approach but also highlight the need to prevent conflicts in Africa and seek in the end to assert that good governance plays a role in preventing conflicts.

IV. Methodology

This study is retrospective in nature. In view of this, historical, descriptive, critical and analytical methods will be utilised to accomplish the aim the research work is set to achieve. Therefore, various relevant texts will be consulted in order to have a critical examination of not only the narratives of the events but also the views of some scholars on germane concepts and issues.

V. Limitations of Study

This study will be geographically limited to evaluating established commissions in Africa, while highlighting and discussing generally some of the them based on sub-regions and in details the South African Truth and Reconciliation Commission. This study will not be concerned about an in-depth evaluation of other established commissions in other regions in the world. It will nevertheless give a general overview of the TRCs, reflecting their common traits, and investigate the peculiar cultural traits that make TRCs more acceptable in Africa.

The research is not concerned about retelling individual experiences of victims. This is not to suggest that their stories are insignificant nor not worth telling nor that their pains have paled into irrelevant cesspit of our time; but recounting details of the stories of victims will not aid the achievement of the aim of the research work. However, the research work in not retelling these stories of atrocities committed against numerous individuals may briefly refer to some where necessary and situate the atrocities committed against them within a general framework.

In achieving the aim of study, a heavy reliance on theoretical and descriptive methods will be adopted in this qualitative research and there will be no use of questionnaires because it does not serve this purpose of the research work. Admittedly, the results of questionnaires will be interesting. However, even though questionnaires are not used directly in this work to gather data, results of some other surveys will be quoted in the work where necessary. The further use of the method directly in the work for the purpose of achieving the aim of this present research is therefore not expedient.

CHAPTER ONE:

THE NOTION OF *UBUNTU* AND THE AFRICAN CONCEPT OF JUSTICE

I. Introduction

The concept of *Ubuntu* is more intricate than we contemplate and it is therefore challenging to transliterate or even translate into a western language. *Ubuntu* as an African[1] concept is undeniably challenging to render in a Western language. When a notion is non-existent in a clime, we encounter difficulty trying to explain succinctly what it is. Indeed, many African tribes and ethnic groups have different terms to describe a seemingly similar idea. For instance, among the people living around Okene, Kogi State in Nigeria, it is referred to as *Ebira*. Although the concept is rendered in diverse forms in different languages spoken across Africa, *Ubuntu* as a term stems from the Bantu languages of East, Central and Southern Africa.[2] Ubuntu is part of the cultural heritage of much of the African population. It is innately part of the communal society. This is attested to in the case *Port Elizabeth Municipality v Various Occupiers*[3] where it was said that the spirit of *Ubuntu* is something that is 'part of the deep cultural heritage of the majority of the population'[4]. The South African variant of this African concept has become popular in the Western world probably due to its affinity to the South African society and politics.

This concept nevertheless plays a very vital role in the culture of many African ethnic groups, their notion of justice, and the relationship amid the community and its members. Invariably, culture in turn plays a vital role in a society's perception of justice and how the society actualises reconciliation or resolves disputes. The significant role culture plays in binding people together and helping them resolve their disputes and forge stronger ties is imperative and cannot be ignored. The intricacy associated with the concept, its meaning, its cultural significance and its role in the notion of justice and in the resolution of disputes will be discoursed below.

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[1] The usage of this term is not largely limited to Black Africa or Sub-Saharan Africa but also encapsulates North Africa. The concept of *Ubuntu* is also linked to North Africa as we shall see below in reference to an Egyptian concept, which encapsulates the notion of *Ubuntu*.

[2] Tim Murithi, 'An African Perspective on Peace Education: Ubuntu Lessons in Reconciliation.' International Review of Education (2009) 55:221–233, 226. [https://www.infona.pl/resource/bwmeta1.element.springer-26968a90-70f8-3356-bceb-305a17bd6a7d] accessed on March 15, 2017

[3] *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC) § 37

[4] *Ibid.*, at 37: In the words of the court: "The spirit of *Ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised, and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

II. Clarification of Concept

Ubuntu as a concept is difficult to define. Efforts to describe what *Ubuntu* is will subsequently made below. What really is *Ubuntu*? *Ubuntu* could be viewed as a cultural perspective, which endeavours to capture the essence of what it means to be human.[5] It could be said to encapsulate the idea of the interconnectedness in the society, reflecting how interwoven and dependent every individual is to the other. Simply put, *Ubuntu* is the notion of ''I am because we are'' and ''a person being a person through other people''. *Ubuntu* began to be defined as a philosophy, an ethic, African humanism, and as a worldview in written sources in the second half of the 1900s.[6] Consequently, Christian Gade defines *Ubuntu* within two different perspectives "as a moral quality of a person" and "as a phenomenon…according to which persons are interconnected". He therefore sees the concept of the person playing a central role in both understandings of *Ubuntu*.[7] The human person through human behaviour express the moral quality of *Ubuntu*.

Desmond Tutu gives a more detailed description of *Ubuntu* and affirmed the dual pronged perspectives to the understanding of the concept in terms of representing the character of the person and the interconnectedness of humanity. In his words: "It speaks to the very essence of being human. When you want to give high praise to someone we say, 'Yu, u nobuntu'; he or she has ubuntu. This means that they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means that my humanity is caught up, is inextricably bound up, in theirs. We belong in a bundle of life. We say, 'a person is a person through other people' (in Xhosa Ubuntu ungamntu ngabanye abantu and in Zulu Umuntu ngumuntu ngabanye). I am human because I belong, I participate, and I share. A person with ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes with knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when other are tortured or oppressed, or treated as if they were less than who they are."[8]

Scholars may not agree on what the notion of *Ubuntu* is or whether other concepts as expressed in other African cultures connote the same meaning as what *Ubuntu* embodies. However,

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[5] Tim Murithi, *supra note* 2

[6] Christian B.N. Gade, 'What is *Ubuntu*? Different Interpretations among South Africans of African Descent', S. Afr. J, Philos. 2012, 31(3) 485 -503, p. 492. [http://docplayer.net/34070499-What-is-ubuntu-different-interpretations-among-south-africans-of-african-descent-1.html] accessed on March 24, 2017

[7] *Ibid*., 487

[8] Desmond Mpilo Tutu, *No Future Without Forgiveness*. London: Rider Books, 1999, 34 - 35

Ubuntu "encompasses notions of harmony and reconciliation particular to chthonic, and African, concepts of justice."[9] It is an African perspective, philosophy or ethic, which encapsulates the phenomenon of the interconnectedness of persons and therefore *Ubuntu* seeks to restore communal harmony and not just to serve punishment on offenders. *Ubuntu* consequently and inevitably highlights public participation in the process of making peace because it is based on social solidarity and the members of the society take part actively in the process of building peace. It also offers the opportunity to support victims and encourage offenders during the onerous process of peace-making. *Ubuntu* clearly accentuates the importance of perpetrators admitting guilt and be remorseful for wrong acts, while the encouraging victims to forgive in order to achieve reconciliation in the society. Essentially, *Ubuntu* constantly appeals to the unity and interdependence of all members of the community and ensures that members empathise with each other, cooperate to resolve disputes and share resources with others.

III. Comparable African Concepts

Africa is an enormous continent with 55 recognised[10] States and an array of cultures, dialects and languages. Nigeria, a country located in West Africa alone play host to about 500 languages and dialects.[11] This fact indicates the display of diverse ethnic, cultural and linguistic affiliations on the continent. A generalisation of certain concepts or even stereotypes to cover the whole of Africa will therefore be particularly disingenuous. The term *Ubuntu* under review is therefore not a term known and utilised by all Africans but by certain Africans within a given sub-region. The notion can be found in different African traditions and cultures but expressed in different terms, each using its language of expression to articulate the same or similar concept. Indeed, this notion can be found in most African cultures and it "underlies virtually every indigenous African culture."[12] Scholars may not agree on what *Ubuntu* denotes or whether the other derivatives of the expression used in different African cultures mean the same or similar thing just as what *Ubuntu* depicts; many indigenous people, who are native speakers comprehend that the terms they used connote the totality of the African humanism,

[9] Douglas H. M. Carver, 'The Xhosa and the Truth and Reconciliation Commission: African Ways', *Tribal Law Journal*, 8: 34 -51, 35

[10] These are States that are either recognised by international organisations such as the United Nations or the African Union.

[11] See Ethnologue Languages of the World. [https://www.ethnologue.com/country/NG] accessed on July 15, 2017; See also Spain Exchange Country Guide, 'Languages in Nigeria', Business School. [http://www.studycountry.com/guide/NG-language.htm] accessed on July 15, 2017

[12] Roederer, C. & Moellendorf, D, *Jurisprudence.* Lansdowne: Juta & Company Ltd., 2004, 441

which portrays the interconnectedness of the human person. *Ubuntu* as a cultural *Weltanschauung* capturing the essence of what it means to be human is therefore found in different forms and expressions in many societies in Africa.

Ubuntu as a term finds expression in countries located in Central, East and Southern Africa among the *Bantu* speaking people of these territorial precincts. Although generally understood as an African concept, it is strictly speaking a term the people of southern Africa are more familiar with. Consequently, the different ethnic groups in this region can lay claim to the nomenclature as theirs. According to Gade, it is an Nguni[13] word, this is corroborated by Christopher Roederer and Darren Moellendorf who say that "(t)he Nguni word *ubuntu* represents notions of universal human interdependence, solidarity and communalism which can be traced to small-scale communities in pre-colonial Africa, and which underlie virtually every indigenous African culture."[14] It can also be regarded as a Xhosa word.[15]

The notion of *Ubuntu* which depicts the idea of a shared humanity, illustrates the principle of reciprocity and shows that what affects an individual likewise affects others members of the society too, is expressed by varying nomenclatures in different parts of Africa. According to Willem Fourie, "…the concept of *ubuntu* still seems to exclude those parts of Africa where Bantu languages are not spoken, especially Africa north of the Sahara. It also – on such a reading – seems to disregard the immense linguistic and cultural plurality of the more than 1000 million people who live in Africa."[16] The notion of *Ubuntu* however could then be arguably linked with the Arab-Berber speaking people of North Africa. Indeed, some values and principles of *Ubuntu* have been linked to ancient Egypt (*Khem*) and the concept of *Ma'at* which is linked with some declarations and guidelines to ensure moral behaviour.[17] The understanding of the two concepts shows that they could be used interchangeably.

Among the *Ebira* people[18] for instance, the concept takes an interesting dimension as it also describes the people. The same word, which depicts this concept also designates the people themselves. As a concept, which relates to the perspective in question, it portrays the ideology and principle guiding human and societal relationship. Within the purview of our discourse

[13] Nguni is also a tribe found in Southern Africa.
[14] Roederer, C. & Moellendorf, D, *supra note* 12, 441
[15] The Xhosa people are part of the Nguni speaking group and they make up 60% of the Bantu speaking group in South Africa.
[16] Willem Fourie, 'Four Concepts of Africa', HTS Theological Studies, (2015) Vol. 71, No 3. [https://hts.org.za/index.php/HTS/article/view/2847/html] accessed on August 9, 2017
[17] What is Ubuntu? [http://www.humanitysteamsa.org/ubuntu/] accessed August 9, 2017
[18] It is also the name of the tribe.

therefore, *ebira* connotes character and in this sense, it implies the moral value of the person, which is intrinsically good. Therefore, an *ebira* person is described as an *an'ebira* meaning an individual who possesses good character. Such a person is regarded an embodiment of virtues: altruistic, loving, considerate, honesty, hardworking, hospitable, respectful and loyal, just in dealing with others, etc. Every person forming the nucleus of the larger society is therefore expected to possess good character, which will translate into the making of a loving, peaceful and harmonious society. In this way, the success of the individual is predicated and viewed from the lens of the collective success, hence the idea of *oza ovehe ni*, meaning an individual fulfilment, is seen through the life of others.

In Rwanda, a similar concept is the *gacaca* and this could be found in many more ethnic groups in Africa as enunciated laconically by Nkonko Mudipanu Kamwangamalu: "It is a common claim in the literature that even though '*ubuntu*' is an Nguni term, terms with similar meanings are found in African languages all over sub-Saharan Africa. Kamwangamalu lists the following terms as examples: '*umundu*' (in Kikuyu, Kenya), '*umuntu*' (in Kimeru, Kenya), '*bumuntu*' (in kiSukuma and kiHaya, Tanzania), '*vumuntu*' (in shiTsonga and shiTswa, Mozambique), '*bomoto*' (in Bobangi, Democratic Republic of Congo), and '*gimuntu*' (in kiKongo, the Democratic Republic of Congo, and in giKwese, Angola). If we accept the premise that these terms have the same meaning as '*ubuntu*', then these examples serve to support the claim that the basic idea of *ubuntu* is shared by many indigenous peoples in sub-Saharan Africa under different names."[19]

What is apparently common to these societies in regards to the concept of *Ubuntu* or whatever term they use, is the fact that *Ubuntu* societies as a common denominator cherish communal life and every member of the community carries a responsibility to maintain good relationship in the society. Such responsibility involves tasks to ensure a peaceful coexistence with other neighbours, and a dispute between members is the concern of whole community because every member of the community is associated with the disputants. To this end, Tim Murithi surmises: "Ubuntu societies developed mechanisms for resolving disputes and promoting reconciliation with a view to healing past wrongs and maintaining social cohesion and harmony. Consensus-building was embraced as a cultural pillar with respect to the regulation and management of relationships between members of the community. Depending on the nature of the disagreement or dispute, the conflict resolution process could take place at the level of the

[19] Kamwangamalu, N.M, '*Ubuntu* in South Africa: A Sociolinguistic Perspective to a Pan-African Concept', *Critical Arts* (1999)13(2), 24-41, 25

family, at the village level, between members of an ethnic group, or even between different ethnic groups or nations situated in the same region."[20] For the purpose of academic clarity, *Ubuntu* will be used as a generic concept to describe generally an African concept and not used as a southern African term.

IV. Significance of Ubuntu to the African Concept of Justice

As articulated above, the concept of *Ubuntu* plays a role in shaping the cultural approach to dispute settlement in many parts of Africa. Under this heading, it is then essential to address the question of what role *Ubuntu* plays in the process of dispute settlement, peace building and the dispensation of justice. The core principles of *Ubuntu* emphasise reciprocity among individuals in the society, sacrifice on the part of every member of the society in order to achieve reconciliation and altruistic values in placing the interest of the larger society above that of the self. Consequently, *Ubuntu* seeks to reconcile both parties to a dispute, so that social trust and cohesion could be maintained. This would ultimately help to prevent the rise of retribution or revenge amount feuding parties, their immediate and extended families and the society at large. The wellbeing of the larger society is paramount and it surpasses personal interest. Sequel to this, the individual in the African society is expected to be prepared, in the spirit of *Ubuntu,* to sacrifice his/her interest to enhance societal cohesion. This does not mean that the individual does not feel hurt caused by the abuses done or that the wrong done is pleasing but the individual places the interest of the immediate community and its interconnectedness above his/her hurts and pains. This is contrary to the notion of justice as known in most societies – retributive justice.

Tim Murithi captures the essence of the role of the notion of *Ubuntu* in the process of peace building. He argues that *Ubuntu* underscores this role "through the principles of reciprocity, inclusivity and a sense of shared destiny between different peoples." He believes that *Ubuntu* offers a value system which makes it possible to receive and give forgiveness without the desire to carry out revenge for wrongs done by perpetrators. He concludes that *Ubuntu* provides inspiration and offers guidelines for societies, and their governments, on how to legislate and establish laws which will promote reconciliation.[21]

In the traditional dispute settlement setting, all forms of offences or disagreements are entertained before the elders of the community. These may include: theft, arson, personal or

[20] Tim Murithi, *supra note* 2, 228
[21] *Ibid.*, 227

family matters and even murder. Such disputes are settled by serving appropriate sentencing. In the spirit of *Ubuntu*, such judgements take cognisance of the way the society views itself and the need to ensure a common good for the benefit of all. It does not forget to recognise the important maxim that keeps the threads of unity in the society knitted together, that maxims, which says that 'I am because you are' and accordingly makes the process of reconciliation a happy ending. Even when it involves difficult cases like murder, the offender in most cases is not to face the death penalty because such a retributive punishment will hurt the society as a whole. The offender could be banished from the given society if need be to signify his lack of preparedness to be part of the community and adhere to the tenets of the community.

In the traditional setting, the principles of *Ubuntu* practically aided the process of peacemaking and this assisted *Ubuntu* societies to maintain law and order in the community. Such reconciliation mechanisms preceded the advent of colonialism and it subsists in many local communities. Tim Murithi describes a process, which involves five important different stages of dispute resolution in the traditional set up: "Firstly, after a fact-finding process where the views of victims, perpetrators and witnesses were heard, the perpetrators – if considered to have done wrong – would be encouraged, both by the Council and other community members in the inkundla/lekgotla forum, to acknowledge responsibility or guilt. Secondly, perpetrators would be encouraged to demonstrate genuine remorse or to repent. Thirdly, perpetrators would be encouraged to ask for forgiveness and victims in their turn would be encouraged to show mercy. Fourthly, where possible and at the suggestion of the Council of Elders, perpetrators would be required to pay an appropriate compensation or reparation for the wrong done. (This was often more symbolic than a re-payment in kind, with the primary function of reinforcing the remorse of the perpetrators). Amnesty could thus be granted, but not with impunity."[22] The fifth stage according to him consolidates the whole process. At this stage, the parties are encouraged to commit themselves to actual reconciliation. The process of reconciliation does not just involve only the victim and the perpetrators but also the family members and friends of both parties. "Both groups would be encouraged to embrace co-existence and work towards healing the rift between them, thus contributing towards restoring harmony within the community, which was vital in ensuring its continuing integrity and viability. The act of reconciliation was crucial in that it symbolised the willingness of both parties to move beyond the psychological bitterness that had prevailed in their minds during the conflict situation."[23]

[22] *Ibid.*, 228
[23] *Ibid.*, 228-229

It is not always the case that every individual is prepared to grant forgiveness and reconcile. There are instances where some individuals are persuaded to forgive. Where this successfully takes place and the individuals forgive, it means the parties and the community could then move forward without the propensity of revenge and threat to community peace. It enhances the cohesion that is ideal for the benefit of the larger society and the benefit of the individuals too.

The relevant question at this stage is, do Africans always imbibe the notion and spirit of *Ubuntu*? The answer would obviously be rendered in the negative. Just as in every human society with its human imperfections, the notion of *Ubuntu* has not always prevailed, probably due to human weakness or still, the influence of Western values. This therefore accounts for why it appears *Ubuntu* was on holidays for example when the Rwanda genocide and similar atrocities committed by Africans against each other raged. Such individuals who do not imbibe the spirit of *Ubuntu* and destroy the peaceful coexistence in the society are regarded as people who do not possess *Ubuntu* and could ultimately be expelled from the community because they have not shown the qualities of being part of the community.

Ubuntu has been seen in action at various times in the lives of the African peoples. Nelson Mandela was not the first person to put the notion and option into practice when he pursued the establishment and supported the work of the TRC in South Africa. A few instances could be cited where the notion of *Ubuntu* was in practice in the life of the African people. Aside unrecorded personal sacrifices of many individuals for the benefit of the nuclear and extended families, and the larger society, *Ubuntu* was at work in Kenya after independence through Jomo Kenyatta when there was a grave expectation for revenge and retribution but he chose otherwise; Robert Mugabe, after independence talked about reconciliation, rehabilitation and reconstruction in Zimbabwe against revenge; Sam Nujoma also did not pursue vengeance when he took over the mantle of leadership after independence in Namibia.[24] Similarly in Mozambique, traditional healing processes and reconciliatory practices were at play in reuniting and reintegrating combatants including child soldiers back into their communities, and such a traditional approach did not fail in the desire to achieve reconciliation at different times in some countries like Chad, Niger and Ghana.

The Africans had their own traditional dispute mechanism before colonial domination. This assertion is true among the Yoruba people of Nigeria. Adeyemi Ademowo makes allusion to

[24] Desmond Mpilo Tutu, *supra note* 8, 36

this when he said that "…before the advent of slave trade and colonialism, African societies had well-established mechanisms for conflict management, peace-making; peace education, peace building, conflict monitoring and conflict prevention. These institutions and methods were effective and highly respected and their decisions binding on all the parties concerned. The methods are relatively informal and thus, less intimidating."[25]Although colonialism is sometimes perceived to have destroyed some vital and cherished values espoused in the African cultures, where colonial administrations found it expedient and beneficial, indigenous dispute resolution mechanisms were employed to resolve disputes in African societies before the introduction of the judicial approach.[26] "The British system of colonial administration employed the system of indirect rule. Indirect rule is a system of governing colonies through the use of local chiefs or other approved intermediaries and traditional laws and customs with British officials merely supervising the administration. The British colonialist through native courts, installed and controlled chiefs by warrant as they believed that African people had to be governed by chiefs in order to maintain the organic unity of the Nigerian society."[27]The innate values inherent in *Ubuntu* and its propensity for the settlement of disputes was recognised by the drafters and negotiators of the South African Interim Constitution of 1993. In order to combat the dissension, disunity and tension caused by the apartheid era in South Africa, they agreed that: "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization."[28]

This import was also underscored during the proceedings of the South African Truth and Reconciliation Commission, where Archbishop Desmond Tutu based on his religious and African backgrounds, largely appealed to *Ubuntu* in order to realise the desired objective of national reconciliation in a broken community. The communal import of the notion of *Ubuntu*, which encapsulates and contemplates the need of every member of the society, focuses not only on the victim in a dispute but also the offender or perpetrators of wrongs. Desmond Tutu captures this essence succinctly when he enunciated that: "*Ubuntu* means that in a real sense even the supporters of apartheid were victims of the vicious system which they implemented

[25] Adeyemi J Ademowo, 'Conflict management in Traditional African Society' ResearchGate. [https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society] accessed Aug 9, 2017

[26] The indirect rule system employed by the British Government in administering Northern Nigeria, which ceded some powers to adjudicate based on native and customs law attests to this.

[27] Olaniran Olusola and Arigu Aisha, 'Traditional Rulers and Conflict Resolution: An Evaluation Of Pre And Post-Colonial Nigeria'. Research on Humanities and Social Sciences, Vol.3, No.21, 2013, 120-129. [http://pakacademicsearch.com/pdf-files/art/448/120-127%20Vol%203,%20No%2021%20(2013).pdf] accessed August 9, 2017

[28] *Constitution of the Republic of South Africa*, Act 200 of 1993: Epilogue after Section 251

and which they supported so enthusiastically. Our humanity was intertwined. The humanity of the perpetrator of apartheid's atrocities was caught up and bound up in that of his victim whether he liked it or not. In the process of dehumanizing another, in inflicting untold harm and suffering, the perpetrator was inexorably being dehumanized as well."[29]

V. Conclusion

Despite the observation above that Africans don't always imbibe the notion and spirit of *Ubuntu*, it could be concluded that the notion generally has helped the traditional African society to live in peace and settle disputes whenever and wherever such occur. This spirit of *Ubuntu*, which is welcoming and receptive, facilitated the acceptance and the initial hospitable disposition many Africans accorded European invaders without knowing their ulterior motives of subsequent slavery, colonisation, apartheid and economic repression against Africa and Africans.

Without *Ubuntu*, which encourages forgiveness and assists a person to let go of the past, the peaceful coexistence or correlation of the Black African with other races in the world would be inconceivable, against the background of the history of oppression they have suffered in form of slavery, colonialism, economic repression, racism and other forms of injustices for some centuries. The perception of this attitude as stupidity or weakness would be preposterous. The pragmatic example of the South Africa experience is illustrative of this argument. The spirit of *Ubuntu* played a huge role in helping South Africans of African Descent to forgive and agree to coexist and cohabit with the South Africans who oppressed and subjugated them to inhuman and degrading treatments during the reign of the apartheid regime.

Similarly, the spirit of *Ubuntu* went beyond being receptive to these foreigners, who came to the shores of Africa but forgave easily the terrible injustices of slave trade, colonialism, apartheid, neo-colonialism and attendant forms of repressions and violations during these epochs. In tears, the traditional African expresses his hurts conveyed by words and songs, not in submission or cowardice but with inner strength and moral courage letting go of pains and forgiving the past, while being prepared to move on.

Desmond Mpilo Tutu added his voice to this when he recognised this assertion and called this spirit of the traditional African a divine gift when he said: "God has given us a great gift, Ubuntu…Ubuntu says I am human only because you are human. If I undermine your humanity,

[29] Desmond Mpilo Tutu, *supra note* 8, 35

I dehumanize myself. You must do what you can to maintain this great harmony, which is perpetually [continually] undermined by resentment, anger, desire for vengeance. That's why African jurisprudence [legal theory] is restorative [healing] rather than retributive [vengeful]."[30]

The discussion above ultimately brings into focus the notion of restorative justice. An approach which gives priority to victims and survivors, and accentuated by the victim-centred justice propelled the truth and reconciliation commission approach to dispensing justice. The voyage of this approach to justice will be discussed in the subsequent chapters of this research work.

[30] Cath Senker, *Days of Decision: Mandela and Truth and Reconciliation*. Chicago: Heinemann Library, 2014, 28

CHAPTER TWO

GENERAL OVERVIEW OF TRUTH AND RECONCILIATION COMMISSIONS

I. Introduction

Unlawful and inhuman treatment of people takes place during some catastrophic events such as wars, civil strives and despotic rule, slavery, colonialism and apartheid. These events fall within the boundaries of different acts of injustices and repression, violations of human dignity, abuse of human rights in particular unlawful killing, torture, etc. These abuses of human rights and the violation of human dignity are deemed incompatible with human rights law and international humanitarian law. Steps are put in place to investigate what took place; who perpetrated such heinous crimes within a given period of time; identify affected victims; create avenues for rehabilitation of identified victims; seek to heal individuals of their wounds and reconcile the society to ensure social cohesion in order to prevent future occurrence.

After the World War II, the Nuremburg and Tokyo trials were established to try war offenders. The effort to stem human rights abuses continued after the Cold War with the establishment of formal mechanisms like some ad hoc international tribunals, the International Criminal Court and some regional human rights courts.[1] These mechanisms followed extant laws and legal procedures aimed at ensuring fair trials for accused persons. These criminal trials and their judicial approach are based on the retributive form of justice.

The emergence of the truth (and reconciliation) commissions (TRCs) introduced another dimension to the measures for the protection of human rights and the inhibition of other abuses. This dimension offers an alternative to the retributive form of justice with the restorative form of justice. The history of the TRCs is replete with contrasting opinions as to where the first TRC took place. This controversy is not helped by the lack of unanimous definition of what a TRC is or should be.[2] This will be dealt with in the sub-section below. Priscilla Hayner[3] noted that the first widely acclaimed truth commission was that established in 1983 by Argentina neglecting an earlier commission which was set up in Uganda in 1974. Although Hayner

[1] Such regional human rights courts include: the European Court of Human Rights, the Inter-American Courts of Human Rights, and the African Court on Human and Peoples' Rights.

[2] Priscilla B. Hayner, *Unspeakable Truths*: *Transitional Justice and the Challenge of Truth Commissions*. (2nd Edition) New York: Routlege, 2011, 10. Hayner noted that: "There is still no single, broadly accepted definition of what constitutes a truth commission. Thus, published lists and databases of truth commissions differ, with some researches liberally including a broad range of inquiries, and others insisting on a more rigorous and narrow definition and thus a small number of commissions.

[3] Priscilla B. Hayner, *ibid.*

admitted that the Argentine Commission was not referred to as a *truth commission* at the time it was established (it was called a National Commission on the Disappeared - CONADEP)[4], the same argument was not made for the Ugandan Commission, which was called a Commission of Inquiry mandated to investigate disappearance of persons.

After the initial commissions, many other commissions have been established to help deal with the past, investigate varying degrees of gross human rights violations and repressions. Many of these have been established in Africa (particularly sub-Saharan Africa) and Latin America. Famous among these are the following without an intent to arrange them in any order: Argentina, Bolivia, Chad, Chile, Democratic Republic of Congo, Ecuador, El Salvador, Ghana, Guatemala, Haiti, Kenya, Liberia, Mauritius, Morocco, Nigeria, Panama, Paraguay, Peru, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Togo, Uganda, Zimbabwe, etc. Other notable TRCs established in other climes other than in Africa and in Latin America also include for instance Canada, Federal Republic of Yugoslavia, Germany, Nepal, Philippines, South Korea, Scotland, Timor-Leste, etc.[5]

Mark Freeman argues that the TRCs evolved out of the typical Commonwealth styled commissions of inquiry, which are initiated by governments "as an exceptional recourse in response to particularly urgent public controversies or concerns. They are usually established by order in council under powers provided by statutes or constitutions"[6] They therefore resemble the modern TRCs. These commissions of inquiry are vested with powers to subpoena anyone they deem necessary; they are mandated to carry out hearings either in public or in camera; they are endowed with the authority to find out the level of culpability of offenders and proffer useful propositions in a final report.

According to Freeman, "Commonwealth member states have established scores of them in response to proven or alleged human rights abuses. Some of these – commissions of inquiry in Uganda (1974 and 1986), Zimbabwe (1984), Nepal (1990), Sri Lanka (1994), and Nigeria (1999)."[7] Freeman distinguished the Commonwealth commissions as against the TRC by enunciating the opinion that: "In other Commonwealth countries – for example, South Africa and Sierra Leone – truth commissions were established under fresh legislation rather than under

[4] *Ibid.*
[5] See *Ibid.*, 12ff and 256ff for detailed list and categorisations of the TRCs.
[6] Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge: Cambridge University Press, 2006, 22
[7] Mark Freeman, *supra note* 6, 23; Priscilla Hayner, on the other hand, characterized these not as normal Commonwealth Commissions of Enquiry but as truth commissions.

extant commissions of inquiry statutes. Yet the influence of the Commonwealth commission of inquiry tradition in these places is apparent. In each instance, the drafting of the truth commission legislation was influenced by commission of inquiry legislation"[8]

Why is the TRC interested in dealing with the past? What is the import of not ignoring past wrongs and turning a new page and just moving on? Although some could prefer to ignore the past because of their level of participation in grave wrongful acts or involvement in creating the messy past, the past cannot be simply ignored. The society has to come to terms with the past, face it and not just fall into a state of amnesia. Facing the past will also help to work towards a peaceful future. This has a great significance for peace in the society: lives are no longer lost; physical and human development can take place; human dignity is preserved and upheld, and the citizenry live without or insignificant apprehension or tension. Not ignoring the past will also lead to knowing the truth, set official records straight and serve some deterrence.

Discussing the moral justification of TRCs, Rajeev Bhargava distinguishes between a minimally decent society and a barbaric society. In the former, the society is administered by 'minimally moral rules'. In this society, the best ethical standard is not realised in the society and the society experiences injustice, exploitation and other condescending behaviour. Here, there are gross violations of basic rights, barbarism, physical torture and extra-judicial killings. Ultimately, enmity is created between victims and perpetrators. While in the latter, there is a complete breakdown of rules and procedural justice is non-existent.[9] Bhargava makes a further distinction between symmetric and asymmetric barbarism. In the asymmetric barbaric society, the perpetration of evil is traced to the activities of those in control of political powers against defenceless victims. In the symmetric barbaric society on the other hand, social and political evil originate from both sides. In this case, hell has been let loose without any distinction between perpetrators and victims. Indeed, the general madness in this society indicates that the society is 'beyond the pale of morality.'[10]

This barbaric state, which brings about carnage and disregard for human dignity, calls for the establishment of the TRCs in order to investigate what took place in such barbaric societies and find ways to achieve a sane society. In this chapter, therefore, the concept or the definition

[8] Mark Freeman, *supra note* 6, 24
[9] See Rajeev Bhargava, 'The Moral Justification of Truth Commissions', in Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press, 2000, 60-67, 60-61
[10] *Ibid.*, 63-64

of the TRC will be discussed. The question as to what the general features of the TRCs will be answered. An attempt will be made to take a cursory look at the contrasting features of the TRCs since not all the TRCs are designed in the same fashion, while a subtle comparison will be made between the TRCs.

II. Defining the Truth (and Reconciliation) Commissions

Different scholars have proffered different conceptual clarifications on the notion of the TRC. What the TRCs really are and the nature of the TRCs have eluded a consensus among various scholars. One of the foremost experts in the matter of TRC, Priscilla Hayner defines TRCs as a body which encapsulates the following features: focus on the past; set up to investigate a pattern of abuse over a certain period of time and not necessarily a specific event; established as a temporary body with the intent of producing a public report; and authorised or empowered by the State.[11]

Mark Freeman accepted the attempted definition of Hayner but noted that some elements were missing in Hayner's definition. Freeman noted that the first element Hayner omitted is that truth commissions are also commissions of inquiry with the primary function to investigate. The second element Freeman believed is omitted from Hayner's definition is the fact that truth commissions predominantly pay attention to severe acts of violence or repression. Furthermore, Freeman opined that the context within which such 'acts of violence or repression' took place play a role and noted that truth commissions focus their investigations on such afore-mentioned acts which happened 'during recent periods of abusive rule or armed conflict'. Freeman continued to argue that truth commissions are 'concerned not only with sorting out the facts of individual cases but also with providing an account of the broad causes and consequences of the violations that occurred.' Freeman also observed that truth commissions 'focus on violations committed in the sponsoring state', and that the states set them up and empower them in their states. Freeman concluded that Hayner's definition should have included an essential characteristic of truth commissions, the fact that TRCs are victim centred bodies and enjoy a relative independence from the State setting it up.[12] Based on these perceived omission, Freeman offered an enhanced definition of the TRC.

[11] Priscilla B. Hayner, *supra note* 2, 11; Hayner also acknowledged other fundamental characteristics of a truth commission, viz: focus on recent events; investigation of politically inclined violations; operation within an ambience of manifest widespread violations; and established within the framework of a political or post-conflict transition.

[12] See Mark Freeman, *supra note* 6, 14-16

Mark Freeman therefore defines a truth commission as "an ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention".[13] Freeman added that this definition is descriptive in nature and not intended to convey any status of superiority on the TRCs over other mechanisms but noted that the definition is intended to place a set of criteria or yardsticks for the easy identification of what a TRC is or should be.[14] It is however pertinent to note that the incidence of truth commissions will not remain static and their evolutive nature may necessitate further alterations or enhancement of the nature and concept of truth commissions.

In a reaction to Freeman's intervention, Hayner went further to revise the earlier definition and acknowledged that: "A truth commission (1) is focused on the past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding with a final report; and (5) is officially authorized or empowered by the state under review."[15]

Based on these technical definitions, some commissions which have been called truth commissions may lose such appellation because not all the bodies regarded as TRCs will meet the criteria set by these definitions. For instance, the Commission set up by Idi Amin Dada in Uganda and the Algerian Commission may not meet the standards set, while the South African, Chilean and the Uruguay Commission will scale the hurdle.[16] In ascertaining whether a body set up to enquire a given situation merits the name *truth commission,* a test for conformity is essential. An indispensable task is initially to check whether the body in question is in conformity with the technical definition of a TRC and if it is not, the determination that there is a broad domestic and international consensus that it is a truth commission becomes expedient.[17] Thus Freeman concluded that: "What should be clear, however, is the importance of going beyond technical definition. In seeking to assess whether a body is a truth commission, both objective and subjective criteria should be evaluated. The ultimate classification should,

[13] Mark Freeman, *supra note* 6, 18
[14] *Ibid.*, 19
[15] Priscilla B. Hayner, *supra note* 2, 11-12
[16] See more details in Mark Freeman, *supra note* 6, 20
[17] *Ibid.*, 21-22

in other words, be internally coherent (i.e., the body in question should reasonably conform with the technical definition of a truth commission) and externally coherent."[18] The latter conformity test will consequently ensure that many of the commissions treated in subsequent chapters qualify to be called truth commissions since many of them enjoy vast domestic and international understanding that they are truth commissions properly so-called.

III. General Features of Truth and Reconciliation Commissions

The allusion above to the Commonwealth commissions of inquiry presupposes that the TRCs are not the only form of commissions set up to investigate certain unpalatable events surrounding the past. Under this sub-heading, the general features of the TRCs which distinguish them from other classical methods of enquiry or investigation will be highlighted.

As noted above in the various attempts to define what a TRC is, the TRCs which belong to the transitional realm are intended to investigate abuses, mandated to seek reconciliation and find ways to achieve peace. The TRCs have their own objectives. The main objective of the TRCs is to investigate serious past violations of human rights with a view to prevent similar future occurrences. Such objectives set the roadmap that navigates the activities of the TRCs and ultimately, these objectives are the measuring rods to judge the achievements and successes or otherwise of the TRCs. In addition, Charles Villa-Vicencio suggested that the ultimate objectives of the TRCs are the 'prevention of the recurrence of human rights abuses' and the reparation of the damage caused.[19]

Other kinds of official inquiries, which also sometimes carry out inquest into past human rights abuses play very vital roles in looking into records of State abuse perpetrated against its population. This was the case in Australia and Canada to find solutions to State abuse against the aboriginal population. Similarly, such inquest was carried out in the United States of America to give insight into medical experiments performed on patients, prisoners and some communities in the country.[20] These forms of enquiries are sometimes "limited in authority or scope, or were undertaken only as a precursor to a possible full-fledged truth commission to follow."[21] Another feature of the other kind of inquiry is that it could be set up not only by the government but also by non-governmental bodies like international organisations or civil

[18] Mark Freeman, *supra note* 6, 21
[19] See Charles Villa-Vicencio, 'Restorative Justice: Dealing with the Past Differently', in Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press, 2000, 68-76, 68
[20] Priscilla B. Hayner, *supra note* 2 14-15
[21] *Ibid.*, 15

societies as evident in Rwanda.[22] This suggests that this form of inquiry could be official, semi-official or unofficial. In articulating their *modus operandi,* Priscilla Hayner stressed that: "These commissions collect evidence, sometimes including testimony from victims, and submit a report, but they have not been authorized by the state under investigation, nor are they aimed at studying the overall patterns, causes, and consequences of the violence. Rather, they evaluate evidence of criminal wrongdoing and violations of international law. In a number of cases, these commissions have led to the creation of an ad hoc international tribunal, such as in the former Yugoslavia and Rwanda."[23]

Returning to the features of the TRCs, a significant distinctive feature of the TRCs is that they are normally established at a time of post-conflict or political transition. This brings in the notion of transitional justice, which "concerns how states in transition from war to peace or from authoritarian rule to democracy address their particular legacies of mass abuse."[24] A context that unites many of the TRC is the legacy of extensive viciousness and tyranny. According to Mark Freeman, it "is this feature that led to the development of the field of transitional justice. In many of these countries the ordinary tools of justice – primarily, the courts – were simply not up to the task of meting out a form of justice commensurate with the scale of violations committed. The contexts demanded other tools, other responses, other mechanisms. Truth commissions constitute one such response or mechanism. Transitional justice is not, however, synonymous with truth commissions; truth commissions are but one component of the field of transitional justice."[25]

The TRCs are known to deliver the restorative approach to justice.[26] The restorative justice process helps to come to terms with the past and has a huge psychological impact in bringing

[22] *Ibid.*, 16. This commission was established before the Rwandan genocide. The outcome of the commission was not given the right attention and unfortunately it could not prevent the Rwandan genocide as its findings were not acted upon.
[23] Priscilla B. Hayner, *supra note* 2, 16
[24] Mark Freeman, *supra note* 6, 4
[25] *Ibid.*, 5; Freeman likewise stressed that: "In theory and in practice, transitional justice focuses on four main mechanisms: 1. Trials – whether civil or criminal, national or international, domestic or foreign 2. Fact-finding bodies – whether truth commissions or other similar national or international investigative bodies 3. Reparations – whether compensatory, symbolic, restitutionary, or rehabilitative in nature 4. Justice reforms – including legal and constitutional reforms, and the removal of abusers from public positions through vetting or lustration procedures" These four mechanisms of transitional justice are concomitant with obligations of States under international human rights law.
[26] See Charles Villa-Vicencio, *supra note* 19, 69ff. Here Villa-Vicencio lists eight concerns, which restorative justice must include. They are: system must be based on international standards of human rights; justice administered must benefit all parties; moral values, which provide for a shared commitment to the creation of a society governed by the rule of law, must be promoted; those responsible for gross violations of human rights must be held accountable; the issue of collective criminal guilt must be addressed; the importance of memory

about healing to victims who had traumatic experiences. The process ensures official acknowledgment of past crimes perpetrated by offenders and proceeds to seek the restoration of the dignity of victims. According to Eric Bahn, the proponents of the TRC process often "point to research on crime victims. In many cases, being able to tell their story is tremendously therapeutic for victims of violence. Truth commissions can assist in the healing process by the fact that the listener has official status."[27]

An implicitly central issue to the establishment of the TRC is reparation, which is mostly sponsored by the State. This reparation does not only focus on pecuniary handouts to individual victims but also on communal and symbolic actions to assuage the pains suffered by individual victims and the given community during the period of repression. This feature of the TRC could be problematic where many individuals and communities have suffered from government systematic abuse. Where numerous communities and individuals have to be paid different reparation packages and government finds it difficult to afford either adequate, total or partial payment to implement reparation proposals for affected victims and communities, the situation could be more depressing for the affected victims.

One of the features special to the TRC is that the TRCs place finding the truth as a priority while exercising their mandates. When the truth is known, what becomes of the revelation? What happens to the perpetrators after their disclosure? Many of the TRCs "have recommended or even passionately urged in their final reports that there be prosecutions, and many have provided specific names and evidence to support legal action."[28] What happens thereafter to these recommendations is no longer within the powers and mandates of the TRCs. From practice, many governments are however slow to implement or do not implement at all such recommendations.

While the TRCs seek to find the truth, the process of finding the truth does not come cheap. Truth comes at an expense because many perpetrators are usually unwilling to confess their dealings. The grant of amnesty could be employed by the TRC to persuade perpetrators to come forward to cooperate with the commission and confess their various roles and degree of participation during the perpetration of the injustice under investigation. The grant of amnesty could be broad or narrow but should not be unconditional. Amnesty granted to perpetrators is

must be acknowledged; the need for punishment must be stated where necessary and finally victims must be rehabilitated.

[27] Eric Brahm, 'Truth Commission' Beyond Intractability. [http://www.beyondintractability.org/essay/truth-commissions] accessed on April 4, 2017, 7

[28] Priscilla B. Hayner, *supra note* 2, 93

usually predicated on some conditions as seen in the South African TRC. This is a very controversial aspect of the TRC. It has been a subject of many debates whether to be or not to be. Hayner concluded that amnesty "for international crimes are increasingly frowned upon and widely considered to be a violation of international law, and thus generally not considered to be an option for modern-day truth commissions."[29]

Though the peculiar mandates of the TRCs may differ from country to country, they are fundamentally saddled with the aim of discovering, clarifying and formally admitting or confirming past abuses. They have the objective of finding facts and setting records straight in order to prevent further falsification of facts and bring about an official acknowledgment. The TRCs are geared towards paying greater attention to the victims of different abuses investigated. They listen to the stories of the victims through public or private hearings, thereby giving a voice to the hitherto voiceless oppressed and making sure that victims who have been hurt are giving the opportunity to be heard, treated with human dignity in contrast to the dehumanisation they had received in the hands of their oppressors. The TRCs are expected to render a final report which will contain extensive and detailed recommendations on the needed reforms in the various strata of the society.

A TRC could also be given the responsibility to promote healing and national reconciliation. In contributing to this issue, Rajeev Bhargava succinctly expressed the thought that TRCs can "contribute towards creating conditions for reconciliation in the future. But such reconciliation, if and when it happens, can be only a fortunate by-product of the whole TRC process, and not intentionally brought about by it."[30] The promotion of national reconciliation is an arduous goal to be achieved by a TRC. This is predicated on full disclosure by perpetrators and voluntary forgiveness on the part of the victim.[31] Rajeev Bhargava however places a caveat and stressed that certain conditions must exist before it becomes morally justifiable to forgive. Accordingly, Bhargava said: "Clearly, only when the self-respect of victims is enhanced by forgiveness, or at least is not undermined by it. This in turn happens when former perpetrators admit their wrongdoing, distance themselves from the wrongful act and join the victims in condemning the act, as well as their own past."[32]

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[29] *Ibid.*, 105
[30] See Rajeev Bhargava, *supra note* 9, 67
[31] The debate on whether names of culpable individuals should be published or not have been argued based on two contradictory principles: the first is the notion of due process associated with the presumption of innocence and the second is that the process of truth-telling comprises naming names. See details in Priscilla B. Hayner, *supra note* 2, 20-23
[32] See Rajeev Bhargava, *supra note* 9, 66

A unifying feature of the TRCs is the absence of power to prosecute accused persons. They may have powers to investigate crimes, find out evidence against perpetrators but they cannot go further to prosecute such persons. The TRCs can only recommend such persons for further prosecution. Proper identification of individual perpetrators could even be lacking.[33] This sometimes raises the question of bringing violators of human rights to justice. When the TRC lacks the power to prosecute and can only recommend prosecution, it leaves the implementation to the whims and caprices of the government that may not be interested in giving effect to the recommendations. This is contrasting to criminal trials where identified offenders are punished accordingly.

To achieve their goals and objectives, the TRCs hold public or private hearings where they listen to stories of victims or survivors, family members who lost their loved ones, witnesses who possess credible evidence and also the confessions or defence of perpetrators who were active actors in the violations under review. The TRCs utilise the media for civil enlightenment and also "conduct varying degrees of public outreach, academic-style research, police-like investigation, data processing, quantitative analysis, and selected exhumations. The provision of psychological and medical support, the organization of public hearings, and the writing of the final report are other common activities of truth commissions."[34]

In conclusion, Priscilla Hayner surmises that: "Truth commissions are typically tasked with some or all of the following goals: to discover, clarify, and formally acknowledge past abuses; to address the needs of victims; to "counter impunity" and advance individual accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past."[35]

In addition one could also speculate that "if criminal trials were alone sufficient, the field of transitional justice would never have emerged. The fact is that other responses, beyond criminal justice, are required. Justice systems simply are not designed to remedy violations committed on the massive scale typical of transitional contexts. Rather, justice systems are designed to handle crime as an exceptional occurrence. The relatively slow pace, minimal victim participation, and weak rehabilitative or reconciliatory capacity that tend to be endemic to criminal prosecutions also limit the depth and reach of their impact, no matter the context.

[33] See Priscilla B. Hayner, *supra note* 2, 121ff
[34] Mark Freeman, *supra note* 6, 35
[35] Priscilla B. Hayner, *supra note* 2, 20

Accordingly, the recourse of transitional governments to complementary non-judicial mechanisms such as truth commissions is natural."[36]

IV. Contrasting Features of Truth (and Reconciliation) Commissions

After looking at the common features of the TRCs above, further common elements of the TRCs will be discussed under this heading but with the intent of highlighting the diverse respects in which they vary in practice. Priscilla Hayner attests to this saying: "Truth commissions have been multiplying rapidly around the world and gaining increasing attention in recent years…We should expect differences between commissions, as each country must shape a process out of its own historical, political and cultural context."[37]

For example, TRCs are known to be temporary in nature with specified duration; they are also established with special powers and mandates but the interplay of these essential characteristics vis-à-vis a peculiar TRC however differ. This presupposes that TRCs are not totally identical but differ based on the circumstances surrounding their establishment. Some are established by the legislature and some others by the executive arm of government; some have shorter or longer duration in comparison to others; some hold public hearings, while some others favour private hearings; some have powers to subpoena accused persons, some do not; some are well funded, others are not; etc.

The contexts of each TRC differ from one TRC to another and these varying circumstances appear more than the apparent binding features or similarities of the TRCs. Such contexts that may confer some level of uniqueness to a TRC may also include: the nature of the transition (whether it is quick and relatively unconstrained or slower and more constrained); which organs are involved in negotiating the ceasefire or the end of the crisis; whether foreign bodies intervened to crystallised the transition; and if internal rebellion or other internal factors fuelled the crisis. Further settings could be accentuated by the scale and nature of the violence involved during a crisis, (whether it was massive or not and whether it lasted long or not); who committed the violence (the State or non-State actors); and the extent of government involvement or responsibility.[38] These distinctive aspects of the TRCs will be considered below.

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[36] Mark Freeman, *supra note* 6, 10

[37] Priscilla Hayner, 'Same Species, Different Animal: How South Africa compares to Truth Commissions Worldwide', in in Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press, 2000, 32-41, 34,35

[38] See Mark Freeman, *supra note* 6, 5

A common feature of TRCs is the fact that they have mandates and powers to act. Where they derive their powers from is another question which differentiates them from one another. The framework within which they will operate is very vital at their formative stages. The responsibility of taking this important step in establishing and mandating the TRCs is sometimes taken by the legislative arm or the executive arm of government mainly at the domestic level. Sometimes, there is a cooperation between the two arms in the establishment and legal empowerment of the TRCS. For instance, the formal legislative role in establishing the TRC in Chile was taken by the executive arm; the legislative arm did in South Africa; a royal decree accomplished that in Morocco; a presidential order based on an existing legislation reflects a hybrid authority in Nigeria; the legislative and executive arms jointly endorsed the TRC in Democratic Republic of Congo; and it could also be set out in peace agreements or legislations codifying the terms of the peace agreements like in El Salvador and Sierra Leone.[39] It is pertinent that the mandating authority possess the requisite legitimacy and credibility so as to give the TRC integrity and the significant legal and political backing to exercise its duties convincingly.

TRCs have general objectives but each TRC has its peculiar objectives. Every TRC is established to attain the set objectives. For instance, the Chile TRC was set up to achieve national reconciliation; the Timor-Leste TRC was to accomplish reconciliation between victims and perpetrators; the Argentina TRC was established to realise criminal justice; the Peru TRC was set up to bring about dignity for victims while the Democratic Republic of Congo was to consolidate peace and democracy.[40]

Closely related to the question of who sponsors the mandate for the TRCs is also the issue of who is responsible for the appointment of their staff. Usually, the executive branch of government officially assumes the responsibility of appointing the commissioners of the TRC. This is not always the case. In South Africa, there was a joint action between the executive and the legislative arms of government; the executive arm of government or the monarch alone appointed them in Panama and Morocco respectively; the legislative branch on the other hand acted alone in Germany; and there are times where commissioners for the TRCs are appointed in conjunction with international organisations like in El Salvador and Sierra Leone.[41] These appointments are sometimes predicated on the experience or expertise of the individual

[39] See Mark Freeman, *supra note* 5, 27; See Priscilla B. Hayner, *supra note* 2, 210ff
[40] See Priscilla B. Hayner, *supra note* 2, 75-77; See also Mark Freeman, *supra note* 6, 33
[41] Mark Freeman, *supra note* 6, 28

commissioner selected. Care could be given to gender, professions, ethnic group representation and their national appeal or acceptance. Apart from the commissioners, the TRC also need support staff. Generally, the commissioners in turn assume the duty to employ needed support staff based on exigencies of the commissions and availability of funds. Where there is paucity of funds, bureaucrats or civil servants could be seconded as support staff as it was the case in Nigeria.[42]

The TRCs need funds to operate successfully. In subsequent chapters, we shall see that the TRCs operate on a comparatively smaller budget in comparison to the judicial system, irrespective of the size and complexities of the TRC.[43] The fact that the TRCs have lesser budget does not suggest that their funding be overlooked. While some enjoy relatively good financial support like the South African TRC from the government setting it up, some are left at the mercy of foreign donors like the Nigerian TRC.

As stated above, the TRCs are temporary bodies and their lifespans are relatively short in comparison to some criminal trials. This common trait however varies in terms of the duration of each TRC. They do not all have the same number of months or years, some are longer than the other. The span of the TRC is highly influenced by the length of time devoted to either public or private hearings and the number of victims, witnesses and perpetrators who have to appear before the TRCs. Initial durations of the TRCs could be extended depending on the peculiar situation and the need of each TRC.[44]

The object of investigation of the TRCs is to focus on past acts of relatively recent repression and abuses in a definite country. They are not just historical commissions that will investigate events of many generations ago.[45] These commissions therefore concentrate on different abuses resulting from extreme physical violence, various forms of violations, enforced disappearances and even property crimes. Cases of rape, torture, illegal detention and extra-judicial killing committed during such period of repression are subjected to their investigative lens.[46] The TRCs investigate different incidents of abuses.

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[42] Priscilla B. Hayner, *supra note* 2, 250

[43] The typical average TRC budget tends to be in the range of US$5 million to $10 million. See Priscilla B. Hayner, *supra note* 2, 216ff

[44] Mark Freeman, *supra note* 6, 32; See also Priscilla B. Hayner, *supra note* 2, 216

[45] Some TRCs, however, investigate events of many generations ago. The TRC in Mauritius went as far as investigating events which took place during slavery and colonialism; the TRC in Morocco went beyond two epochs; Guatemala and South Africa travelled into time to investigate events which took place as far back as in the 1960s. Therefore, the TRCs are not limited to just recent pasts.

[46] See Mark Freeman, *supra note* 6, 33

Contrasting elements of the TRCs could be perceived in their legal attributes. Freeman claims that the early TRCs established in Latin America had limited investigative powers in contrasts to the TRCs in Commonwealth countries, which possessed some vital investigative powers such as: subpoena, search and seizure, witness protection. Additionally, Freeman stressed that some TRCs have the power not only to conduct public hearings but also the power to determine individual culpability for human rights violations. He concluded that: "If a truth commission's work has historically been focused on research and investigation, and if its powers have mostly been linked to truth-seeking activities, that situation is beginning to change. In recent years there have been truth commissions wielding "adjudicative" powers (i.e., the power to settle legal rights). These include the power to grant amnesty to perpetrators of gross human rights violations (i.e., South Africa), the power to formalize contracts of community service and reparation between eligible perpetrators and specific beneficiary communities (i.e., Timor-Leste), and the power to grant financial compensation to victims."[47]

Apart from common activities like public hearings associated with the TRCs, some TRCs go further to undertake some exceptional projects for the benefit of their countries. The *National Vision for Sierra Leone* created by the TRC in Sierra Leone requested for the submission of written and artistic works articulating the imagination of each contestant on the future of the country. While Peru TRC organised a photography exhibition titled *To be Remembered.* This exhibition documented the systemic violence which took place during the period under review.[48]

The issue of amnesty has been treated in the previous subheading as part of the common features of the TRCs. Amnesty does not, however, enjoy uniformity in execution regarding implementation in varying TRCs. The South African TRC offered a unique approach to the grant of amnesty by exchanging amnesty for confession predicated on some criteria. Some other TRCs like the Chile and Argentina TRC did not adopt this approach. The South African TRC subsequently attained universal fame and became a yardstick for many other TRCs thereafter. Indeed, Freeman stressed that "one can divide the history of truth commissions into two periods: before South Africa, and after. Before South Africa, truth commissions did not conduct victim-centered public hearings; after South Africa, truth commissions have almost always conducted such hearings."[49] Priscilla Hayner, however ,cautioned that in spite of the

[47] Mark Freeman, *supra note* 6, 34
[48] *Ibid.*, 35
[49] *Ibid.*, 26

attractions the South African TRC drew to itself, it "may not be the appropriate model for many other states – in fact, the mandate and operation of the Guatemalan commission was much closer to the norm and may have more elements that are more appropriate to other countries."[50]

The inherent advantages and probable disadvantages of the TRCs will be discussed in chapter five, which is dedicated to the comparison between the TRC approach and the criminal trial approach. It is, however, apt to say that the TRCs and other human rights investigations are not the same. The TRCs do not only differ among themselves but also from other human rights investigations which are bodies set up to investigate human rights and other interrelated violations. While the TRC offers a model not only to investigate violations but also to vindicate the rights of individual and that of the society. These human rights investigations are also important as they are sometimes precursors to the TRCs and lay foundation for the work of the TRCs.

According to Mark Freeman, such human rights investigations could take place within the following framework: 1. Non-governmental human rights investigations 2. National human rights commissions, ombudsman offices, and hybrid variations 3. Standing and ad hoc multilateral human rights monitors 4. Ad hoc national human rights–related commissions of inquiry 5. Coroners and medical examiners 6. Ad hoc multilateral human rights–related commissions of inquiry 7. Standing and ad hoc multilateral and national human rights compensation and reparation bodies 8. Standing and ad hoc multilateral and national human rights vetting and lustration bodies 9. Standing and ad hoc multilateral human rights complaint procedures 10. State reports on the human rights practices of foreign states 11. Standing national human rights–related administrative tribunals.[51] This confirms that the TRC is not the only way to investigate past abuses. However, it is becoming frequent in the contemporary society for many countries emerging from conflicts to establish a TRC to investigate whatever abuses and violations of human rights which may have occurred during such phase of its national history.

V. Conclusion

The TRCs as highlighted above are saddled with the responsibility of investigating past spate of various abuses and violations of human rights and other crimes. They are established during a transition or by a new government in office. Although they face some challenges in their

[50] Priscilla Hayner, *supra note* 37, 34

[51] Mark Freeman, *supra note* 6, 41; See also 40-69 for detailed description of each type of human rights investigation enumerated.

operations or in the execution of their mandates, they are able to ensure a delicate balance which avoids the concept of *victor's justice* by not only focusing on the victims alone but also the common good of the larger society. Therefore, they deal with forgiveness, healing, reparation, amnesty, truth, deterrence, etc. in the pursuit of societal cohesion and sustainable peace and the entrenchment of democracy. In their operations, they are able to expose gory facts of past crimes with the aim of ensuring social transformation and helping the society avoid such pitfalls in the future. Desmond Mpilo Tutu puts it wittingly: "While the Allies could pack up and go home after Nuremberg [war crimes tribunals following WWII], we in South Africa had to live with one another."[52] This is because the reconciliation of the community is an essential value which the TRCs help to create. It could be observed that most TRCs have taken place in Africa, Latin America and even Eastern Europe. The Western World appears to be lagging behind in this respect. Patrick Glenn opines that: "Reconciliation of community as a paramount value in criminal law is alien to Western forms of justice. Chthonic traditions focus on the re-integration of those who commit crimes into the group. In Africa, there was "no effort to eliminate chthonic legal traditions."[53]

From the foregoing, it could be said that TRCs have been established in various parts of the world. However, they are more prominent and important on some continents. In subsequent chapters therefore, the attention of this research will focus on the African experience with particular reference to the South African voyage.

[52] Desmond Tutu, *No Future Without Forgiveness*. London: Rider Books, 1999, 21
[53] H. Patrick Glenn, *Legal Traditions of The World* (2d Ed.) Oxford: Oxford University Press, 2014, 82

CHAPTER THREE

OVERVIEW OF THE TRUTH AND RECONCILIATION COMMISSIONS IN AFRICA

I. Introduction

Transitional justice arguably aims at achieving the following objectives: halt ongoing human rights abuses; investigate past crimes; identify those responsible for human rights violations; impose sanctions for some of those responsible for serious human rights violations; provide reparations to victims; prevent future abuses; preserve and enhance sustainable peace; and promote individual and national reconciliation.[1] Against this background, one could agree that Africa as a geographical entity has had a fair share of human rights abuses at various times that needed investigations and attention. This situation is borne out of the varying and notorious despotic rulers Africa had produced, and likewise the apartheid regime in Southern Africa, which produced injustice, repression, abuse and other traits of the violations of human rights. Such violations, in addition, created dissension in the society based on inexplicable and atrocious acts of discrimination, caused deep individual wounds and hurts, and left numerous and dissatisfied victims seeking justice. There have therefore been several efforts at investigating such abuses on the continent of Africa in the past, through the institution of truth (and reconciliation) commissions.

This most popular non-judicial approach to justice, which is an alternative to the more legalistic judicial approach, is employed to investigate history of past abuses within a certain period, recommend appropriate actions to be taken for victims and against perpetrators of violations of human rights, and proffer proposals for a probable peaceful and just future coexistence in society. Daniel Hendy thus defines a truth and reconciliation commission as "an official investigative body that documents a pattern of past human rights abuses … [and] provides an alternative method of addressing a state's violent past when the violence resulted in widespread human rights violations that occurred amidst ethnic, racial, class, or ideological disputes over justice and power."[2] Charles Manga Fombad, concludes that: "This is essentially a non-judicial body, which tries to investigate the past to determine the full extent of past abuses through truth-telling public hearings. It holds perpetrators of past violations accountable, promotes reconciliation, makes recommendations on reparations, memorializes victims, survivors or

[1] See Charles Manga Fombad, 'Transitional Justice in Africa: The Experience with Truth Commissions', 2 [http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html] accessed on March 15, 2017

[2] Daniel J. Hendy, 'Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq?' 20 Ohio St. Journal on Dispute Resolution (2005) 527, 535

historical events and makes proposals for institutional reforms designed to prevent future abuses"[3] Consequent upon experiences from past mandates and the aforesaid definitions or conceptual clarifications, four characteristics of truth (and reconciliation) commissions are perceptible: focus on the past; investigate a pattern of abuses over a period of time; temporary body for they are not permanent and they are officially sanctioned, authorised or empowered by the State or a mandating authority.[4] The nomenclature varies from country to country. It ranges from truth commission; truth and reconciliation commission; dialogue, truth and reconciliation commission; reconciliation commission; equity commission to commission of enquiry, and many more. Some will be seen below.

In this chapter, a concise evaluation of some truth (and reconciliation) commissions based on the geographical regions in African will be done. A detailed evaluation will not be done, neither will all the past truth (and reconciliation) commissions conducted in Africa be evaluated because there have been about thirty different truth commissions at different times, which have been established by various countries on the soil of Africa[5] and this chapter is incapable of doing justice to all these commissions. However, some of the truth (and reconciliation) commissions, which have graced the continent of Africa, will be examined without an exhaustive analysis but giving a rather informative synopsis of each of them. This will be done without any basis for an intended scale of preference but randomly selected to satisfy the criterion of regional representativeness. They will not be chosen based on their level of prominence or strength in terms of how popular they are or how much success they achieved.

II. Central Africa

a. Chad

The Lagos Accord ended the civil war in Chad in August 1979 culminating in the establishment of a government of national unity. Peace was breached again in 1981 when fighting broke out between forces loyal to President Goukouni Queddei and the Defence Minister Hissène Habré, a conflict which ended to the advantage of Hissène Habré. Upon gaining control, Hissène Habré indulged in varying forms of repression not limited to torture and killings. Idriss Déby, a former Hissène Habré's general, launched an attack against him in December 1990 with the support of Libya and Sudan and subsequently became the President. A commission was

[3] Charles Manga Fombad, *supra note* 1, 2
[4] Priscilla B. Hayner, *Unspeakable Truths*. New York: Routledge, 2001, 14
[5] Charles Manga Fombad, *supra note* 1, 3

announced based on a presidential decree[6] to investigate the atrocities committed during the regime of Hissène Habré, which lasted for eight years. The Commission was mandated to investigate *inter alia* "illegal detentions, assassinations, disappearances, torture, mistreatment, other attacks on the physical and mental integrity of persons; plus all violations of human rights, illicit narcotics trafficking and embezzlement of state funds between 1982 and 1990."[7] The Commission had ten members and two secretaries as stipulated by the Decree that established it among whom were "two magistrates, four officers of the judicial police, two civil administrative officers, and other clerks and secretaries, with the first deputy prosecutor serving as president."[8] There was also a female member.[9]

The Commission which operated between 1990 and 1992 faced some challenges ranging from lack of various resources, initial lack of space to lack of transport logistics. Nevertheless, the Commission went ahead to accomplish the task and submitted a report[10] published on May 7, 1992. The report: found that Hissène Habré's government was responsible for an unknown number of cases of torture and illegal incarcerations, culpable for about 40,000 political killings and additional 3,428 other extra-judicial killings; provided details of individual perpetrators including their photographs; revealed that the Directorate of Documentation and Security carried out acts of cruelty, contempt, and harassment of the populace; and detailed the involvement of foreign governments in providing funds and training for the perpetrators.[11]

The United States of America, Iraq, France, Zaire (presently Democratic Republic of Congo or DR Congo) and Egypt[12] were mentioned in the report to have provided funds and training for such a reprehensible and deplorable practice. The inclusion of foreign supporters and financiers of perpetrators in Chad is particularly heart-warming for this writer though shocking to some. Heart-warming because many have refused to see the hypocrisy of the United States of

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[6] Decree No. 014 /P.CE/CJ/90 December 29, 1990

[7] United States Institute of Peace, 'Truth Commission: Chad'. [https://www.usip.org/publications/1990/12/truth-commission-chad] accessed on July 27, 2017

[8] Priscilla B. Hayner, *Unspeakable Truths*: *Transitional Justice and the Challenge of Truth Commissions* (2nd Edition). New York: Routledge, 2011, 245

[9] Charles Manga Fombad, *supra note* 1, 4

[10] See Commission's Report which can be found here: Commission's report

[11] See United States Institute of Peace, *supra note* 7; See also Charles Manga Fombad, *supra note* 1, 4

[12] Priscilla B. Hayner, *supra note* 8, 246. Quoting Jamar Benomar: "The diplomatic corps present at the ceremony was shocked to hear that the investigation uncovered the fact that members of the security service, the DDS [Directorate of Documentation and Security], who carried out all the killings and other abuses, were trained until the collapse of Habré's regime in December 1990 by U.S. personnel both in the USA and N'Djaména. The DDS received a monthly payment of 5 million FCFA from the U.S. government. This amount had doubled since 1989. Iraq also was named as a contributor to the DDS budget, along with France, Zaire and Egypt. A U.S. advisor worked closely with the DDS director at the DDS headquarters where political prisoners were tortured and killed daily."

America in many facets of world politics. The involvement of the U.S.A. was particularly shocking to many, probably because the clandestine manoeuvres of the U.S.A. have been rightly interpreted and placed within proper perspective. Amnesty International[13] was even reported to have discovered the involvement of the USA in the support of anti-people and repressive policies years earlier but as usual, the benefit of the doubt always ends in the favour of the *super power* United States of America.

The government published the report on May 7, 1992 but unfortunately, not all the recommendations of the Commission were implemented[14]. The report recommended that individual abusers who are still part of government and its security forces be expunged from the system but that was largely ignored by the government. Rather than purging the government and the security forces of these accused individuals, the impunity continued with the perpetrations of further abuses leading to the assassination of a legal practitioner working for the victims and some prosecutors receiving death threats.[15] The Commission also recommended the creation of an independent judiciary and a National Human Rights Commission; the reform of the security forces; prosecution of perpetrators and provision of symbolic reparations.[16] Some of these recommendations have not been executed.

b. Democratic Republic of Congo (DRC)

Zaire, now Democratic Republic of Congo (DRC), became independent in 1960 and knew no peace as political violence for about six years after independence caused by a secessionist war with the Katanga Province killed about 100,000 people. Mobutu Sese Seko became president in 1965 and ruled for 32 years, a regime characterised by corruption and highhandedness. Laurent Kabila ousted Mobutu in May 1997 with the assistance of Tutsi-dominated Rwanda. However, Kabila purged ethnic Tutsis from the government, a situation which created a resurgence in violence and civil unrest as Congolese Tutsi rebels were irked by his action, and supported by Rwandan troops began the plot to oust Kabila, who was ultimately assassinated in January 2001.[17]

After the death of Laurent Kabila, his son Joseph Kabila was made the president but this only

[13] Priscilla B. Hayner, *supra note* 8, 246
[14] The detailed evidence in the report was however instrumental in the prosecution of Hissène Habré in Senegal at the international level
[15] United States Institute of Peace, *supra note* 7; Charles Manga Fombad, *supra note* 1, 4
[16] United States Institute of Peace, *supra note* 7
[17] United States Institute of Peace, 'Truth Commission: Democratic Republic of Congo'. [https://www.usip.org/publications/2003/07/truth-commission-democratic-republic-congo] accessed on July 24, 2017

exacerbated the violence. The Inter-Congolese Dialogue in Pretoria brought together numerous stakeholders in the conflict and culminated in the Sun City Accord signed in December 2002. In 2003, a transitional government was put in place to foster peace in the country but it did not help to halt the violence ravaging the eastern provinces. The transitional government was, however, able to establish a truth and reconciliation commission in 2003 based on the Comprehensive Peace Agreement sealed in December 2002 and later pursuant to a law[18] enacted by President Joseph Kabila on July 30, 2004.[19]

The Truth and Reconciliation Commission (Commission Verité et Réconciliation) was set up as one of the five institutions to enhance democracy in the country as recommended in the agreement mentioned above, to restore truth and foster peace, ensure that justice is done and that reparations are paid, and consolidate national unity by seeking forgiveness and reconciliation. The Commission was therefore mandated to investigate violations of human rights and politically motivated crimes covering the period from June 30, 1960 to the end of the transition.[20] The Commission, which was headed by Bishop Jean-Luc Kuye Ndondo wa Mulemera, comprised twenty-one members, with eight of them representing each party of the Inter-Congolese Dialogue who were six males and two females, and others included were "religious leaders, representatives of scientific associations, women's organizations and other civil society groups with objectives similar to the commission."[21]

The Commission completed its work and its report was submitted in February 2007. This was done out of schedule (the initial mandate was two years) and after the first democratic elections were conducted in July 2006 under the watch of the United Nations peacekeeping mission. In its recommendations, the Commission earnestly sought financial aids from the international community in order to promote transitional justice in DR Congo and recommended public awareness campaigns for future initiatives.[22]

This Commission could be said to have failed in some respects as it failed to investigate atrocities committed; it did not hold public hearings to find out and confirm the truth about killings and other violations of human rights; it lacked credibility in the perspective of the citizenry; and the selection of Commissioners was flawed with persons of tainted integrity

[18] Loi N°/04/018 Du30juillet 2004 Portant Organisation, Attributions Et Fonctionnement De La Commission Verite Et Reconciliation (Law No. 04/018)
[19] Charles Manga Fombad, *supra note* 1, 5
[20] *Ibid.*, 6
[21] United States Institute of Peace, *supra note* 17
[22] Charles Manga Fombad, *supra note* 1,6; United States Institute of Peace, *supra note* 17

as some were accused of various abuses themselves or regarded as having been part of the government. Its work was generally rejected and a new commission is contemplated.[23]

Convincingly, this Commission was a waste of time and resources. A pertinent question remains: how could a commission know the truth and reconcile a nation without actively engaging in finding out the truth through public hearings? The Commission was wrongly conceived and imperfectly executed.

III. East Africa

a. Burundi

On October 21, 1993 President Mechior Ndadaye of Burundi, a Hutu, was assassinated by a group of Tutsi army officers. This subsequently led to a massacre in the country as Hutu civilians massacred the Tutsis and the Tutsi-dominated army murdered the Hutus. An international commission of enquiry was inaugurated by United Nations Security Council to unravel causes of the mystery behind the death of President Mechior Ndadaye, the massacre of civilians and the various offences committed between October 1993 and August 1995. This was designed to achieve a threefold objective: bring known perpetrators to book, put an end to anarchy and bring about national reconciliation and unity.The Commission did not achieve much, and based on the outcome of the Arusha Accords in 2004, a UN team, which visited Burundi recommended "the establishment of a truth commission to establish historical facts of the conflict, determine its causes and nature, classify the crimes committed since independence and identify those responsible. It also recommended the establishment of a special chamber within Burundi's court system to prosecute those bearing the greatest responsibility for genocide, crimes against humanity and war crimes."[24]

There was initial delay in setting up the commission based on some disagreements. After the initial disagreement on the modalities of setting up the commission and the special tribunals was settled, President Pierre Nkurunziza finally set up the truth and reconciliation commission in 2012. The Commission was saddled with the responsibilities of probing decades of ethnic killings. It will investigate issues of appalling violations of human rights committed from 1962 to 2008 such as death by torture, death in custody, mass killing, political assassinations, etc.[25] In addition, the Commission was given some further powers

[23] Priscilla B. Hayner, *supra note* 8, 253
[24] Charles Manga Fombad, *supra note* 1, 3
[25] A special tribunal to try some offenders will be set up after the completion of the commission's investigations.

"to investigate by interrogating any person with relevant information regardless of rank or position. The commission also has the right to unfettered access to all relevant documents and any attempt to conceal or destroy said documents, is punishable by disciplinary or penal sanctions. The commission can order immediate compensation where the circumstances and resources permit. The commission has the power to subpoena any document, or testimony from any person."[26]

The Parliament in 2014 appointed the members of the Commission. "The Commission appointed is made up of six Hutus, whose ethnic group makes up roughly 86 percent of the population, four Tutsis and one Twa, and will be headed by Hutu Catholic Monseigneur Jean-Louis Nahimana with a Tutsi Anglican archbishop as his deputy."[27] The Commission was finally launched in March 2016 amidst criticisms from the opposition and scepticism from the populace. While some welcome the establishment of the Commission, others see it as a diversionary tactic and an empty vessel that will achieve nothing. Civil society organisations decry their non-inclusion in the process. Three Commissioners of the Commission are either said to be former government officials or are said to have been accused of abuses. The Commission was also criticised for its timing, with some persons believing it was government's tactics to divert domestic attention and sway international opinion at a time citizens are being killed daily after President Pierre Nkurunziza ran and won an election on July 24, 2015 for a third term against constitutional provisions. Government however firmly denies these allegations and asserts that it is on course.[28]

The Commission is still at work but plagued by daunting challenges in order to conclude its work and accomplish its objectives and mandate. No clear programmes have been delineated by the Commission. The Commission, at the same time lacks sufficient budget to continue with its requisite operations. The opposition on the hand is boycotting the activities of the Commission. The controversial re-election of President Pierre Nkurunziza has continued to increase tension in the country and the present political unrest in the country does not provide an enabling environment for the Commission to thrive. The

[26] Institute for International and Comparative Law in Africa, 'Burundi Truth and Reconciliation Commission', [http://www.icla.up.ac.za/images/un/commissionsofinquiries/countries/Burundi-Commission-of-Inquiries.pdf] accessed on June 30, 2017

[27] AFP, 'Burundi appoints controversial truth commission members' Mail Online http://www.dailymail.co.uk/wires/afp/article-2860084/Burundi-appoints-controversial-truth-commission-members.html

[28] Ephrem Rugiririza, 'Burundi Truth Commission "a Diversionary Tactic", says Critics' JusticeInfo. 16.03.16. [http://www.justiceinfo.net/en/truth-and-justice-commissions/burundi-truth-commission-%E2%80%9Ca-diversionary-tactic%E2%80%9D,-say-critics.html] accessed on July 15, 2017

government, however, argues that the lack of individual reparation does not preclude the ongoing collective reparations already carried out through the building of physical infrastructures such as schools and hospitals.[29] Building physical infrastructure could be laudable but how does that assuage individual hurt and pain.

b. Ethiopia

In Ethiopia, the Office of the special prosecutor was created in 1992 by the President with the mandate to unearth and set straight the record of human rights abuses; prosecute those found to be responsible for war crimes and violations of human rights during the period between 1974 and 1991. This is not modelled along the usual approach of the truth and reconciliation approach but purely after the judicial approach.[30]

Our efforts here are focused on the little-known Inquiry Commission set up by the Ethiopian Parliament to investigate killings which took place after violence erupted following the announcement of the 2005 election results where about 193 protesters were killed by security forces. The Commission spent some months interviewing witnesses and gathering evidence and approximately 1300 testimonies from witnesses were heard.

After it completed its assignment and was set to present its findings in the parliament, parliament went on recess a day before the presentation of the findings was due. It was reported that the Chairman of the Commission and the deputy were allegedly harassed and coerced to alter the findings in the report waiting to be submitted. Refusing to comply with the demand, they both fled the country for fear of their lives. A newly appointed chairman absolved the security forces of any misconduct, although the original report was said to have held the security forces culpable for deliberately firing shots at unarmed protesters, not to disperse them but with the clear intent to kill because victims' heads and chests were targeted.[31] It is obvious why this Commission does not attract relevant attention. One wonders why and how a new chairman, who probably knows little about previous investigations could be employed to do a hatchet man's job to submit a predetermined finding of interested forces. One still wonders why the Inquiry Commission was set up in the first place, if the sincerity of purpose was lacking to properly investigate the killings, why then make a caricature of the process.

[29] See [http://www.icla.up.ac.za/images/un/commissionsofinquiries/countries/Burundi-Commission-of-Inquiries.pdf] accessed on June 30, 2017
[30] Charles Manga Fombad, *supra note* 1, 6
[31] *Ibid.*

c. Kenya

An initial attempt to establish a truth commission in Kenya saw the creation of a task force on a truth, justice and reconciliation commission in 2003 by President Mwai Kibaki after President Daniel Arap Moi was defeated in an election. The task force carried out public hearings and reported that about 90% of Kenyans.[32] were in favour of the establishment of the commission. The investigation of unimaginable brutal tactics, repressive policies and targeted assassinations which characterized the reign of Daniel Arap Moi and his Kenyan African National Union (KANU) Party from the period of independence in 1963 to December 2002 was to form the mandate of the proposed commission. In addition, the investigative searchlight was to be beamed on corruption and economic crimes during the period under review. Paradoxically the government of President Mwai Kibaki who incidentally set up the task force developed cold feet on setting up the commission and other political priorities displaced the establishment of the commission. One wonders why he set up the task force in the first place if he lacked the political will to heed the outcome of the exercise.

The aftermath of the violence associated with the December 2007 presidential election left about 1500 people dead and almost half-a-million people homeless. The violence was based on ethnic lines but for political gains. The situation caught the attention of the international community like the UN, with the former Secretary-General of the United Nations, Kofi Annan, actively participating in forging a peaceful solution for Kenya; the AU brokered an agreement, intended to usher in a power-sharing agreement. The agreement provided for the establishment of some commissions and investigative bodies, among which was the Truth, Justice and Reconciliation Commission (TJRC).[33]

After initial disagreement on some issues in the draft legislation, the legislation establishing the Commission was finally passed in October 2008 and signed into law on November 28, 2008. The enabling law mandated the Commission to investigate the abuses of human rights perpetrated between December 12, 1963 and February 28, 2008, the day when President Kibaki and Prime Minister Raila Odinga signed the power-sharing agreement. The Commission was also expected to ascertain the causes, nature and scope of the post-election conflict and present a complete picture as much as possible of the

[32] *Ibid.*
[33] *Ibid.*, 6; see also Priscilla B. Hayner, *supra note 8,* 73

violence.[34] Further, it was mandated to venture into "cases of politically motivated violence, assassinations, displacements and major economic crimes such as grand corruption and irregular acquisition of land. The Commission was empowered to recommend policies with regard to reparations for victims, recommend prosecutions, and the creation of institutions conducive to a stable and fair society."[35] The establishing law was criticised "especially by civil society groups, because it allowed amnesties for human rights violations, excluded victims from the process, and failed to offer sufficient protection for witnesses."[36]

The Commission was comprised of four males and three females. These were composed of four Kenyan nationals and three foreigners, who were nominated by the peace negotiators.[37] Bethuel Kiplagat and Betty Kaara Murungi were chairman and vice chair, respectively, but both resigned in 2010 after some controversies and Tecla Namachanja Wanjala became the chairperson.[38] Under President Uhuru Kenyetta the mandate of the Commission was extended and Christopher Gitari Ndungú summarises the new mandates and the findings when he said "the commission divided the period into four distinct eras, corresponding to the four political administrations that governed the country during that time: the British colonial era (1895–1963), the presidency of Jomo Kenyatta (1963–1978), the presidency of Daniel Arap Moi (1978–2002), and the presidency of Mwai Kibaki (2002–2008). The commission found that during all four periods the government was responsible for numerous gross violations of human rights, including torture, political assassinations, arbitrary arrest and detention, illegal and irregular acquisition of land, economic crimes, grand corruption, extrajudicial execution, sexual violence, looting and burning of property, and enforced disappearances."[39]

After surmounting some controversies on the Commission's enabling law, its establishment, its composition and the procedure, the Commission finally submitted its report to the President Uhuru Kenyatta on May 21, 2013 alongside accusations that the report

[34] United States Institute of Peace, 'Truth Commission: Kenya'. [https://www.usip.org/publications/2009/07/truth-commission-kenya] accessed on July 21, 2017; Charles Manga Fombad, *supra note* 1,6
[35] Charles Manga Fombad, *supra note* 1, 6
[36] *Ibid.*
[37] See United States Institute of Peace, *supra note*, 34. It however began with nine Commissioners with two resigning later. The enabling law stipulated seven members
[38] United States Institute of Peace, *supra note* 34
[39] Christopher Gitari Ndungú, 'Lessons to be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission, ICTJ Justice Truth Dignity'. ICTJ Briefing. May 2014, 4 [https://www.ictj.org/publication/kenya-TJRC-lessons-learned] accessed on July 23, 2017

was edited before it was released thereby compromising the integrity of the report.[40] Christopher Gitari Ndungú, however, identified some good aspects of the Commission when he said that "the commission's positive achievement is the treatment of children as both a special group of victims and as participants in the TJRC process. The commission also paid specific attention to sexual and gender-based violence and its impact on women, making some excellent analysis of particularly notorious violations of human rights."[41] The Commission recommended that an implementation committee be put in place to administer the plans for reparation, and its establishment is to be supported by law; an external monitoring process be established to ensure that government accounts and periodically report to the National Assembly; and demanded redress for victims of varying abuses.[42] The Commission's report recorded the government's involvement in a series of abuses of human rights and confirmed that institutions of government are exposed to corruption; it named some military officers alleged to be culpable of human rights violations in the northern part of the country during the Shifta war in the 1960s and recommended them for proper investigations and prosecution where necessary.[43]

Criticism has also been levelled against the government for its failure to disseminate the final report as widely as possible. Some persons went to court to challenge some aspects of the reporting requesting that the court expunge these contentious aspects of the report. The Commission was also accused of not providing a clear chart on reparations for victims of abuses and violence, and it did not mention the ethnic or tribal influence on the conflict in order to forge unity, because it is essential to admit the role such divisive elements play and seek ways to prevent reoccurrence. In spite of these imperfections, the recommendations of the Commission should be fully implemented to promote lasting peace in the country.

d. Rwanda

Rwanda is a country known at the international level for its beleaguered history of conflicts and violence, which was associated with wanton killings and abuse of human rights and human dignity. Sequel to these unfortunate realities, there have been at least five different

[40] *Ibid*., 1
[41] *Ibid*.
[42] *Ibid.*, 9-10
[43] Christopher Gitari Ndungú, 'Kenya TJRC Final Report Deserves Serious Analysis and Action'. ICTJ News. 15.19.2014. [https://www.ictj.org/news/ictj-kenya-tjrc-final-report-deserves-serious-analysis-and-action] accessed July 20, 2017; See also Christopher Gitari Ndungú, *supra note* 39, 2ff

efforts at fostering peace in the nation. These efforts included but were not limited to: the famous International Criminal Tribunal for Rwanda (ICTR); the traditional *Gacaca* courts; the African Union (AU)-sponsored International Panel of Eminent Personalities to investigate the 1994 genocide; the International Commission of Investigation on Human Rights Violations in Rwanda; and the National Unity and Reconciliation Commission.[44] Our attention in this segment will be focused on the National Unity and Reconciliation Commission, which is not crafted in the usual transitional justice approach of truth commissions but geared towards logistical and precautionary measures.

In October 1990, the Tutsi-Rwandan Patriotic Front (RPF) crossed over to Rwanda from Uganda and carried out an attack on Rwanda aimed at unseating President Juvénal Habyarimana. This triggered government-controlled forces retaliatory attacks on the Tutsis and moderate Hutus. The carnage escalated as Tutsi-Rwandan Patriotic Front (RPF) recruited child soldiers and targeted Hutu civilians in their deliberate attacks.[45] Almost two years later, precisely in July 1992, a ceasefire pact was reached leading to the signing of the Arusha Accords[46] and consequently the end of the war on August 4, 1993, but this did not halt tensions between the Tutsi and Hutu factions.

The assassination of President Juvénal Habyarimana in 1994 triggered a genocide that killed about a million people. This unfortunately delayed the establishment of the proposed commission based on the Arusha Accords but it was eventually created in 1999 by the new Transitional Assembly.[47] The Commission was intended to inform the populace about the

[44] The African Union body was set up with the mandate to investigate the 1994 genocide. It worked between January 1999 and June 2000 with a published report: Rwanda: The Preventable Genocide; The *Gacaca* courts are indigenous to Rwanda and this traditional dispute resolution process was established by law in March 2001 to revive the traditional forms of justice aimed at reconciling the people of Rwanda and solving the problems occasioned by the genocide. This system was intended to prove the capacity of the local communities to settle their own conflicts. The courts were mandated to reveal the truth; speed up trials as against usual delay due to legal technicalities in normal courts and end the culture of impunity (more on this traditional court system can be found in Charles Manga Fombad, *supra note* 1, 10); The ICTR was created by the United Nations Security Council Resolution 955 of November 8, 1994 with the responsibility to prosecute persons accused of genocide and other international humanitarian law violations in Rwanda and the neighbouring countries between January 1, 1994 and December 31, 1994; The Liaison Committee of Association in Defense of Human Rights in Rwanda, a federation of four international NGOs, established the independent International Commission of Investigation on Human Rights to investigate the violations of human rights perpetrated in Rwanda since October 1, 1990. It worked for three months and published its report in March 1993.

[45] United States Institute of Peace, 'Truth Commissions: Rwanda 99'. [https://www.usip.org/publications/1999/03/truth-commission-rwanda-99] accessed on July 7, 2017

[46] The Arusha Accords could be found here: [http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/rwan1.pdf] Article 16 of the accord provided for the establishment of a Commission of Inquiry and a National Commission on Human Rights, necessary to investigate violations of human rights perpetrated by all parties.

[47] Government of National Unity Law No. 03/99, March 12, 1999

need for national reconciliation and national unity, and promote tolerance. To achieve this, it had three basic programmes: civil education, community initiatives and conflict mediation. It conducted three national conferences between October 2000 and December 2006. These conferences and the organised national debates are geared towards fostering tolerance, building peace and imbibing a new culture of human rights. It is mandated to publish annual reports of its activities. A law enacted in 2002 made the Commission a permanent body. [48] The work of the Commission is yielding good fruits and according to a former Commissioner: "Rwandans are now discovering, to their surprise, that the ethnic differences which have been so much magnified in the past are not the real differences. The issue in Rwanda was bad governance, the culture of impunity and social injustices by successive ruling cliques. These have affected almost every Rwandan in one way or another"[49]

e. Uganda

Uganda, a country that has known a history of turbulent occurrences since independence, is said to be the first country in Africa and the third in the world to have adopted the approach of a truth commission.[50] After the first experience, the country has gone further to organise more truth commissions without prejudice to an additional effort at a judicial approach.

The first in line of these commissions was established in June 1974 by President Idi Amin Dada and mandated to investigate the violations of human rights in Uganda from 1962 to 1986 and particularly to inquire into the disappearances of people in Uganda since January 1971 under his regime. The establishment of this Commission of Official Inquiry was at the behest of international pressure on the government of Uganda. It was headed by a Pakistani Judge and three other Ugandans.[51] The Commission conducted public hearings where 545 witnesses were heard, and about 308 cases of disappearances were documented by the Commission. Consequently, the Commission condemned military officers, military police and intelligent units for abuse of power; concluded that special security bodies established under the regime of Idi Amin were responsible for the disappearances these persons; and recommended the reformation of the police and other security agencies.[52]

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[48] Government of National Unity Law No. 35/2002
[49] United States Institute of Peace, *supra note* 44
[50] Dumisa Buhle Ntsebeza, 'Can Truth Commissions in Africa deliver justice?' 375-389:375, [http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/12_Ntsebeza.pdf] accessed on April 29, 2017; See also Charles Manga Fombad, *supra note* 1, 13
[51] Priscilla B. Hayner, *supra note* 8, 239
[52] *Ibid.*

It is not surprising that President Idi Amin did not publish the report of the Commission and did nothing to implement the recommendations contained therein because he lacked the political will from the onset and the idea of the Commission was not his but created out of external pressure. The security forces therefore continued varying abuses without restraint and with reckless abandon. Irrespective of the treatment its report got from Idi Amin, the Commission must be commended for its courage to carry out its duty by investigating the same government in power, more so a brutal one at that and that while the Commission was at work, disappearance decreased.[53]

Yoweri Museveni took power after overthrowing Milton Obote in January 1986 and set up the second commission in Uganda to scrutinise various past abuses of government forces between December 1962 and January 1986, which included but were not limited to torture and murder, illegal arrests and confinement. The Commission of Inquiry into Violations of Human Rights was not however mandated to investigate the abuses done by rebels of Yoweri Museveni before he seized power.[54] This Commission was chaired by a high court judge and was mandated to proffer ways of avoiding a repeat of the abuses. Public hearings were conducted amidst high public interest. Without a deadline, it lingered on for some years and then had financial difficulties; it was only able to continue its work after receiving funding from some foreign agencies.[55]

The Commission concluded its assignment and submitted its report in October 1994. The submission of its report indeed took place nine years after it began its work. In the report, the Commission properly set the records of various abuses straight and recommended the repeal of subsisting draconian legislations in the country. Based on the recommendations, apart from the creation of the National Human Rights Commission in Uganda, the report of the Commission was largely ignored.[56] The long duration of this Commission is very uncharacteristic of a truth commission and was enough to vitiate public interest. Many people will not only lose interest but even forget about the subsistence of such a commission. Unfortunately, even though the Commission was to proffer ways of preventing further abuses, the Yoweri Museveni who set it up remains the Ugandan President till date and he is accused of various abuses himself. During his rule, different discordant voices opposed his style of governance, and such dissatisfaction led to rebel groups like the Lord's Resistance Army

[53] See *Ibid.*, 240
[54] Charles Manga Fombad, *supra note* 1, 13
[55] Priscilla B. Hayner, *supra note* 8, 243
[56] Charles Manga Fombad, *supra note* 1, 13

fighting to unseat him, but they only succeeded in perpetrating horrible abuses. This situation led to the establishment of yet another commission.

Apart from other alternative transitional justice institutions like the trial of the Lord's Resistance Army (LRA) commanders by the ICC in The Hague, a third commission was established in Uganda christened the Amnesty Commission in 2000. It was established by the Amnesty Act to promote reconciliation and enhance peace and security in the country by carrying out the DDR process of disarmament, demobilisation and reinsertion. It had seven member-Commissioners including the chairman. Amnesty applicable to actions dating to January 26, 1986 was extended to offenders and this commission was saddled with the responsibility to conscientise the populace about the Amnesty Law; promote dialogue and reconciliation; demobilise and process amnesty applications; provide measures for resettlement and recommend long-term social and economic reintegration of combatants and repatriation of combatants where necessary. This mandate was to run till May 24, 2012 but it was later extended.[57]

The World Bank supported this mission by donating funds to take care of certain parts of this project and according to Damian Kato, the Secretary of the Commission, about 26,232 fighters have been granted amnesty and about 20,263 former combatants and abductees have been given the reinsertion kit[58], which included "a lump sum of US $150, a mattress, blanket, hoe and some seeds due to a shortage of funds."[59] These were also given additional support beyond the reinsertion kits in terms of training, which includes: metal works, motor vehicle and bicycle repairs, tailoring, bricklaying, carpentry, hairdressing and agricultural management. Already over 6,439 trainees, who in addition are given tools and pecuniary backing, have benefited from this training.[60]

The third Commission in the view of this writer was largely successful despite its challenges. Although the probable stigmatization of returning combatants may appear to take some shine off this success, their return to their respective communities puts an end their uncertain lives as combatants and at the same time, helped the peace process in the country. Especially, it has helped to bring relative peace to Uganda.

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[57] Damian Kato, 'The Amnesty Commission DDR in Uganda'. [http://www.tdrp.net/PDFs/KampalaPPT_Kato.pdf] accessed on June 12, 20017; See also Charles Manga Fombad, *supra note* 1, 13-14
[58] Damian Kato, *supra note* 57
[59] Charles Manga Fombad, *supra note* 1, 14
[60] Damian Kato, *supra note* 57

VI. Northern Africa

a. Algeria

In the 1990s after a crisis where militant Islamists protested the cancellation of an election in Algeria, which led to the security forces' highhandedness and the subsequent death of about 15,000 people and the disappearance of several thousands of persons, President Abdelaziz Bouteflika instituted a commission after his election in 1999 to investigate the incidents as part of his measures to bring about national reconciliation. The commission which was named Ad Hoc Inquiry Commission in Charge of the Question of Disappearances was chaired by Farouk Ksentini and composed of five men and a woman.[61]

The Algerian commission had the mandate to identify cases of alleged disappearances and determine the fate of those who disappeared, as well as draft measures to provide aid and compensation to victims' families. However, the mandate of the commission did not include identifying those responsible for the disappearances and its investigative powers were limited by the fact that it had no access to the archives of the security forces.

The commission submitted its report on 31 March, 2005 and the report was not made public. But the chairperson in a public statement claimed that the "Algerian Army was responsible for more than 6,000 of the disappearances and many more deaths."[62] This commission was criticized for its limited investigative power but the president made efforts to implement some recommendations of the commission. The president enacted a decree to provide a legal background for reparation, and around 2,640 families have been paid an approximate $37 million; however, compensations could only be received "with the presentation of a death certificate, which many were reluctant to obtain without knowing the fate of their loved ones. Victims argued that the government was trying to bribe them to stop asking for information."[63] Amnesty was also granted to perpetrators. Although criticized by some, the measures drastically reduced the level of insurgency and armed attacks in the country.

b. Morocco

Interestingly, the Moroccan truth commission, the first in the Arab world, was set up by the constitutional monarch, King Mohammed VI, to probe abuses, which took place during the

[61] United States Institute of Peace, 'Truth Commission: Algeria', [https://www.usip.org/publications/2003/09/commission-inquiry-algeria] accessed on July 28, 2017; See also Charles Manga Fombad, *supra note* 1, 3
[62] United States Institute of Peace, *supra note* 61
[63] *Ibid.*

reign of his father and grandfather. His father, King Hassan II, took over power in 1961 and led the country for about forty-five years under "a policy of harsh repression that included the imprisonment, torture, and forced exile of political opponents and rights activists. Some opponents were "disappeared" for nearly two decades, kept in secret detention centers, alive but unknown to anyone outside; others were imprisoned and then killed."[64] There was also the repression of advocates of Western Sahara independence and the maltreatment of political prisoners. His father took over from his grandfather, King Mohammed V, who was the king at independence and had adopted brutal tactics in order to consolidate his stay in power for fear of being toppled.[65]

At the beginning, many doubted the sincerity of the King and questioned if he really wanted to change from the past way of abuse, although noticeable changes of state repressive policies had improved the situation in previous years. Gradually, it became evident that he was prepared to address past abuses. Compensations were awarded to the families of those missing after he set up an Independent Arbitration Panel in 1999. Almost 7,000 recipients were awarded approximately $100 million. This step emboldened some human rights groups to begin the demand for the truth commission, and the Advisory Council on Human Rights (CCDH) ultimately recommended the establishment of the commission in 2003.[66]

The Equity and Reconciliation Commission, which was approved by the King, had seventeen members and was chaired by Driss Benzekri (a former political prisoner). Other members included a woman, renowned human rights advocates, eminent academics and former political prisoners.[67] The Commission curiously drafted its mandate but was later given a royal approval through a royal decree. It is not common that a Commission drafts its mandates against the practice of many commissions getting predetermined mandates. The Commission was therefore mandated to: "i) investigate and document grave abuses (forced disappearances and arbitrary detention) that occurred from independence in 1956 until 1999, notably during the 38-year reign of King Hussein II from 1961-1999. ii) decide on reparation packages for victims and survivors: iii) propose other remedies for victims, and safeguards against a recurrence of abuses; iv) provide a report by April 2005 that provides both a general historical record and specific information for families of victims."[68]

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[64] Priscilla B. Hayner, *supra note* 8, 42-43
[65] Charles Manga Fombad, *supra note* 1, 9
[66] See Priscilla B. Hayner, *supra note* 8, 43
[67] *Ibid.*
[68] Charles Manga Fombad, *supra note* 1, 9

After working for a period of twenty-four months, the Commission received over 20,000 submissions from victims. The Commission had its challenges. Sequel to the lack of authority to subpoena perpetrators, some security agencies and former officials did not cooperate; it had limited investigative powers and was barred from naming or identifying individual perpetrators.[69] This strategy may have been adopted not just to whittle down the powers of the Commission but to protect invariably the powerful officials behind such atrocities. It could be interpreted to be another form of amnesty for offenders.

After the completion of its work, the Equity and Reconciliation Commission submitted its final report to King Muhammed VI on December 1, 2005. The King made it available publicly on December 16, 2005 with the instructions that the recommendations be implemented. The Commission established that 742 persons suspected to have disappeared were indeed dead and recommended further investigation in the case of 66 other victims, whose fate remained unknown. It did not, however, name individuals responsible for the cruel acts.[70] It also recommended *inter alia* that certain rights be enshrined in the nation's constitution; the strengthening of the legislature and judiciary; abolition of the death penalty; the creation of an institute of contemporary history; the ratification of the Rome Statute of the International Criminal Court; reform and strengthening of the security, judiciary and legislative sectors; financial, medical and psychological support to victims, and an official apology to the victims etc.[71]

The Commission can be commended for executing a wonderful assignment and making excellent recommendations. However, despite the King's public support and order for the implementation of the Commission's recommendations, many of the recommendations contained in the report have been neglected.

IV. Southern Africa

a. Mauritius

The Truth and Justice Commission in Mauritius was created by the Parliament through a Charter[72] adopted on August 11, 2008. The Commission was eventually inaugurated on

[69] See United States Institute of Peace, 'Truth Commission: Morocco', [https://www.usip.org/publications/2004/12/truth-commission-morocco] accessed on July 27, 2017; See also Charles Manga Fombad, *supra note* 1, 9 and Priscilla B. Hayner, *supra note* 8, 43
[70] United States Institute of Peace, *supra note* 69; See Priscilla B. Hayner, *supra note* 8, 43-44
[71] Charles Manga Fombad, *supra note* 1, 9; see also Priscilla B. Hayner, *supra note* 8, 44
[72] The Truth and Justice Commission Act, no. 28 of 2008, Government Gazette of Mauritius No. 84 of 28 August 2008

February 1, 2009 to investigate over 371 years' abusive practices. The Commission was mandated to "conduct inquiries into slavery and indentured labour in Mauritius during the colonial period and for that purpose, it may gather information and receive evidence from any person. The Commission has the responsibility to determine appropriate measures to be extended to descendants of slaves and indentured labourers; enquire into a complaint, other than a frivolous and vexatious complaint, made by any person aggrieved by a dispossession or prescription of any land in which he claims he had an interest; and prepare a comprehensive report of its activities and findings, based on factual and objective information and evidence received by it and submit the report to the President of the Republic."[73]

This Commission is unique in nature as it seeks to investigate a longer history in comparison to other truth commissions. It did not only seek to unravel issues of abuse during colonialism but its mandate is extended to the period of slavery, labour practices,[74] dispossession of land and the determination of appropriate measures for the descendants of the victims of these abuses. Interestingly, it was chaired by Alex Boraine, who deputised for Desmond Mpilo Tutu at the South African Truth and Reconciliation Commission. What makes it more intriguing is that Alex Boraine is a South African national and this will be one of the few truth commissions to be headed by a foreign national. Apart from Alex Boraine, there were four other Commissioners, altogether four men and a woman. The Commission had 64 staff members. The Commission had twenty-four months to complete its work with the possibility of a supplementary six months´ extension.[75]

The Prime Minister Navin Ramgoolam explained the rationale for the Commission thus: "Years have passed since slavery and indentured labor were abolished. The horrors of such brutality and bondage no longer exist today. But such treatment meted out to human beings does have its psychological impact, which can be permanent and as destructive if not more so, compared to physical slavery."[76]

[https://www.usip.org/sites/default/files/ROL/Truth%20and%20Justice%20Act%2028%20No_%202008-2.pdf] accessed July 24, 2017

[73] Charles Manga Fombad, *supra note* 1, 9

[74] The indenture labour practice involved the shipping of about half a million labourers to the country, predominately from India. These were placed on contracts, which kept them indebted to their employers and their conditions almost equated to slaves.

[75] See United States Institute of Peace, 'Truth Commissions: Mauritius', [https://www.usip.org/publications/2012/02/truth-commission-mauritius] accessed on July 24, 2017; See also Priscilla B Hayner, *supra note 8*, 70 and Charles Manga Fombad, *supra note* 1, 9

[76] Priscilla B Hayner, *supra note 8*, 70

After about two years of extensive work, the Commission's report[77] was released in November 2011. The Commission painstakingly documented different experiences of varying groups of Mauritians under colonial regime. The "economics of colonialism, slavery, and indentured servitude, the experiences of indentured Africans, Indians, and French *engagés* and living and working conditions on sugar estates" were well documented.[78] The Commission then recommended that slavery be memorialised in the country; a balanced account of the history and culture of Mauritius be told; the Mauritian heritage be protected; racism and elitism be deemphasised in the country and strongly suggested that the government provide empowerment schemes for Mauritians of African and Malagasy descent, essentially relating to land issues, to ensure social and economic justice.[79]

b. South Africa

During the apartheid rule in South Africa, the African National Congress (ANC) was at the forefront of the struggle against the oppression and repression which characterised the regime. The party eventually won the election when apartheid gave way to democracy. This largest and most important party that fought apartheid, based on a pact negotiated during the transition, decided that a truth and reconciliation commission was necessary to heal the nation, as the nation transitioned from white rule to majority rule. Alex Boraine noted that this "must be the first time in history that a liberation movement, rather than seeking general amnesty, called for an independent truth commission so that everyone could be held accountable for the past."[80] James Gibson described the South Africa's truth and reconciliation process as "surely the most ambitious the world has ever seen. Not only was the [TRC] charged with investigating human rights abuses and granting amnesty to miscreants, but the process was expected as well to contribute to a broader 'reconciliation' in South Africa."[81]

The South African Truth and Reconciliation Commission which was established by President Nelson Mandela offered amnesty to offenders *quid pro quo* in return for truth recovery through full disclosure. It was a product of a process of negotiation, had a legislative endorsement and executed its mandate tenaciously by eminent personalities during a precarious transition in a nascent democracy. Though deemed a success and well celebrated, not many wanted it to see

[77] Available on this website: [https://www.usip.org/sites/default/files/ROL/TJC_Vol1.pdf] accessed on July 23, 2017
[78] United States Institute of Peace, *supra note* 75
[79] United States Institute of Peace, *supra note* 75; See also Charles Manga Fombad, *supra note* 1, 9
[80] Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford: Oxford University Press, 2000, 11-12
[81] James L. Gibson, Overcoming Apartheid: Can Truth Reconcile A Divided Nation? 176 (2004).

the light of the day partly because of the offer of amnesty to offenders. In the case of *Azanian Peoples Organisation AZAPO and Others* v *The President of the Republic of South Africa and Others*,[82] S. 20(7) of the TRC ACT[83], which addressed the effects of amnesty granted, was challenged at the Constitutional Court. The relevant section stipulates: "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organization or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence." The Court held that the definition of amnesty must be predicated on the circumstances it applies to because amnesty has no inherent or fixed meaning. The Court then concluded that the offer of amnesty was for a worthy cause since it was a genuine incentive to encourage perpetrators of past wrongful acts to appear before the Commission and make full disclosure of the violations of human rights perpetrated by them, therefore it should extinguish both civil and criminal liability thereto.[84]

As the most famous of all the commissions in Africa for obvious reasons: the attention it got from the West, the fact that apartheid itself had generated international interest, the role of the *dramatis personae* such as Nelson Mandela, Desmond Tutu and others. According to Charles Manga Fombad: “The most significant of these truth commissions was, however, the South African Truth and Reconciliation Commission, which in many respects marked the high-water mark for truth commissions generally.”[85] This rich experience from South Africa will be extensively evaluated in the subsequent chapter.

c. Zimbabwe

The work of the Zimbabwean Commission is not famous when compared to the fame enjoyed by some other truth commissions and the obvious reason will be seen below. In 1983, there was a systematic repression of so called dissidents in the Matabeleland region by government forces, which led to the killing of many victims. The Chihambakwe Commission of inquiry was then set up by President Robert Mugabe in 1985 to investigate this carnage. The Commission was presided over by a Zimbabwean lawyer and worked for several months.[86]

[82] CCT 17/96, Constitutional Court, 25 July 1996
[83] *The Promotion of National Unity and Reconciliation Act, no, 34 (1995)*
[84] Summary of the case available at this website: [http://www.justice.gov.za/trc/legal/azaposum.htm] accessed July 22, 2017
[85] Charles Manga Fombad, *supra note* 1, 3
[86] See Priscilla B. Hayner, *supra note* 8, 242

After completing its work, the Commission submitted its report but the government did not publish the report, claiming that the report will remain confidential because the publication of the report of the Commission could endanger peace and security in the country.[87] This raises a question on the initial sincerity of government to set up the Commission in the first place and the way and manner the Commission went about its work. If it was aimed at investigating past wrongs with a view to take appropriate actions to assuage the feelings of victims and finding the truth about the atrocities then the populace getting confirmation of what they know transpired in their vicinity should not spark any violence over past wrongs as the government claimed. Strangely, in 1988 President Mugabe granted amnesty to members of his party and members of the security forces who were incarcerated for the violation of human rights in the Matabeleland region.[88] "In 1992, the commander of the military brigade responsible for many of the atrocities was promoted to head the air force…many others involved in the repression also continued to hold senior government posts."[89] With such an attitude to the recommendations of the Commission by treating it with disdain, lack of publication, reward to offenders and the grant of arbitrary amnesty to offenders, how could the work of the Commission be analysed and digested by the public and become famed?

The situation took an unusual turn when a glimpse into what the report would have been, was provided unofficially in 1997 by the Legal Resources Foundation and the Catholic Commission for Justice and Peace. In a report titled "Breaking the Silence, Building True Peace", based on a synopsis of private evidence such as victims' statements; records provided by journalists, lawyers and missionaries; and documents from NGOs, they concluded that over 20,000 civilians were murdered by security forces during the repression. Evidence of mass graves gave credence to this assumption. This "unofficial report recommended a national reconciliation process, a proper burial for the victims and compensation packages for those affected."[90] The report was submitted to the government with the hope of either getting a response from the government or that the government will have a tool to work on, but curiously, the Legal Resources Foundation and the Catholic Commission for Justice and Peace got no response at all from the government.[91]

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[87] See Charles Manga Fombad, *supra note* 1,14
[88] See *Ibid.*, 14
[89] See Priscilla B. Hayner, *supra note 8*, 242
[90] Charles Manga Fombad, *supra note* 1, 14
[91] See Priscilla B. Hayner, *supra note*, 8, 243

V. Western Africa

a. Côte d'Ivoire (Ivory Coast)

The Ivorian Dialogue, Truth and Reconciliation Commission (Commission Dialogue, Vérité et Réconciliation, CDVR) is one of the most recent commissions in Africa in a country, which has known series of serious upheavals. Since the death of its former President Félix Houphouët-Boigny in 1993, who came to power in 1960 at independence the country has not enjoyed the peace it used to have under the former president. Henri Konan Bédié took over from him but was overthrown by Robert Guei in a military coup in 1999, who subsequently changed the constitution with a provision requiring a presidential candidate to have been born of Ivorian parents before he can become an Ivorian president. This he did to exclude Alassane Ouattara, whose parents were of Burkinabe origin but was born in Ivory Coast. He organised an election in 2000, lost the election but wanted to declare himself winner. This gave rise to a popular uprising, which led to the official declaration of Laurent Gbagbo as the duly elected president. During the uprising, about 171 Ivorians were killed, which made the new president set up a Committee for National Reconciliation. This body concluded that Laurent Gbagbo was legitimately elected and that Alassane Quattara was a *bona fide* citizen of Ivory Coast. The failed coup in September 2002 caused violence again and led to the clear division of the country into two demarcated camps: the north and the south.[92]

This deplorable situation led to a series of international interventions aimed at restoring peace to the country. Under the 2007 Ouagadougou Political Agreement, an election was held in November 2010. The election ended in a stalemate and a runoff between Laurent Gbagbo and Alassanne Quattara was subsequently conducted with both candidates laying claim to victory and each declaring himself the *de facto* president. France, the United Nations and the African Union recognised Alassanne Quattara as the duly elected president and rejected Laurent Gbagbo, who was relying on a decision of the Constitutional Council to hang on to power. Before Laurent Gbagbo was captured and arrested by forces loyal to Alassanne Quattarra, the political tension culminated into a conflagration of violence resulting in the death of about 3,000 people, with half-a-million people displaced and obvious human rights abuses perpetrated by both parties to the dispute.[93]

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[92] See Julia Crawford 'Transitional Justice in Cote d'Ivoire', [http://www.justiceinfo.net/en/live-feed/406-transitional-justice-in-cote-d%E2%80%99ivoire-%E2%80%93-in-brief.html] accessed on July 20, 2017; See also Charles Manga Fombad, *supra note* 1, 5

[93] *Ibid.*

With the aim of bringing about national unity after the fracas, President Alassanne Quattara inaugurated on September 28, 2011 the Dialogue, Truth and Reconciliation Commission to investigate human rights abuses and promote national reconciliation. Its membership was made up of 11 commissioners. It was headed by former Prime Minister Charles Konan Banny and other members included some religious leaders, regional representatives and the football star, Didier Drogba. It was given two years to achieve its objectives. Upon completion of its initial mandate without any public hearing, a preliminary report was ready in November 2013, but the Commission´s mandate was extended for another year, within which the Commission held public hearings in September 2014 for three weeks and received testimonies of victims and perpetrators, about 80 people altogether. Its final report was submitted to the President in December 2014. It recommended *inter alia* the effective execution of the existing rural land law and the introduction of a national Memorial Day and day of forgiveness. It also recommended the prosecution of alleged offenders and the release of those who are considered of no danger to the society.[94]

The number of witnesses who ultimately appeared before the commission were intangible and negligible in comparison to some over 70,000 statements received and the level of carnage witnessed. The three weeks´ public hearing does not appear to have done enough justice to all parties. There were reports of media restriction, how then can the Commission guarantee its impartiality with such *clandestine* style? The appointment of the former Prime Minister was also viewed as political. An International Federation for Human Rights (FIDH) statement concluded that "its results seem very week: manipulation for political purposes, lack of a clear strategy, weak investigations, bloated administration, crucial lack of resources, lack of information on victims and support from civil society, etc. Since they were not able to talk about what they lived through, the Ivoirians seemed to reconcile in the name of "normalisation" alone."[95]

In a bid to ensure a successful implementation of the report of the Commission, the National Commission for Reconciliation and Victims' Compensation was put in place to distribute equitably the €15m compensation fund set aside for the purpose.[96] It would seem that many of those who are facing prosecution are supporters of Laurent Gbagbo, who himself was handed over to the jurisdiction of the ICC on November 30, 2011 to be tried for crimes against

[94] See Julia Crawford, *supra note* 92; See also Charles Manga Fombad, *supra note* 1, 5
[95] FIDL, et. al. 'Ivory Coast: Fight Against Impunity at Crossroads', 20 [https://www.fidh.org/IMG/pdf/cotedivoire617uk2013basdef.pdf] accessed on July 23, 2017
[96] See Charles Manga Fombad, *supra note* 1, 5

humanity, murder, sexual violence and rape. Such selective justice where both parties committed atrocities cannot result in national unity.

b. Ghana

After its independence in 1957, Ghana witnessed four military coups, and the different military regimes have been accused of violations of human rights. Jerry Rawlings played a part in two of the coups but later introduced changes which saw Ghana adopting a new constitution and return to democracy with him winning the multiparty election. He was accused of employing draconian methods in his anti-corruption push. In 2000, he declined to participate as a candidate in the elections; his party lost the election which saw John Kufour of the opposition party winning and ascending to the Ghanaian presidency. Upon his assumption of office, the National Reconciliation Act 2002[97] was enacted and it established the National Reconciliation Commission of Ghana. It was inaugurated in May 2002 with nine Commissioners, six men and three women, with the Former Chief Justice K.W. Amua-Sekyi appointed to head it.[98]

The mandate of the National Reconciliation Commission was essentially to promote national reconciliation in the country. It was responsible to establish precise records of the violations of human rights from March 5, 1957 to January 6, 1993. Its mandate included the recommendation of measures to redress wrongs committed and to suggest relevant institutional reforms. In setting out to achieve its mandate, the Commission set up four regional offices in addition to the headquarters, and received over 4, 200 statements from victims to the surprise of some who had argued against the establishment of the Commission. The Commission had six committees which included: press; labour and student movements; legal profession; professional bodies other than legal; security services; and religious bodies and chiefs. Hearings were held from January 2003 to October 2004, where victims openly expressed their concerns and ventilated their feelings. Those accused were invited to have their day, but few admitted their wrongdoings and pleaded for clemency while many others denied the charges levelled against them. The former President, Jerry Rawlings, was subpoenaed to appear before the Commission in relation to two important pieces of evidence in his possession. Upon appearance, he

[97] National Reconciliation Act 2002, Act no. 611
[98] See United States Institute of Peace, 'Truth Commissions: Ghana' [https://www.usip.org/publications/2003/01/truth-commission-ghana] accessed on July 24, 2017 See also Charles Manga Fombad, *supra note* 1, 6

admitted having been previously in possession of the said recordings but denied knowledge of their present location.[99]

After hearing testimonies from about 2, 129 victims and 79 accused offenders for about a year, the five-volume final report was concluded in July 2004, presented to the President in October 2004 and released to the public in April 2005 in addition with the government's response. The report asserted that colonialism played a role in laying the foundation for the abuse of human rights, and decried the involvement of law enforcement agencies and government officials who were largely responsible for the abuses. The Commission then recommended: "a comprehensive reparation programme involving apologies, a memorial and monetary compensation…reparations for approximately 3000 victims of repression under Rawling's rule and reforms within the prisons, the police and the military."[100]

Government accepted wholly the report of the Commission, apologized to victims, offered to reform relevant institutions and then set up a Reparation Committee comprising three members to ensure the implementation of the recommendations. Although some complaints claimed that the amount government paid is inadequate, the relative good news is that many victims of abuses were paid reparations within a year of the release of the report. Some institutional reforms were also said to have taken place. Today Ghana remains one of the examples of thriving democracy in Africa.[101]

c. Liberia

Civil war broke out in Liberia which eventually led to the killing of President Samuel Doe by Prince Yormie Johnson and his rebel group in 1989 but it was Charles Taylor's rebel group who ultimately succeeded in consolidating power, and this led to a further crisis that plunged the country into a fourteen-year civil war. The war ended in 1991 after the intervention of the Economic Community of West African States (ECOWAS) and the Nigerian-led ECOWAS Monitoring Group (ECOMOG), a multilateral armed force mainly financed by Nigeria and predominately made up of Nigerian soldiers who fought gallantly to restore peace to Liberia (and later Sierra Leone)[102]. After series of failed peace accords, Charles Taylor was eventually elected president in 1997 but the relative peace was short-

[99] See Priscilla B. Hayner, *supra note* 8, 56; Charles Manga Fombad, *supra note* 1, 6
[100] Charles Manga Fombad, *supra note* 1, 6-7
[101] *Ibid.*, 7; Priscilla B. Hayner, *supra note* 8, 57
[102] The ECOMOG was however replaced by the UN Mission in Liberia to monitor the peace process. Unfortunately, the UN went *AWOL* when the civil raged.

lived as hostilities resurfaced in 1999 when the government faced armed opposition by rebels who attacked Monrovia. During the civil war and other hostilities, numerous atrocities were committed, including but not limited to crimes against humanity, human rights violations including; sexual abuse; the killing of approximately 200,000 people and the displacement of over a million people.

A comprehensive Peace Agreement, which was signed in Accra by the main rebel groups and political parties of Liberia, provided for the establishment of a Truth and Reconciliation Commission. The Truth and Reconciliation Act was passed in May 2005 in consonance with the terms of the Accra agreement. An election was also conducted in November 2005, in line with the agreement, which produced President Ellen Johnson-Sirleaf, a former World Bank official.[103] The President appointed nine Commissioners after the initial appointments were contested, and the Commission was inaugurated on February 20, 2006. The Commission was given an initial two-years period to complete its work, but the duration could be extended for up to a year if the need arose. Jerome Verdier was chosen as chairperson by the Commissioners who included "three religious leaders, a security specialist, a nurse, and a journalist".[104]

The Commission, which enjoyed relatively good financial support from the government, was mandated by the TRC Act, 2005 to investigate human rights violations and abuses relating to massacres, sexual abuse and extra-judicial killings. Interestingly, it was mandated to also investigate economic crimes involving the exploitation of natural resources. The mandate covered January 1979 to October 14, 2003. The Commission also had the power to go beyond 1979 where necessary. It had the responsibility to provide measures to address impunity; establish accurate records of past abuse with special attention to gender-based violence; and present a report of its findings and proffering recommendations.[105]

The Commission was bedevilled by different challenges during its lifespan.[106] It had financial and logistical hitches at the beginning and could not hit the ground running but could only begin public hearings in 2008. Charles Manga Fombad noted that there were

[103] President Olusegun Obasanjo played a huge role in persuading Charles Taylor to relinquish power in Liberia to enable peace to reign in Liberia. He offered him asylum in Calabar, Nigeria, in exchange for his non-interference in the domestic affairs of Liberia. Charles Taylor was eventually handed over for prosecution in The Hague contrary to his expectation when he left Liberia for Nigeria.
[104] Priscilla B. Hayner, *supra note* 8, 67
[105] Charles Manga Fombad, *supra note* 1, 8
[106] See Priscilla B. Hayner, *supra note* 8, 67

three types of hearings: individual hearings, thematic hearings and diaspora hearings.[107] The Commission was accused of being too lenient with alleged offenders by not asking probing questions and some even denied any wrongdoing, but the notorious General Butt Naked[108] admitted to have killed about 20,000 people during the hostilities.

Despite the criticisms, the Commission ultimately received over 20, 000 statements from Liberians, who wanted to tell their stories. After the Commission completed its task, the unedited final and consolidated report of the Commission was released on December 19, 2008, while the edited final and consolidated report was released on June 30, 2009, and submitted to Parliament. The Commission recommended over 150 individuals, corporations and institutions for prosecution and the establishment of an Extraordinary Criminal Tribunal for Liberia to achieve this purpose,[109] and dozens of prominent politicians to be barred from public office for their various roles in the war and crisis, including President Ellen Johnson-Sirleaf.[110]

Some others, though believed to have cases to answer were not recommended for prosecution because they cooperated with the Commission and expressed remorse, top amongst this group was General Butt Naked. In its findings, it attributed the remote and proximate causes of the conflict in Liberia to "poverty, greed, corruption, limited access to education, economic, social, civil and political inequalities, identity conflict, the lack of reliable and appropriate mechanisms for the settlement of disputes and the chasm between settler Liberian and indigenous Liberian."[111]

The Commission placed the responsibility for abuses and crimes committed during the war at the doorstep of all factions in the conflict and accused external actor of complicity in the violence. It urged government to assume responsibility for reparation and

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[107] See Charles Manga Fombad, *supra note* 1, 8; He explained the three different types of hearings thus: "Hearings fell into three categories: individual hearings based on statements or interviews; thematic hearings that looked at the trends and causes of the conflict; and institutional hearings, which examined how national institutions (such as the judiciary and education system) have been affected by the conflict, with a view to bringing about reforms. One of the unique features of the Liberian Commission was that it involved the active participation of the Liberian Diaspora. Diaspora hearings and outreach activities of the Commission took place in 11 US cities, in Ghana, Nigeria and Sierra Leone, all places where a significant number of Liberian refugees reside."

[108] His real name is Joshua Milton Blahyi but he is commonly known by his *nom de guerre*. He was a traditional priest who converted to Christianity and strangely became a pastor, leading a church. Despite the atrocities committed he was not recommended for prosecution as a reward for cooperating with the Commission.

[109] It also recommended the adoption of a complementary traditional dispute resolution mechanism, which is indigenous to a given community.

[110] Interestingly, the Supreme Court in the case of *Williams v Tah* [http://archive.is/9NKp] held that barring individuals from holding public office for thirty years was not in consonance with the Constitution.

[111] Charles Manga Fombad, *supra note* 1, 8

compensations for victims who have been victimized and brutalized by the conflict and to deter future occurrence, the Commission recommended the promotion of good governance and upholding human rights.[112]

The report is no doubt earth-shaking, partly because its recommendations affected many prominent persons across different strata of the society. The reactions were swift in coming: former warlords condemned the report; the President minimally made supportive remarks; some challenged the constitutionality of some recommendations; commentators called the report a moral confusion but the people of Liberia were largely supportive and satisfied with the outcome of the Commission's assignment. Little progress has however been recorded in the implementation of the recommendations of the report of the Commission[113] so as to ensure justice for victims.

d. Nigeria

After her independence in 1960, Nigeria had her first military coup in 1966, which led to a civil war. After the civil war ended in 1970, the country witnessed successive military coups beginning in 1975, which led to a long period of military and despotic rule. After a short-lived democratic rule, further military regimes came to power. The penultimate military leader was Gen. Sani Abacha, who died suddenly and mysteriously in 1998. His death paved the way for the current democratic rule Nigeria now enjoys. During this period, many were subjected to human rights abuses, some were killed and others went missing. Olusegun Aremu Obasanjo (a former military head of state and a retired army general) became the president in 1999 after his release from the military gulag. He set up the Human Rights Violations Investigation Commission (popularly known as Oputa Panel[114] in Nigeria). The Commission was made up of seven persons comprising of five men and two women. Amongst them were legal practitioners, religious leaders, human rights activists and members of the civil society.[115] This Commission, which was headed by a well-respected jurist Justice Chukwudifu Oputa, had the mandate to investigate human rights abuses and killings that had plagued the country between 1966 and 1999. But according to the relevant constituent legal instrument, the Commission

[112] See *Ibid.*; See also Priscilla B. Hayner, *supra note* 8, 68
[113] See Priscilla B. Hayner, *supra note* 8, 68
[114] Commissions set up by the Federal Government of Nigeria are popularly referred to in public domain after the name of the persons who head them. In this case, Justice Chukwudifu Oputa headed it and its informally named after him.
[115] Matthew Kukah, 'Peace versus Justice? A View from Nigeria' in Chandra Lekha Sriram and Suren Pillay (Eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa*. Woodbridge, Suffolk: James Currey, 2010, 171-186, 173

was initially mandated to "ascertain or establish the causes, nature and extent of human rights violations and abuses with particular reference to all known or suspected cases of mysterious deaths and assassinations or attempted assassinations committed in Nigeria between the 1st day of January 1984 and the 28th of May, 1999."[116] Based on heavy criticism, President Olusegun Obasanjo later extended the period of its mandate as seen above from 1966 to 1999. The Commission was also to identify individuals or institutions to be held accountable for abuses and to determine if such acts were politically motivated or if they were policies of governments or the organisations which carried them out.[117] Additionally, the Commission was to recommend measures to forestall future reoccurrence.

The Commission was well received and it generated enormous public interest with the live broadcast on the media. Hearings were held at various locations in Nigeria for about a year. Many of those accused readily cooperated by voluntarily appearing before the Commission. Since some were not ready to cooperation however, the Commission had to use its power of *subpoena* on former military presidents, who refused and got court orders to appear. The Commission was not well funded and had limited resources to execute its mandate. A grant of $450, 000 from Ford Foundation was a lifeline, "which covered the cost of the hearings. Its small number of professional staff, totalling about a dozen persons, were on loan from government agencies; the commission also turned to non-governmental organizations for expertise and assistance in strategic planning. Its limited resources prevented it from undertaking investigations or corroborating cases other than the questioning that took place at the hearing."[118]

Despite the challenges it had, the Commission completed its work and submitted its report containing various recommendations to the President in May 2002. The content of the report was not made public, although it is available online after being independently published by an NGO.[119] Unlike the South African Truth and Reconciliation Commission, the Nigerian Human Rights Violations Investigation Commission was established under an existing law, the Tribunals of Inquiry Act,[120] and not a peculiar legislation specifically drafted for the establishment of the Commission. Some military officers like Gen. Ibrahim Babangida, Gen.

[116] Instrument Constituting a Judicial Commission of Inquiry for the Investigation of Human Rights Violations, published in the *Federal Republic of Nigeria Official Gazette* 86, no 56 (1999), Lagos (Statutory Instrument 8 of 1999), 1
[117] *Ibid.*, 2
[118] Priscilla B. Hayner, *supra note* 8, 250
[119] See [https://dawodu.com/oputa1.htm] accessed on May 10, 2017.
[120] Tribunals of Inquiry Act, Cap. 447, LFN, 1990, Vol. XXIII

Abdusalam Abubakar and Major Gen. Muhammadu Buhari[121] refused to appear before the Commission, intending to undermine the significance of the Commission and also escape justice.

Ultimately, the recommendations of the Commission were not implemented by the government. In his reaction to this, Matthew Kukah, who was the secretary to the Commission and presently is the Catholic Bishop of Sokoto Diocese noted that: "Critics have told me: 'You guys did a great job and look how the president messed you people up. Where is the report now? And why did those generals not appear?"[122] Nevertheless, the Commission toured the length and breadth of the country and had public hearings, where victims and members of affected communities appeared before the Commission to tell their stories. The opportunity to revisit their affliction and ventilate their bottled-up feelings gave many of them real satisfaction, satisfaction not because they were paid huge compensations nor were the perpetrators incarcerated but sequel to their ability to confront the lords of yesteryears and ventilate their minds. In addition, Matthew Kukah surmised that "the fact that the commission at least exposed the underbelly of the military in terms of its incipient corruption and bankruptcy went a long way towards helping Nigerians say with a loud voice, 'Never again' to military rule. We cannot find a more solid rock on which to lay foundations of democracy."[123]

e. Togo

In 2005 a constitutional crisis arose in Togo when President Gnassingbé Eyadéma, who ruled Togo for thirty-eight years, suddenly died and his son Faure Gnassingbé succeeded him contrary to constitutional provisions. This gave rise to a protest, which was suppressed by security forces, and about 500 people were killed. Although an election was hurriedly conducted months after he took over power, in which he scored a controversial victory, the political crisis in the country lingered. A Comprehensive Political Agreement, agreed to by the main political parties and civil society organisations in 2006, supported the creation of a truth commission.[124]

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[121] An insight into the issue of their invitation and subsequent actions taken by either the Commission or the military officers concerned are documented in Matthew Kukah, *supra note 112,* 179

[122] Matthew Kukah, *supra note* 112, 182

[123] *Ibid.*, 183

[124] See also the role of the United Nations in holding the government responsible and pressurising the government to agree to the establishment of the Commission in Priscilla B. Hayner, *supra note* 8, 71-72; See also Jeremy Sarkin and Tetevi Davi, 'The Togolese Truth, Justice and Reconciliation Commission: Lessons for Transitional Justice Processes Elsewhere', Peace and Conflict Studies: (2017) Vol. 24: No. 1, Article 2. [http://nsuworks.nova.edu/pcs/vol24/iss1/2] accessed on July 22, 2017

The president, after initial delay, established in 2009 the Truth, Justice and Reconciliation Commission or in French *Commission de Vérité, Justice et Réconciliation* (CVJR) and widened its mandate to investigate politically related violence and gross human rights abuses dating back to two years before independence from 1958 till 2005. Some analysts think that the extended scope of the Commission was to ensure that not only members of the Gnassingbé dynasty were accused in the end.[125] A Catholic bishop, Monsignor Nicodème Barrigah-Bénissan, was appointed to head the Commission, which also had other ten members made up of university professors, politicians, religious leaders and civil society leaders. The president of the Commission explained the mandate of the Commission: "Our work was to examine the causes of divisions in Togo and propose measures to overcome them…our mandate was to identify the victims, so as to draw up a programme of reparations for them. It was also to identify the perpetrators of the violence and propose recommendations to the government with regard to them. Finally, we were asked to propose reforms to end impunity and ensure non-repetition of these human rights violations."[126] The Commission was specifically given an initial 18 months period with a possible extension of another 6 months.[127]

The Commission set out to work, during its work within a span of about three years, hearings were held in all regions of the country. Nationals abroad were not left out as hearings also took place abroad. After the conclusion of its assignment, it submitted the first volume of its report to President Faure Gnassingbé on April 3, 2012, while three other volumes were submitted in May 2013. At the submission of the first report, the head of the Commission lamented the "minimal participation of suspected perpetrators". This was no doubt a huge disappointment for many Togolese who would have loved to hear their confession and possible words depicting their remorse. The president of the Commission concluded that the "Commission has not therefore enabled the Togolese people to know more today than they did yesterday about the leaders and executors of the crimes in question."[128]

The first volume of the report contains a summary of the whole work and recommendations. Although not officially published, Bernard Bokodjin, a member of the Citizens' Justice and Truth Platform, claimed that volume 3 of the report contains names of victims and the reparation due to them; volumes 2 and 4 appears to have tackled the

[125] Maxime Domegni, 'Togo Transitional Justice Leaves Much to be Done'. JUSTICEINFO. [http://www.justiceinfo.net/en/component/k2/26210-togo-transitional-justice-leaves-much-to-be-done.html] accessed on July 22, 2017
[126] Maxime Domegni, *supra note* 125
[127] Jeremy Sarkin and Tetevi Davi, *supra note* 124
[128] Maxime Domegni, *supra note* 125

background causes of the crisis in the country.[129] Shedding light on the violations of human rights during this period was an essential step for reconciliation amid a people, who have been harassed and disunited by a lengthy period of dictatorship. Unfortunately, the opportunity the Commission offered in accomplishing this may not have been properly managed. The president however set up the High Commission for Reconciliation and Reinforcement of National Unity (HCRRUN), a body that is expected to restore citizen's trust. How far this goes is left for posterity to judge.

According to Jeremiah Sarkin and Tetevi Davi, the Commission made sixty-eight recommendations which covered issues of promoting understanding and respect within the different ethnic groups in the country; need to reform the electoral system, the security sector and the judiciary; put in place measures to combat impunity; provide varying reparations for victims, and create the enabling environment for civil society organisations and human rights activists to thrive.

Furthermore, it recommended the creation of memorial days and the building of monuments; the provision of incentives for reconciliation; the establishment of a body to grant reparation; the investigation and prosecution of crimes committed during this period of its mandate. Jeremy Sarkin and Tetevi Davi also surmise that many of the recommendations have not been implemented. For instance, a recommendation to limit successive presidential terms was ignored by the President as he was re-elected to another term in 2015.[130] This attitude questions the relevance of the Commission.

Sierra Leone

The Sierra Leonean situation chronicles the tale of two processes. The establishment of the Truth and Reconciliation Commission and the Special Court, which ran at a point simultaneously. The Commission is the object of our discussion, while allusion will be made to the Special Court. The Lomé peace accord included the establishment of a truth and reconciliation commission and it was set up by the Truth and Reconciliation Act 2000.[131] It was mandated to ascertain a historical documentation of human rights' violations and abuses from 1991 to 1999;[132] to address impunity; attain healing and

[129] *Ibid.*
[130] Jeremy Sarkin and Tetevi Davi, *supra note* 124
[131] *Truth and Reconciliation Commission Act, 2000* [Sierra Leone], 2 March 2000, available at: [http://www.refworld.org/docid/3fbcee4d4.html] accessed 28 July 2017
[132] This was extended to January 2002 in order to cover the continued conflict at the time because further political violence broke out after the Lomé peace agreement and after the TRC began.

reconciliation; provide deterrence to avoid a repeat of future atrocities; and react appropriately to the needs of the victims, particularly victims of sexual abuse and children.[133]

Though designed to be independent, the UN Office of the High Commissioner for Human rights (OHCHR) was saddled with the administrative management of the Commission and it helped to raise funds and gave administrative support. What happens to the case of the adage that says he who pays the piper dictates the tune? Did this affect the independence of the Commission? It definitely did! The Commission consequently lacked the liberty to take operational decisions. This was not considered "the most advantageous administrative structure."[134] The Commission began its work on July 5, 2002 and ended in October 2004. It had seven commissioners comprising four Sierra Leoneans and three foreigners. The work of Commission gained acceptance amongst the citizens and even ex-combatants, who sent it over 7,000 statements. It addressed four kinds of truth: factual or forensic truth; personal and narrative truth; social truth; and healing and restorative truth.[135] Public hearings were held across the country and confessions were made by offenders. Traditional cleaning rituals were supported by the Commission. Although President Tejan Kabbah did not apologise for the role played by government forces, political parties and the representatives of armed forces and police offered public apologies for their own roles in the conflict.[136]

The four-volume report of the Commission, which was submitted to the government in 2004 and to the public in 2005 contained about 5,000 pages which addressed various issues such as "testimonies, history of the conflict, human rights violations (with statistical apportioning of blame and names of responsible persons), external factors, recommendations, etc. The commission had found that the central cause of the war in Sierra Leone was corruption and an overwhelming control of the executive. Colonialism and the subversion of traditional systems also had an effect. Amongst its recommendations was the need to fight against corruption, the creation of a new bill of rights developed in a participatory constitutional process, the independence of the judiciary, strengthening the

[133] See also Charles Manga Fombad, *supra note* 1,11
[134] Priscilla B. Hayner, *supra note* 8, 58
[135] See Thelma Ekiyor, 'Reflecting on the Sierra Leone Truth and Reconciliation Commission: A Peacebuilding Perspective', in Chandra Lekha Sriram and Suren Pillay (Eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa.* Woodbridge, Suffolk: James Currey, 2010, 153-170, 159
[136] See Priscilla B. Hayner, *supra note* 8, 58 – 59; See also Charles Manga Fombad, *supra note* 1, 11

role of parliament and stricter control of the security forces."[137] These are excellent recommendations *sui juris* because they adequately addressed the dire need of the people but implementation remains an essential aspect to make the fruits of the Commission efficacious in the country. Unfortunately, the government did not make quick progress on the implementation of the recommendations contained in the report of the Commission. However, after some pressure from NGOs and understanding this need, the government designated the National Commission for Social Action to implement the recommendations of the Commission. This body was saddled with the responsibility to execute a programme for reparations and teamed up with civil society organisations to sensitise the populace on the Commission's report and its implementation. By so doing, about 30,000 victims were registered and some victims got an interim payment of $100. Similarly, educational support and health care reparative measures were dispensed to some victims such as amputees and victims of sexual violence.[138]

As noted previously, after the signing of the Lomé accord and after the TRC Act became law, new political violence broke out and the government requested a hybrid tribunal to prosecute those responsible for crimes after November 1996. Thus, the Special Court for Sierra Leone was born in January 2002 with an overlapping mandate with the Commission without a proper guideline on what their relationship will be. The Special Court indeed denied the request of the Commission to allow some indicted detainees in the custody of the Court to participate in the public hearings of the Commission.[139] The different procedures of the Commission and the Special Court definitely constituted a challenge to have permitted access to the detainees.

VI. Conclusion

An unpalatable trait common to many of the commissions discussed above is the partial implementation, non-implementation or total disregard for the report of the commission. The non-binding nature of the recommendations of the commissions makes it for some government a *non-sequitur.* The Commissions lack the powers to compel governments to implement their recommendations and this tends to continue the culture of impunity on the part of government and government officials. The argument could be made that Africa does not need the truth commissions because her leaders treat the outcome of the reports with disdain but such

[137] Charles Manga Fombad, *supra note* 1, 11
[138] *Ibid.*
[139] Priscilla B. Hayner, *supra note* 8, 59, 118

negligent attitude is not limited to the recommendations found in the final reports of many Commissions in Africa alone, but also extended to judgements of courts of law, as there are cases of government also disobeying court orders without regard to the rule of law. Therefore, it cannot be a ground to deprive the truth commissions of the benefits they render on the continent. The leaders only need to wake up to their responsibilities. The argument cannot also stand because some implementations have been carried out and the opportunity the truth commissions afford victims to tell their stories and gain back their dignity cannot be quantified. Sometimes the success of the commissions is determined by their failures and limitations, their success should be determined more by the effects they have on the victims and the perspectives of the victims, not the perception of scholars who may not understand the African orientation or who tend to impose the Western orientation on the African milieu.

On the significance of truth commissions in Africa, Charles concludes that: "It cannot be denied that truth commissions today provide the most viable, flexible and credible mechanism for laying down the foundations of a democratic society in Africa as well as resolving the numerous open or latent conflicts. They provide an avenue for taming, balancing and recasting the anger and desire for revenge in a positive direction that can provide progress, development, peace and prosperity. A number of changes need to be made to make the process worth the time and money expended on it."[140]

One may argue that many of the truth commissions have largely been successful when one limits the success to the actual proceedings of the commissions but the real success should lie in the implementation of their reports. When the reports are fully implemented, the issue of failure may not come up. Unfortunately, many of these recommendations have not been implemented and the reports hidden somewhere. Some political leaders appear to lack the spirit of *Ubuntu* and established these commissions without the requisite sincerity to act upon their results, while exploiting the goodwill of the citizenry. It then raises the question if there is the political will to take the bull by the horns and resolve disputes on the African soil through this approach. Could this be a legacy of colonialism or an interweave between the traditional and modern or even the introduction of democracy and so-called modernity in Africa, which may not completely be beneficial? More need to be done generally in Africa to derive the benefits of this restorative approach to justice. Against this background, the South African TRC stands out in comparison to many others in Africa. It will be discussed in the next chapter.

[140] Charles Manga Fombad, *supra note* 1, 15

CHAPTER FOUR

THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION AND RESTORATIVE JUSTICE

I. Introduction

After years of violence, oppression, victimisation and injustice under apartheid in South Africa, apartheid was defeated and fell, and the country transmuted into a democratic system of governance. This dawn witnessed a new beginning whereby many who were victims of oppression became leaders in the new government of National Unity. Notable was the ascension of Nelson Mandela to the presidency. The deep wound of hatred and dissension, which apartheid had created had not been healed. The new government pondered on how the country could unite and move forward in harmony with common purpose and destiny. President Nelson Mandela and his government had an onerous task to heal the wounds, not necessarily obliterating the scars, and charting a new course for a new dawn in the rainbow nation. This gave rise to the idea and the birth of the South African Truth and Reconciliation Commission (hereinafter called "SATRC"). In this chapter, the objectives of the SATRC will be discussed; the achievements of the SATRC will be highlighted; a dispassionate critique of the establishment of the SATRC and other issues surrounding the operations, approach and activities of the SATRC will be made, and the implementation of the recommendations contained in the final reports of the SATRC will be investigated.

II. Objectives of the South African Truth and Reconciliation Commission

In the effort to unravel the objectives of the SATRC, the legal instrument establishing the Commission is vital and helpful in this search. The legal instrument delineated the functions and the objects of the Commission. An Act of the Parliament of South Africa was issued. The *Promotion of National Unity and Reconciliation Act, 1995*[1] (hereinafter referred to as the "Act") came into force to give the SATRC the needed legal authority to carry out its functions effectively. The Act[2] saddled the SATRC with the responsibility of investigating and establishing "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons

[1] Section 3(1)(A) of the *Promotion of National Unity and Reconciliation Act, no, 34 (1995)*
[2] Section 3(1)(A)

responsible for the commission of the violations, by conducting investigations and holding hearings." The Act went further to empower the SATRC to take "measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights".

The SATRC, a semi-judicial body, was designed to serve as a post-conflict truth-seeking body. It had the extended scope of investigating violations of human rights perpetrated between 1960 and 1994. This investigation is to cover all sides of the divide in the struggle against apartheid. This therefore meant the investigative net will be extended to members of the apartheid regime, the South African security apparatus and other groups who were fighting against apartheid and the apartheid regime. The SATRC was created to establish probable causes, nature and even the extent of grave human rights violations, not only within the South African borders but also outside the South African borders. The investigation is expected to be accomplished within the stipulated timeframe.

The SATRC was consequently saddled with the responsibility to develop measures, which will aid the restoration of dignity to victims. Section 3(1) (c) gives credence to this assertion when it gave powers to the SATRC to establish "and make known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are victims, and by recommending reparation measures in respect of them". The SATRC envisioned to gather relevant evidence and adopted to hear testimonies from the victims and their oppressors. Public hearings were to be held in different locations in the vast country, thereby affording the victims and the perpetrators of gross human rights violations to meet face to face.

The SATRC was instituted to facilitate the grant of amnesty to those perpetrators of crime and gross human rights violations,[3] who are eligible in accordance to the conditions laid down. There were three conditions for amnesty: actions must have taken place between 1960 and 1994; such actions must have been politically motivated and the applicant in question must reveal the facts surrounding the crime he admitted to have committed.[4] Surviving victims and the families of deceased victims needed to know the truth. Many family members had vague or no ideas of what truly happened to their loved ones. Offering amnesty in return for

[3] S. 3 (1) (b) of the *Act*
[4] Cath Senker, *Days of Decision: Mandela and Truth and Reconciliation*. Chicago: Heinemann Library, 2014, 34

confession of crimes committed was intended by the SATRC to achieve this aim of telling the truth, so that knowing the truth, the process of reconciliation and healing could be enhanced.

The SATRC was set to promote healing relationships in the larger society but firstly to assuage the feelings of individual victims so as to discourage them from seeking retribution as against forgiving the past. According to Alex Boraine, "[o]ne of the primary motivations for and objectives of the Commission was to bring about a measure of healing to a very deeply divided society in which many citizens have been severely hurt."[5] One can then argue that the effort to heal the individual could consequently lead to the exigent collective healing, which the bruised nation earnestly needed.

An important mandate alluded to above is that of uncovering the truth in order to help the South African citizens put the past behind them and foster the process of a national reconciliation. The Act sets as vital objective of the SATRC the end "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."[6] The president and the drafters of the Act recognised that this was the way forward to achieving the needed national unity because knowing the truth means moving forward and would be major step in attaining national unity and reconciliation.

Section 3 (1) (d) mandates the SATRC to compile a report, which will provide a "comprehensive account of the activities and findings of the Commission" as much as possible. The report was also expected to contain recommendations proffering steps to take to avoid "future violations of human rights. Further powers and duties were given to the SATRC by the Act to enable the SATRC achieve its objectives.

The SATRC as noted above was established in 1995 by the enabling law and began its public hearings in 1996. In order to achieve these laid down objectives, President Nelson Mandela inaugurated the SATRC, which had seventeen Commissioners comprising seven women and ten men; seven persons of African descents, two *coloured*, two Indians and six *whites* (inclusive of two Afrikaners).[7] Archbishop Desmond Tutu was appointed the Chairperson of the SATRC, while Dr. Alex Boraine, a former President of the Methodist Church of Southern Africa and a former member of Parliament, was appointed the Deputy Chair. Other Commissioners

[5] Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford: Oxford University Press, 2000, 295
[6] Sec. 3 (1) of the *Act*
[7] Alex Boraine, *supra note* 5, 75; See also Desmond Tutu, *No Future Without Forgiveness*. London: Rider Books, 1999, 65

included:[8] Dumisa Ntsebeza, Mary Burton, Bongani Finca, Yansmin Sooka, Richard Lyster, Sisi Khampepe, Glendea Wildschut, Fazel Randera, Chris de Jager, Mapule Ramashala, Hlengiwe Mkhize, Denzil Potgieter, Koza Mgojo, Wynand Malan, and Emma Mashinini. These Commissioners had diverse professions and ideological orientations and amongst them were ministers of religion, medical practitioners, former legislators, judges and lawyers, who were notable human rights advocates. The hearings ended in 1998 and the SATRC subsequently submitted its five-volume final report, which was handed over by the Chairperson of the SATRC to the then President Nelson Mandela. The TRC was consequently dissolved in 2001 by President Thabo Mbeki, who succeeded President Nelson Mandela. Nevertheless, the "sixth and seventh volumes of the commission's report were concluded in March 2002 and released in 2003, over six years after the commission began."[9]

The Commissioners of the SATRC, consequent upon the above-mentioned legal framework, took the bull by the horns and set out to achieve the objectives the SATRC was mandated to accomplish. Three Committees were constituted to aid the SATRC to attain its objectives and function efficiently. The Human Rights Violations Committee was saddled with the responsibility of investigating gross violations of human rights, which were carried out during the apartheid rule in South Africa, and not neglecting similar acts perpetrated outside the shores of the country, since some violations of human rights were perpetrated by the apartheid regime not only in South Africa but also in some neigbouring countries in southern Africa. The investigation was to cover the stipulated period from 1960 to 1994. The second Committee was the Amnesty Committee. This Committee had the arduous task to receive applications for amnesty, organise appropriate hearings and take decisions on whether applicants were qualified to be granted amnesty or not based on the criteria set. The last Committee was the Reparations and Rehabilitation Committee, which had the responsibility to evaluate or measure the forms of reparations that were due to various victims. When the measures involved pecuniary compensation, the Committee was to ascertain what amount is due to such victims.[10] These tasks would be the yardsticks to be used to judge the success of the SATRC's achievement of its set objectives below.

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[8] Alex Boraine, *supra note* 5, 75ff; Desmond Tutu, *supra note* 7, 66ff

[9] Priscilla B. Hayner, *Unspeakable Truths*: *Transitional Justice and the Challenge of Truth Commissions*. (2nd Edition) New York: Routlege, 2011, 31

[10] Alex Boraine, *supra note* 5, 85; Cath Senker, *supra note 4*, 30: The SATRC proposed that victims, recognised and properly identified by the SATRC were to be given an annual cash grant for six years irrespective of the peculiar circumstances of their degree of suffering. This became a subject of an acrimonious debate within the SATRC and proponents from every divide adduced reasons for and against their persuasive opinions.

III. Achievements of the South African Truth and Reconciliation Commission

The evaluation of the achievements of the SATRC should be done in consonance with its objectives. The achievements of the SATRC cannot therefore be discussed without reference to its objectives. Perusing the objectives of the SATRC, we must raise the pertinent question if the SATRC succeeded in fulfilling the objectives set for it or not. Its success should then be measured with the yardstick of its mandate and not what is outside of this mandate.

National unity and reconciliation was very vital for a country at the crossroads. Forgiveness was vital to national unity and reconciliation because there cannot be reconciliation without forgiveness. The SATRC understood this axiom by pursuing the task of helping victims to forgive perpetrators of crimes. Forgiveness does not mean that offenders should escape punishment but it helps to stem revenge. Without forgiveness, the cycle of violence is perpetuated and the rule of law would be undermined. Forgiveness may not have offered the justice anticipated by many; it does not, however, suggest that offenders were excused of their crime. The SATRC consequently demonstrated that forgiveness was possible. This major step can be said to have been achieved by the SATRC as it somewhat achieved the reconciliation intended. An opinion poll[11] showed that among the respondents questioned, 70% African, 59% Asian, 53% coloured and 26% white respondents believed that the SATRC will promote reconciliation. The high percentage among the Africans tells so much about the belief in the process based on their cultural background, although they suffered more than any other race. Nevertheless, they were ready to forgive and seek reconciliation, and forgiveness was eventually granted by many. *Ubuntu* at work!

The SATRC succeeded in accentuating a central feature of the African perspective to the world. The notion of *Ubuntu* leads one "to choose to forgive rather than to demand retribution, to be magnanimous rather than wreaking vengeance".[12] Therefore: "The TRC demonstrated the moral and transformative potential of truth telling as well as forgiveness. The need to elicit forgiveness was not part of its mandate, but by virtue of its importance it became a central feature in the TRC's attempt to deal with the truth and promote reconciliation"[13] The

[11] Heather Deagan, *The Politics of the New South Africa: Apartheid and After*. Harlow: Longman Press, 2008, 141

[12] Desmond Mpilo Tutu, *supra note* 7, 34

[13] John de Gruchy, 'The TRC and the Building of a Moral Culture' in Wilmot James and Linda Van de Vijver (Eds.), *After the TRC: Reflections on Truth and Reconciliation in South Africa*. Athens, Ohio: Ohio University Press, 2000, 167-171:170

importance of forgiveness in forging a collective future in South Africa was grave. Forgiveness was key and the SATRC ensured that this was achieved.

A stroke of genius from the SATRC was its wide definition of the community. It addressed *all* South Africans, irrespective of colour or creed, not demarcating between European or native African descent. It contemplated *all* South Africans as part of the society in need of reintegration. According to Douglas, "[t]his principle stands in contrast to the notion of chthonic law being a law used by small, homogenous societies."[14] By so doing, the SATRC fairly forged a societal transformation, where the beginning of a common identity was started and it began a vital process of nation building.

The recommendations contained in its report constituted a vital roadmap towards national reconciliation and prepared a legal background for legislations which addressed inequality and injustice in the society. Reconciliation is a process and the SATRC began the process. Kick-starting the process is arguably an achievement. It is the responsibility of the people of South Africa to further this ideal of the Commission. Alex Boraine believes: "The Commission not only played a role in assisting individuals to pick up the pieces of their lives and indeed to stretch out a hand of friendship to the perpetrators, but also acknowledged frankly and frequently that reconciliation cannot be achieved by a single commission in a limited period and with limited resources."[15]

In carrying out its functions and discharging its mandate, the SATRC conscientiously struggled to remain impartial, although some individuals and organisations accused the SATRC of partiality. Some members of the ANC (the ruling party) felt their party was being criminalised by the SATRC for its fight against apartheid and mounted even legal challenges to prevent the SATRC from releasing such reports on the ANC. Nelson Mandela was, however, of a diverse opinion when he said: "The ANC was fighting a just war, but in the course of fighting the just war, it committed gross violations of human rights. Nobody can deny that, because some people died in our camps and that's what the TRC said."[16] The SATRC looked at the human rights violations involving all sides and publicly exposed the human rights violations and crimes committed under the apartheid regime irrespective of who was involved.

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[14] Douglas H. M. Carver, 'The Xhosa and the Truth and Reconciliation Commission: African Ways' Tribal Law Journal, Volume 8, 2007-2008, 34-51:49 [http://lawschool.unm.edu/tlj/volumes/vol8/8TLJ34-CARVER.pdf] accessed on April 10, 2017

[15] Alex Boraine, *supra note* 5, 356

[16] Cath Senker, *supra note* 4, 42

The SATRC in the exercise of its duty demonstrated that telling the truth had moral and transformative potentials. It could be argued that telling the truth alone will not help the process of reconciliation but such an argument could undermine the therapeutic effects of telling the truth and knowing the truth. In telling the truth and narrating past events, it helped to hold perpetrators accountable. Although not declared guilty by a law court, they confessed to their crimes and acknowledged their responsibility and were rather held accountable for various violations of human rights they perpetrated.

Some may claim that what the SATRC revealed was already known, however, even what was known or probably speculated was now officially confirmed, aside from the fact that many other things said were not previously known at all. Some missing people were confirmed dead and gory details of gross human right abuses were recanted. Bodies were exhumed and were given decent and befitting burials and their graves became identified. This is of a grave importance for an African. In the words of Desmond Tutu "…the families were able to give the remains of their loved ones a decent burial. In the case of ANC cadres, they received a funeral with appropriate military honours, often with a cabinet minister or deputy in attendance. All the families who were able to do this thanked the Commission profusely for finding the bones so they could bury them decently. Now they knew what had happened to their loved one and they experienced closure."[17]

The SATRC equally showed that its work could provide a deterrence for future occurrence. The lack of punishment may suggest that the SATRC does not serve as a deterrence but this writer thinks otherwise. Perpetrators who had to face their victims face to face would be deterred knowing they would not want to go through such an experience in the future. Others, knowing what had happened to perpetrators would not want to be in similar situations.

To be qualify for amnesty, perpetrators were to tell the truth. When perpetrators consequently openly confessed to their crimes, the community knew the truth and that put an end to any probable collective denial. Such a foreclosure succeeded in articulating the new government's resolve to break from the history of impunity, which was associated with the past apartheid regime and then march into a new culture that respects and uphold the tenets of justice and human rights, which are known and acceptable principles inherent in a democratic society.[18]

[17] Desmond Tutu, *supra note* 7, 152
[18] Eric Brahm, 'Truth Commission' Beyond Intractability. [http://www.beyondintractability.org/essay/truth-commissions] accessed on April 4, 2017, 6

The SATRC succeeded in making many religious organisations confess to doing little or nothing to speak loudly against the evil of apartheid. They acknowledged their complicity and recognised their omission and/or commission, and for this reason, their leaders tendered apologies. Religious institutions should be seen to be vanguard for justice and equity, and not be silent in the face of oppression and injustice.[19]

The SATRC also succeeded in putting in place the process for a debate on moral values and the necessity to build a moral culture which will endure and be put into practice; a culture which will emphasise what should be done for the common good of the society. According to John de Gruchy, the SATRC has opened up the debate and provided "the raw material for the task. The critical question is how we are to take the debate further and process the memory of our corporate past that the SATRC has set before us. What we do with these memories will, in large measure, shape the moral contours of the future South Africa. Our past will either be redeemed, or our future will be cursed, depending on our response."[20]

Telling the truth and the expression of feelings were important for many people. The SATRC afforded victims and families the occasion to tell their stories.[21] The SATRC, in this light, left a legacy in helping to uncover the truth and "[w]ithout the TRC, the truth would not have come out [that] this thing was planned by the police".[22] Perpetrators confessed wrongdoings without hard evidence which would have been difficult to achieve through a traditional court proceeding because essential evidence were already destroyed in some cases.[23] Many of such cases would have ended up even in acquittal if they were tried in court. In a criminal case, the prosecutor has the burden of proof in court, to prove beyond reasonable doubt. How then could even the best prosecutor prove *mens rea* and *actus reus* without a balance of evidence?

An advantage of the SATRC, which could also be regarded as its achievement, is the ability to cover many cases involving a very long duration within the relatively short time it was given to achieve its mandate. The SATRC was ultimately able to reach the truth where other methods failed. Some cases which had eluded police investigations came to the fore.[24]

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[19] Lyn S. Graybill, *Truth & Reconciliation in South Africa: Miracle or Model*. Boulder, Colorado: Lynne Rienner Publishers, 2002, 135 – 143
[20] John de Gruchy, *supra note* 13, 171
[21] Alex Boraine, *supra note* 5, 344
[22] Ciraj Rassool, Leslie Witz and Gary Minkley, 'Burying and Memorialising the Body of Truth: The TRC and National Heritage' in Wilmot James and Linda Van de Vijver (Eds.), *After the TRC: Reflections on Truth and Reconciliation in South Africa*. Athens, Ohio: Ohio University Press, 2000. 115-127, 123
[23] Lyn Graybill, *supra note* 19, 57
[24] Desmond Mpilo Tutu, *supra note* 7, 139ff

On its mandate to investigate and establish a somewhat complete picture of causes, nature and extent of serious human rights violations, the SATRC attempted to paint these pictures how incomplete they may appear to be. The report of the SATRC made findings, which were not completely acceptable to many. President Botha, his government and the security forces were found to be responsible for gross human rights violations; leaders of some organisations such as the Volksfront, the African National Congress, the Inkatha Freedom Party, etc. were held responsible for some human rights violations and deaths, and some individuals such as Winnie Mandela were personally held responsible for their wrongful acts. The SATRC created a record of crimes of the past thereby reducing cases of denials or lies. More so, the ordinary people found a voice to express the pain and hurt they experienced under the repressive regime. For some, justice was served by the SATRC to the effect that those who were treated unjustly in the past had their day and had a voice.

The reparations and rehabilitation Committee among other things proposed urgent and interim needs, gave symbolic reparation such as statues or sculptures to help people remember their loved ones, created some programmes to help healing in the communities and instituted an institutional framework to prevent such a carnage in the future.[25] This is in furtherance of its effort to fulfil the objective of taking measures for granting reparation, rehabilitating and restoring the dignity of the victims of varying violations. In terms of reparation, benefits could be divided into three different dimensions.[26] On the individual level, death certificates were issued to families of victims, bodies were exhumed and properly buried; marked graves for the dead; victims had fictitious criminal records hitherto ascribed to them cleared and outstanding legal matters relating to violations were resolved. At the level of the community, streets and facilities were renamed; memorials and monuments were erected and appropriate cultural ceremonies were carried out. The national benefits included: renaming of public facilities; new monuments and memorials were erected and a Day of Remembrance and Reconciliation was inaugurated.

The approach adopted by the SATRC ensured that "[r]estorative justice merges from this desire to create a new nation – the desire to reconstruct a just society. Punishment alone for perpetrators, in accord with prosecutions and the requirements of an arms-length criminal system, hinders the achievement of restorative justice. The better path, the believers in restorative justice suggest, is forgiveness and reconciliation preceded by an accounting of

[25] Ciraj Rassool, Leslie Witz and Gary Minkley, *supra note* 22, 116
[26] Kenneth Christie, *The South African Truth Commission*. London: Macmillan Press Ltd, 2000, 150

violations, a confronting of perpetrators by victims, reparations, and a continuing emphasis on personal motivations and transformations. It is the individual-centered approach of the best truth commissions that contributes meaningfully to restorative justice."[27] If other forms of retributive justice had been employed, many offenders would have probably gone underground or fled the country. Such a circle may bring the justice that some people desired but it may not have ensured a peaceful co-existence by breaking the cycle of revenge. This lays credence to the words of Mahatma Ghadhi when said: An eye for eye would only end up making the whole world blind.

The SATRC recognised the division in the country but it did not only succeed in acknowledging the divide in the country but also sought to bridge the divide. Alex Boraine said: "There are many who would argue that an achievement of the Commission was not to perpetuate the myth of the co-called rainbow nation where everyone claims to love one another, but to reveal the serious divide that does exist; the acknowledgment of this divide is the first step towards bridging it…I think the Commission can claim some credit for helping many to face up to the truth of the past, with all its horror and shame, not in order to dwell there but to deal with that past and move into a freer existence."[28]

The seeming success of the SATRC generated an increased interest in the truth (and reconciliation) commissions approach globally and many other truth (and reconciliation) commissions created after the SATRC wanted theirs be modelled towards that of the SATRC. Priscilla Hayner believes "[t]he increased interest in truth commissions is, in part, a reflection of the limited success in judicial approaches to accountability, and the obvious need for other measures to recognise past wrongs and confront, punish or reform those persons and institutions that were responsible for violations"[29]

Will or can all the victims of apartheid be satisfied with the work and results of the SATRC? It is hardly possible that everyone would be satisfied no matter the outcome of the work of the SATRC. An expectation that everyone would be satisfied and all and sundry applauding the work of the SATRC would be an unrealistic and awkward prospect. Ultimately, the work and results of the SATRC were seen as a success and hailed by many irrespective of the dissenting

[27] Robert I. Rotberg & Dennis Thompson (Eds.), *The Morality of Truth Commissions: Truth V. Justice*, Princeton. New Jersey: Princeton University Press, 2000, 10-11
[28] Alex Boraine, *supra note* 5, 343
[29] Priscilla Hayner, 'Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide' in Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press, 2000, 34

tones. Tutu adds to the debate when he said: "We found that many who came to the SATRC attested afterwards to the fact that they had found relief, and experienced healing, just through the process of telling their story. The acceptance, the affirmation, the acknowledgment that they had indeed suffered as cathartic for them. If this had happened to only one person, then we would have said that the SATRC had more than justified its existence. The fact that many people said the same made us wish we could have afforded many opportunity of unburdening themselves of the heavy weight of their anguish."[30] Although not everyone was able to forgive, many were able to and that accounted for the relief and healing they experienced.

IV. A Critique of the South African Truth and Reconciliation Commission

A story narrated by Father Mxolisi Mpambani portrays the scepticism expressed by adversaries of the restorative approach to justice, whose achievement we have just discussed above. The narrated story is subsequently restated as follows: "Once, there were two boys, Tom and Bernard. Tom lived right opposite Bernard. One day Tom stole Bernard's bicycle and every day Bernard saw Tom cycling to school on it. After a year, Tom went up to Bernard, stretched out his hand and said, 'Let us reconcile and put the past behind us.' Bernard looked at Tom's hand and said, 'And what about the bicycle?' 'No,' said Tom, 'I'm not talking about the bicycle - I'm talking about reconciliation.'" [31]

The story of Father Mxolisi Mpambani about Tom stealing Bernard's Bicycle illustrates the belief of those who argue that reconciliation is impossible where injustice subsists or where retributive justice has not been served. While the story somewhat illustrates the South African situation, it does not relate wholly to the workings and findings of the SATRC for the fact that it was not just the perpetrators who came asking for reconciliation without any remorse, but a platform was created to make the victims express themselves, narrate their pains and grief, and accuse their offenders who consequently felt the obligation to admit wrongdoings in some instances, and apologised and requested amnesty. Sequel to this, the SATRC received some hard knocks right from the beginning. Some argue that it is improper to let go of some of South Africa's most notorious criminals after admitting their heinous crimes but a culture of human rights should not be built on denial of the past or a cycle of revenge, therefore making the people know the truth about the past and reconciling the different parties in South Africa was essential.

[30] Desmond Mpilo Tutu, *supra note* 7, 127
[31] Cath Senker, *supra note* 4, 45

Some have pointed out that most of those who committed crimes did not appear before the SATRC to testify, and those who did appear to testify were forced to do so. Some who eventually testified "tried to evade, conveniently forgot, and transferred responsibility. Interestingly, acceptance of the results of the TRC was much greater amongst South Africans of African descent than it was amongst those of European descent. One study, in fact, compared the views of Xhosa about the TRC to the views of Afrikaners and English South Africans and found that the Xhosa were far more likely to accept that the TRC uncovered the truth and brought about reconciliation."[32]

The question arises whether the approach adopted by the SATRC by granting amnesty to offenders contravened rules of international law. What happened to the duty of States to prosecute perpetrators of heinous crimes under the Geneva Convention?[33] Although the Rome Statute of the International Criminal Court[34] establishing the ICC does not recognise domestic amnesty, it is however not applicable in this instance because treaties are binding only on its contracting parties. Similarly, it was also not in force by the time the SATRC finished its work in 2001. As a general defence, it could be argued that the prosecution of perpetrators in a transitional government could pose special problems, and that could serve as a defence to derogate from fulfilling the provisions of international law.[35] Nevertheless, the SATRC did not grant amnesty to all offenders. There were further prosecutions in some instances and those who were granted amnesty were those who met the criteria set for the grant of amnesty.

There is the argument that the SATRC had a short period to investigate about 34years of abuse, suggesting that the duration the SATRC had was insufficient to achieve significant result. It is also argued that due to the duration and complexities of the South African society,[36] many victims of the repression were left out and couldn't testify before the Commission and their cases were never heard. But what court or judicial system would have succeeded in prosecuting all the atrocities that took place in South Africa for those years even if given more time?

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[32] Douglas H. M. Carver, *supra note* 14, 50

[33] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287

[34] Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, entered into force July 1, 2002

[35] Paul van Tyl, 'Justice without punishment: Guaranteeing Human Rights in Transitional Societies' in Charles Villa-Vicencio and Wilhelm Verwoerd, *Looking back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press, 2000, 42-57, 50

[36] South Africa is a big country with a massive landmass of 1,221,037km^2. Traversing the different centres around the country for public hearings was cumbersome and time-consuming. With a huge population of over 55 million people, there were many victims who could not present their applications or be heard.

The *Promotion of National Unity and Reconciliation Act* establishing the SATRC did not require applicants for amnesty to apologise, be remorseful or show contrition as part of the conditions for obtaining amnesty.[37] It could be asserted that a condition for remorse could have help the healing process and assuage the feelings of the victims or families of the victims. The question then arises, how does one test a sincere remorse or contrition if such a condition is made a prerequisite? Tutu believes: "If there has been such a requirement, an applicant who made a big fuss about being sorry and repentant would probably have been judged to be insincere, and someone whose manner was formal and abrupt would have been accused of being callous and uncaring and not really repentant. It would have been a no-win situation."[38] The conditions given did not include apology but many offered their apologies. For instance, in response to the admonition from Desmond Mpilo Tutu, the Chairperson of the Commission, Winnie Mandela (the former wife of President Nelson Mandela) apologised for the circumstances leading to the death of Stompie Moeketsi saying: "Thank you very much for your wonderful wise words, and that is the father I've always known in you. I will take this opportunity to say to the family of Dr. Asvat how deeply sorry I am, and I say to Stompie's mother how deeply sorry I am. It is true, things went horribly wrong. For that part of those painful years when things went horribly wrong, and we were aware that there were factors that led to that, for that I am deeply sorry."[39]

While the Amnesty Committee acted fast and offenders were left to go scot-free, reparation for survivors or dependants of victims did not come at all or came too late. This writer however believes that the SATRC was not to be blamed for the delay or lack of reparation. The SATRC could only recommend and not implement directly unlike the actions on issue of amnesty.

Gillian Slovo, whose father was killed. said: "The TRC was never supposed to be about justice; it's about the truth."[40] This appears to vitiate the worth of truth telling but knowing the truth is vital and not misplaced. For a black African, not knowing the grave of a loved one is an unbearable pain, which comes with untold emotional grief. For some, the SATRC was a success in this regard. Perpetrators confessed to the abduction and murder of victims and they also disclosed where such victims were buried. Exhumations were consequently done and supervised by officials of the SATRC. Julian Edelstein concludes: "For the victim's families,

[37] Lyn S. Graybill, *supra note* 19, 40; Desmond Mpilo Tutu, *supra note* 7, 47
[38] Desmond Mpilo Tutu, *supra note* 7, 48
[39] Desmond Mpilo Tutu, *supra note* 7, 135; Julian Edelstein, *Truth & Lies: Stories from the Truth and Reconciliation Commission in South Africa*. New York: The New Press, 2002, 50
[40] Cath Senker, *supra note* 4, 28

many of whom had waited years, not knowing what had happened to their spouses, their parents or their children, this was often the first confirmation that their missing relatives were actually dead."[41] Edelstein continues: "Nevertheless, there has been criticism that the full truth did not come out. One high-profile case involving the killers of Steve Biko points to the limited success the TRC's Amnesty Committee had in uncovering the entire truth."[42]

Unlike the SATRC, victims in the Rwanda ICTR setting were often afraid to give their testimony "because they fear reprisals if they point the finger, since the perpetrators live in the same neighborhood."[43] The International Criminal Court (ICC) goes a great length to protect witnesses during examination in chief or cross examination. Per ICC, "[t]he Court has a number of protective measures that can be granted to witnesses who appear before the Court and other persons at risk on account of testimony given by a witness. The Court's protection system is founded on best practices which are aimed at concealing a witness' interaction with the Court from their community and from the general public. These practices are employed by all people coming into contact with witnesses."[44] That was not a frequent or familiar occurrence during the proceedings of the SATRC. The SATRC on the other hand ensured respect for the human dignity of witnesses instead of the hostile cross-examinations they may have been subjected to during legal or judicial proceedings. In the normal judicial proceedings, witnesses appear to be on trial rather than telling their stories. During the proceedings of the SATRC, many witnesses appeared before the public hearings without the fear of retribution, which is not the same with the judicial approach or even some earlier truth (and reconciliation) commissions. The SATRC became a pacesetter in this regard and "was the first big departure from this trend and, in general, it has been more common in Africa."[45]

The idea of the SATRC was criticised right from the beginning.[46] The criticism did not abate when it was constituted and as it commenced its assignment. Some "argued that the composition of the TRC was in favour of the ANC and the liberation cause; the Commission was unbalanced in this sense. The Chairman also had a Liberation bias and in their view should

[41] Julian Edelstein, *supra note* 39, 211
[42] Lyn S. Graybill, *supra note* 19, 69
[43] *Ibid*., 164
[44] According to the information on its website, the ICC goes further to mention specific measures adopted in this regard. It says that "such measures may consist of face/voice distortion or the use of a pseudonym. Separate special measures can be ordered by the Court for traumatised witnesses, a child, an elderly person or a victim of sexual violence. These can include facilitating the testimony of witnesses by allowing a psychologist or family member to be present while the witness gives testimony or the use of a curtain to shield the witness from direct eye contact with the accused." [https://www.icc-cpi.int/about/witnesses] accessed May 25, 2017
[45] Eric Brahm, *supra note* 18, 3
[46] Kenneth Christie, *supra note* 26, 115

have considered excusing himself from the commission. Thirdly, there was very little effort made to grasp what was going on with the military side of the operation along with an oversupply of academic and human rights' oriented commissioners with a typically sentimental approach. And lastly they appeared to suffer from a lack of strategic planning according to the Freedom Front."[47]

The SATRC was also accused of its extensive overtly religious undercurrent and style. Prayer sessions were done before the daily sessions began. Desmond Mpilo Tutu defended this and said they couldn't begin without praying. In the end, it worked, the religious sentiments of some persons were appealed to and it helped to assuage their feelings.[48] Though a quasi-judicial body, it was headed by a religious leader and had other religious leaders as members. The African is innately religious and issues of religion are extremely important in diverse affairs of his/her life. The approach of the SATRC could then be regarded as a tactic to appeal to the African mind to show forgiveness despite the hurt and to ensure that the notion of *Ubuntu* thrives.

Ability of victims to tell their stories relieves them of stress, depression and anxiety, and at the same time promotes healing. The reverse could conversely be the case when victims do not have such an opportunity to express themselves. Individual healing could lead to national healing and reconciliation. The process led to knowing the truth, which aided the healing process. It is relevant to note that even if one is prepared to forgive and the knowledge of what to forgive is lacking, the act or the process of forgiveness could then be hindered because one does not know whom or what to forgive. The SATRC therefore offered the opportunity to know whom and what to forgive.

The SATRC had a legal basis as it was established by law. President Nelson Mandela convened the SATRC through the instrumentality of the Government Gazette of December 15, 1995. This is one of the peculiar characteristics of the SATRC, which many other truth (and reconciliation) commissions in the world and particularly on the African continent lacked. Without legal background and authority, the truth (and reconciliation) commissions will lack credibility and integrity. It then becomes easier for respective Heads of State and Government to disregard and discard reports, which are outcomes of the truth (and reconciliation)

[47] *Ibid*., 114
[48] Piet Meiring, 'The *Baruti* versus the Lawyers: The Role of Religion in the TRC Process' in Charles Villa-Vicencio and Wihelm Verwoerd, *Looking back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press, 2000, 124ff

commissions they set up, and never implement such conclusions and recommendations because of the lack of legal constraints.

One could argue that the SATRC was too generous to the perpetrators of crimes during the apartheid regime and this could be based on the ground that the amnesty granted made it difficult to subsequently prosecute offenders for crimes they had committed. Some believe that there was a mockery of the amnesty system because many applicants for amnesty were not granted, while some were granted.[49] The argument appears to be watery because the SATRC had conditions set as prerequisite for the grant of amnesty. The grant of amnesty, before it was granted, was therefore dependent on the fulfilment of the compulsory conditions sine qua non. The amnesty granted was not just a blanket hand down for every Tom, Dick and Harry.

The SATRC was further criticised for not targeting the decision and policy makers. The focus was not on the leaders of the security forces and main agents of apartheid, and they were not blamed for the abuses and held responsible for actions during the repressive regime. The SATRC rather chose to focus on those on the ground who were carrying out the policies of the policy makers[50] For instance, "[c]ommentators have noted that de Klerk may have ruined chances for reconciliation by refusing to come to terms with the past and by not responding to the politics of grace offered by the Truth and Reconciliation Commission. P. W. Botha, the former state president, also refused to apologize to the victims of apartheid."[51] Tutu lamented this and wished a white leader had stepped forward to apologise for the wrongs of the past.[52]

The SATRC had a comparatively adequate financial provision in contrast to some truth (and reconciliation) commissions, which were established in other parts of Africa. For instance, it had a good staff strength of three hundred personnel and ran on a budget of $18 million per year for its two-and-a-half-year existence.[53] This gives credence to the assertion that it was one of the best conceived and well-funded truth (and reconciliation) commissions. In comparison to judicial tribunals, it was cheaper and more manageable.[54] The prosecution of some leaders of apartheid cost South Africa a huge sum yet it ended in an acquittal. Erin Daily puts this in proper perspective expressing that "[i]n South Africa, the choice of criminally prosecuting the leaders of the apartheid regime was bluntly presented to the citizens: the [approximately US

[49] Cath Senker, *supra note* 4, 44
[50] *Ibid.*, 45
[51] Lyn Graybill, *supra note* 19, 41
[52] *Ibid*., 42
[53] Priscilla B. Hayner, *supra note* 9, 28
[54] The ICC for instance had a budget of €139.5 for 2016 alone according to its website information [https://www.icc-cpi.int/about] accessed on May 28, 2017

$1.3 million] 'in taxpayer-supported court costs' that were spent to prosecute the former Minister of Defense yielded an acquittal. Punishment for wrongs is important, but so are electricity, medical care, jobs programs, education, housing, and so on."[55]

In conclusion, no human institution is perfect but the SATRC should be commended for accepting to accomplish an arduous task of confronting the sad past. Sequel to this, President Nelson Mandela while accepting the SATRC's report from the Chairperson, Desmond Mpilo Tutu, said: "I accept the report as it is, with all its imperfections, as an aid that the TRC has given to us to help reconcile and build our nations."[56] In spite of its imperfection, the SATRC did not make witnesses appear to be on trial rather than telling their stories; it helped to limit the likelihood of revenge; it created the platform for perpetrators and victims to be afforded the chance to tell their stories; it laid emphasis on obtaining acknowledgement and not just on obtaining knowledge; it provided education to the society on issues of human rights violations and their prevention; it ensured reparation and rehabilitation for victims; it set time frame for the application of amnesty, it was not in perpetuity but ended its task and submitted its report; and indeed sought to restore what was lost.[57]

V. The Implementation of the Report of the South African Truth and Reconciliation Commission and its Consequences on the South African Society

In the determination to peruse the scope of the implementation of the report of the SATRC, a quick examination of the recommendations of the SATRC is initially expedient. A cursory look at the final report of the SATRC is essential to be able to ascertain what needs to be implemented. What were the recommendations contained in the seven-volumes report[58] submitted by the SATRC and how have successive South African governments executed the various recommended policies and actions for the benefit of individuals and to the advantage of the country? Conscientious efforts will be made below to answer these questions.

At the end of the SATRC's hearings, the testimonies of approximately 21,000 victims or survivors were heard;[59] 849 cases were granted amnesty, while 5, 392 amnesty cases were rejected (some applicants withdrew their applications); the SATRC noted that the National Intelligence Agency was systematically destroying records of the apartheid regime's human

[55] Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*. Int'l Legal Persp. (2002) 12, 73, 104
[56] Dorothy Shea, *The South African Truth Commission: The Politics of Reconciliation*. Washington, D.C: United States Institute of Peace Press, 2000, 3
[57] Alex Boraine, *supra note* 5, 292 - 294
[58] The Final Reports are accessible here. [http://www.justice.gov.za/trc/report/] accessed on July 15, 2017
[59] Out of this number, about 2,000 appeared at the public hearings.

rights violation, while obliterating traces of official memory affecting the apartheid State's security apparatus; the SATRC's report highlighted the background of violence in the country based on its structure and history; it covered cases affecting individuals and named individual perpetrators where necessary without neglecting issues based on the regional trends in the country, as well as the comprehensive institutional and social environment associated with the apartheid regime.[60]

In the final report, the SATRC recommended a reparation programme, which is a measure aimed at affecting every victim or members of their families and equally the communities. The SATRC proposal for reparation and rehabilitation fell into five categories: "urgent interim reparation, individual reparation grants, community rehabilitation, institutional reform and symbolic reparation."[61] The recommended programmes were pecuniary, symbolic and communal in nature. Some victims or family members were to receive about $3, 500 every year for six consecutive years. Further recommendations by the TRC encompassed the reformation of the country's social and political system comprising businesses, faith communities, the judicial and penal systems, security forces, media and health sectors and not leaving out the educational institutions in the process of national reconciliation. The TRC also recommended that cases where amnesty was rejected because they did not meet the criteria outlined should be prepared for prosecution where evidence could be adduced against the applicants. Finally, the SATRC recommended that its documents be archived and by implication, its work should be preserved. The proposed recommendations of the SATRC were evidently based on five international standards namely: redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition.[62]

As earlier mentioned in another part of this work, President Nelson Mandela warmly received the report of the SATRC when it was submitted. He and the government he represented went beyond endorsing the report. Nelson Mandela took a step further and apologised to the affected victims on behalf of the government. Some others had dissenting views about the report. Thus, divergent reactions expressing different views of notable individuals and some organisations followed the submission of the report. The African National Congress (ANC) for instance, through its president, Thabo Mbeki (who then doubled as the Deputy President of South Africa)

[60] United States Institute of Peace, 'Truth Commission: South Africa'. [https://www.usip.org/publications/1995/12/truth-commission-south-africa] accessed on July 2, 2017
[61] Ciraj Rassool, Leslie Witz and Gary Minkley, *supra note* 22, 116
[62] See Truth and Justice: Unfinished Business in South Africa (Amnesty International/Human Rights Watch Briefing Paper, February 12, 2003) [https://www.hrw.org/legacy/backgrounder/africa/truthandjustice.pdf] accessed on July 13, 2017

expressed reservations on the report and as mentioned above, after its initial challenge in court to stop the submission of the TRC's report fail.

Some institutional frameworks were established and existing ones were reformed in order to preserve human rights and uphold the dignity of South Africans. Unfortunately, even where such positive developments took place, there were noticeable limitations. Tshepo Madlingozi articulates this position succinctly when he said: "There have been some institutional reforms such as the establishment of 'institutions of democracy' such as the Human Rights Commission, Gender Commission and the Office of the Ombudsman. All these institutions operate either inefficiently or lackadaisically or in the context of the Ombudsman (Public Protector's Office) in a hostile environment. The police service is still militarized and police brutality is rife."[63] The recognition of the institutional reform was corroborated by Human Rights Watch and Amnesty International saying: "South African governments since 1994, under the leadership of the African National Congress (ANC), have also engaged in significant institutional reform and created new oversight bodies in an effort to ensure that state structures can never again violate human rights norms with such impunity."[64]

The Amnesty Committee of the SATRC was up and doing, compiled quickly the list of those qualified to be granted amnesty; they were granted amnesty speedily and as noted above over 800 individuals were granted amnesty. The government was, however, slow in implementing other recommendations contained in the report, particularly recommendations affecting reparation, prosecution and policy reforms. This occasioned consequent pressure from the civil society organisations. Sequel to this, the government inaugurated a body[65] in 2006, which was responsible to monitor the implementation of the recommendations of the SATRC as contained in the report.

After amnesty was denied, those denied amnesty and recommended for prosecution were expected to be prosecuted but only a limited number of trials was held and as seen below, the government appeared to have been reluctant to prosecute. Amongst the trials done, some ended in conviction. In the case of the attempted murder of Rev. Frank Chikane for instance, some

[63] Tshepo Madlingozi, 'Taking Stock of the South African Truth and Reconciliation Commission 20 Years Later: No Truth, No Reconciliation and No Justice'. A Paper Presented by the Chairperson of the Khulumani Support Group at the 3rd International Colloquium of the Instituto Humanitas at UNISINOS, Brazil on September 16, 2015, 8

[64] Truth and Justice, *supra note* 62

[65] This body was essentially responsible to monitor, particularly issues concerning exhumation and reparation. Bodies were exhumed and given dignified burial, while the taskforce was also saddled with the mandate to continue to investigate unresolved cases of disappearances or missing persons.

senior members of the police force were convicted, while some others ended in acquittal like the trial of Magnus Malan, the former Minister of Defence.[66]

The seeming enthusiasm the SATRC and its report received during the presidency of Nelson Mandela waned with the three presidents[67] after him. Retrogressive steps were taken by successive presidents after Nelson Mandela. One of such is the amendment to the prosecution policy in 2005, which gave the National Director of Public Prosecutions extensive discretion not to prosecute. With such powers, the decision to prosecute those recommended for prosecution by the SATRC was at the whims and caprices of the National Director of Public Prosecutions. Fortunately, the wide powers given were curtailed by the High Court in Pretoria in 2008 when the court ruled that the policy in question was invalid, unlawful and unconstitutional. This would have amounted to a second immunity particularly to those who flaunted the conditions set by the SATRC and derided its powers.[68]

In 2007, President Thabo Mbeki went further to set in motion a process to offer special pardons to some individuals[69], aside the amnesty granted by the SATRC. Presidents Kgalema Motlanthe and Jacob Zuma continued the process upon assumption of office. Just like the wide discretionary powers given to the National Director of Public Prosecutions, this process is another amnesty after the amnesty granted by the TRC. This measure by many is perceived as repulsive and unacceptable.[70] Some persons cite such political interference in cases already recommended for prosecution by the SATRC for either their non-prosecution or delay in prosecution of such cases.[71] This development also infuriated the Human Rights Watch and Amnesty International. They said: "We are also disturbed by several developments in 2002, including the granting of pardon to thirty-three convicted prisoners, mainly from the former liberation movements, at least some of whom had been refused amnesty by the TRC."[72] Granting pardon is in itself not inappropriate but the circumstances surrounding granting

[66] United States Institute of Peace, *supra note* 60
[67] President Thabo Mbeki took over from Nelson Mandela, Kgalema Motlanthe took over after Thabo Mbeki resigned and Jacob Zuma was elected after him
[68] United States Institute of Peace, *supra note* 60
[69] According to the Human Rights Watch report, he had in May 2002, in the exercise of his constitutional powers, granted pardon to 33 prisoners, who were predominately members of the ANC and PAC, which are regarded as the main liberation movements. He defended his action saying those pardoned were incarcerated because of their involvement in the struggle against apartheid rule. Thus, for Mbeki the struggle for liberation seems to justify impunity and crime. He had maintained this perception before he assumed the mantle of leadership, but President Nelson Mandela believed otherwise
[70] United States Institute of Peace, *supra note* 60
[71] Pearl Boshomane, '20 Years after the TRC Hearings South Africa's Pain Persists'. Sunday Times, 10 April 2016. [https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2016-04-10-20-years-after-the-trc-hearings-south-africas-pain-persists/] accessed on May 18, 2017
[72] Truth and Justice, *supra note 4*, 59

pardon could be controversial. In this instant case, some who got pardoned under this scheme already had their applications rejected by the SATRC, neither did they seek judicial review of the decision of the SATRC. Pardoning such cadre of persons vitiates the ethos and credibility of the SATRC and could jeopardise the intended national reconciliation.[73]

As stated above, the SATRC noted the systematic destruction of relevant documents and records relating to the atrocities of the apartheid regime in the national archive by the National Intelligence Agency. This makes gathering of evidence not only tedious but likewise futile, and without relevant evidence, the objective of a prosecution ending in a conviction is not realistic. Where documents are not destroyed, records of apartheid atrocities are unobtainable or accessible to the families for their own investigations where state prosecutors fail to prosecute. Therefore, over twenty years after the SATRC was established to heal the wounds and wrought national reconciliation, some families are still in the dark about circumstances surrounding the injustices done to them or their loved ones.[74] The lack of the political will to make such files available is lamentable when ordinarily the State should be spearheading the prosecution of offenders and perpetrators of injustice under apartheid. The SATRC was unsuccessful in providing adequate answers in all cases of abuse during apartheid. This was the case even in cases brought before it and not only those that were not brought before the SATRC or covered during the period of its mandate. The cold feet of the State to either prosecute the cases identified or assist where necessary clearly amounts to "a de facto second amnesty."[75]

A former member of the SATRC, Yasmin Sooka, expressed utter disappointment about the lack of or the delay in prosecuting those recommended for prosecution by the SATRC. Thus, the unacceptability of the lack of the anticipated action in terms of prosecution was expressed. Prosecuting authorities alluded to some challenges hindering prosecution. The contention by the prosecuting authority that the cases were very complicated because many had to be investigated from scratch was nothing but unsatisfactory. Yasmin Sooka pointed accusing fingers at the ruling party, the African National Congress (ANC), which established the SATRC. "There's almost a view in South Africa 20 years down the line (that) we should move on, but of course if you speak to family members, they can't move on … how can the party that set up the Truth Commission, which was seen as the great moral mechanism of the 1990s

[73] *Ibid.*,11
[74] Louise Flanagan, 'TRC 20 years on: 'many, many unanswered questions' IOL Politics, 15 April 2016. [http://www.iol.co.za/news/politics/trc-20-years-on-many-many-unanswered-questions-2009894] accessed June 20, 2017
[75] *Ibid.*

– it took the world by storm – how can you not follow through on what you've committed yourself to in legislation".[76]

Unlike the grant of amnesty, the payment of reparations was delayed. Even when payment was done, it was limited to only those the SATRC recognised as victims and the amount paid was lower than the recommended amount because the government did not release the reserved money necessary for the payment of reparations claiming paucity of funds. With the completion of the final volumes of the SATRC report in 2003, President Thabo Mbeki proposed and presented a reparation programme to the South African Parliament. The proposed programme disappointedly was neither in consonance with the recommendations of the TRC nor the expectations of the survivors and pressure groups. The sum of $4000 was intended as a one-off payment for survivors, which was a far cry from the recommendation of the TRC.[77] This seems to be a picture of failed promises and dashed hope. "Only a once-off payout of R30 000 was given. This pay-out is only to those victims lucky enough to be anointed as victims by the TRC – the state still operates on the basis of this "closed list" in making decision about who to help. The TRC recommended a programme of community reparation for the worst affected communities; this has not been done to date."[78]

The lack of or the delay in payment of reparation to victims is in spite of the existence of the President's Fund established by President Mandela. A report revealed that: "In July 1998, the President's Fund, established by President Mandela to handle these payments among other matters, made the first disbursements of "urgent interim reparations," acting on recommendations made by the SATRC's Reparations Committee. Although R300 million (U.S.$61.7 million at the December 1997 rate) was set aside for this process, only R48.37 million (U.S.$4.72 million at the November 2001 rate) had been paid out under this scheme by November 2001, in grants of between mostly two and three thousand rands each to 17,100 applicants (from a total of 20,563)."[79] Human Rights Watch and Amnesty International likewise frowned at the unacceptable level of implementation of the recommendations of the

[76] Mary Kay Magistad, 'South Africa's imperfect progress, 20 years after the Truth & Reconciliation Commission'. Public Radio International (PRI), April 06, 2017 [https://www.pri.org/stories/2017-04-06/south-africas-imperfect-progress-20-years-after-truth-reconciliation-commission] accessed June 20, 2017
[77] Selinah Ntobong, 'South Africa's Truth and Reconciliation Commission accused of delaying justice'. Africanews 15/04/2016 [http://www.africanews.com/2016/04/15/south-africa-s-truth-and-reconciliation-commission-accused-of-delaying-justice/] accessed June 20, 2017
[78] Tshepo Madlingozi *supra note* 5, 63
[79] Truth and Justice, *supra note* 62, 7; See also Natalia Szablewska and Sascha-Dominic Bachmann (Eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach. Cham Switzerland: Springer International Publishing, 2015, 100ff; See also Kenneth Christie, supra note 26*

TRC. The human rights bodies cautioned that the government is not only morally bound by the political transition agreement to grant amnesty to perpetrators of the violation of human rights but to also ensure that the modest reparations suggested by the SATRC are paid to the victims. They emphasised the international obligations of States to adhere to international instruments,[80] which stipulates the provision of reparations, restitution, compensation and rehabilitation for victims whose rights have been grossly violated.[81]

Furthermore, the unwillingness of the government to either properly grant compensation and pay reparation or prosecute those recommended for prosecution fuels the thought that the perpetrators have not only been granted a second amnesty but also that they are the real beneficiaries of the SATRC process. They not only enjoy amnesty but also their pensions, while the victims are left to suffer the repercussions and scars of apartheid.[82] This eventually defeats the objectives of the idea of reparation and rehabilitation of the SATRC as articulated by Elisabeth Stanley: "The Reparation and Rehabilitation Committee sought to provide grounding for a future based on social justice while counterbalancing the SATRC 's displacement of criminal justice. The proposed reparations were established as a 'substitute for the concrete reality of legal claims' and were to be sufficient 'to make a meaningful and substantial impact on (victims') lives'. Together with this individualistic remit, it has been argued that reparations impact at a societal level by preventing further abuse, providing closure and promoting healing and reconciliation."[83]

The transformative initiative intended by the SATRC was established based on the following components: the urgent interim reparation, grants aimed at individual reparation, symbolic reparation/legal and administrative measures, community rehabilitation programmes and institutional reform.[84] This initiative is obviously not only a good intention and but also transformative in nature if only it had been fully executed. The consequence of delaying the payment of the approved reparations to victims does not only mean that survivors witness

[80] For instance, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) provides remedies for the violations of human rights by state parties; Article 14 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ensures the right to redress and compensation for torture victims; Article 2(3)(a) of the ICCPR further requires parties to the Convention to undertake to "ensure that any person whose rights or freedoms as herein recognized as violated shall have an effective remedy." A breach of the treaty occurs when a State party fails to provide a remedy.
[81] Truth and Justice, *supra note* 59, 2
[82] Elizabeth Stanley, 'Evaluating the Truth and Reconciliation Commission'. The Journal of Modern African Studies, Vol. 39, No. 3 (Sep., 2001), pp. 525-546, 534. [http://www.jstor.org/stable/3557322] accessed on July 15, 2017
[83] *Ibid.*, 535
[84] See *Ibid.*, 537

perpetrators enjoy amnesty with immediate effect and also enjoyed their salaries and pensions, but that victims remain disadvantaged and some elderly survivors may have to wait in vain and not enjoy the benefits due to them if death comes knocking before they are paid.

Reparation as noted above was not only monetary. The symbolic reparations included but were not limited to the renaming of streets and public facilities, building and remodelling monuments and memorials, instituting appropriate cultural ceremonies and expunging criminal records purported to have political motivations. These non-monetary reparations largely recorded some outstanding progress as against the monetary reparations.[85] For some affected individuals and communities, injustice was reversed and justice was done.

The recommendation of the SATRC on the wealth tax option, which is expected to put a scheme in place, will enable the beneficiaries of apartheid policies to donate to the scheme aimed at alleviating poverty. Unfortunately, this has remained a subject of hot debate and has not seen the light of the day. Similarly, the recommendation on restitution, which is expected to involve land redistribution, has not been implemented. According to the Khulumani Support Group, an organisation composed of victims and relatives of the victims of the violation of human rights and predominately domiciled in the Western Cape region, only 8% of the land has been redistributed and for this reason, the endemic poverty in South Africa has a colour because this mostly affects the black populace.[86] Such inequality in the country provides a weapon for newer political parties like the Economic Freedom Fighters (EFF), who make the issue of land redistribution a priority.

The new vista of hope ushered by the release from incarceration and the election of Nelson Mandela suddenly became a mirage. Mary Kay Magistad clearly articulates this: "Mandela's leadership and vision haven't been matched by his successors. An opening of South Africa's economy, after the lifting of sanctions imposed because of apartheid, doubled the country's per capita gross domestic product and moved more black South Africans into the middle class, but still disproportionately advantaged the country's white population. And while more colleges and businesses have opened up to non-whites, with affirmative action quotas in place to ensure they do, disparities in income and opportunity remain stark, especially outside of South Africa's major cities."[87]

[85] Kenneth Christie, *supra note* 26, 150
[86] See Tshepo Madlingozi *supra note* 63, 7
[87] Mary Kay Magistad, *supra note* 76

The SATRC also recommended some reforms in the health sectors. Such reforms were to cater for the emotional need of many victims of the crimes committed and the violations of human rights perpetrated by offenders. However, this was not done. The chairman of Khulumani Support Group laid the blame at the doorstep of the TRC. He said the TRC "did not provide proper psycho-social support and most victims felt re-traumatised. Related to this is the fact that victim's wounds were opened without any balm being put to soothe them. While perpetrators got amnesty immediately, victims had to wait for many, many, years. The catharsis was for the nation and not victims."[88]

Elizabeth Stanley rightly associates the high rise of violent crime to disaffected black youths, who were members of the young cadres of the MK army. They devoted their lives to the resistance to the apartheid regime and consequently faced untold hardship ranging from various acts of torture, sexual assault and police brutality in order to secure confessions. They were professionally trained in the handling of weaponry and explosives during the struggle against apartheid repression and got no vocational training, no education, but were only trained to fight for the struggle. This large of number of *combatants* is readily available and as unemployed youths, they enrich the fertility for festering criminal activities not only in the townships but also in the cities. With low level of economic independence, absence of reparation and rehabilitation, taking to crime becomes the attractive option.[89] Therefore, many of those who bore the brunt of the cruelty of the apartheid regime, feeling excluded from development and economic recovery, eagerly anticipate government's meaningful impact on their lives. Changes in their social and economic status will be an assurance that government means well and prove that the TRC has not lost its impact. When the suffering of the people who suffered the most during apartheid is not abated under and through the government of the day, when they still live in abject poverty, unemployment, degrading housing conditions, limited access to education and healthcare services, their perception will be that apartheid is still alive.

This situation led to the recent xenophobic attacks, which took place in some cities in South Africa, whereby some South Africans attacked and killed some foreign people of African descent, claiming that their state of unemployment and poverty was caused by the influx of these migrants into the country. This post-apartheid trend called into question the idea behind pan-Africanism, indicating the failure of governance, and raises the issue of the legitimacy of the government. The inequality and economic disadvantages occasioned by government's

[88] Tshepo Madlingozi *supra note* 63, 8
[89] Elizabeth Stanley, *supra note* 82, 535

ineptitude also seem to have heightened racist rhetoric and national debate in social and mainstream media about discrimination. Inadequate socioeconomic transformation appears to have renewed the tension and the divide. Some digital media companies had to adopt measures like suspending the comments function of their links to avoid torrents of offensive posts, which could endanger national security and social cohesion. However, a survey organised by Afro barometer claims that: "While a majority of South Africans have consistently expressed tolerant attitudes and said they do not believe that the government discriminates against their ethnic group, perceptions of government discrimination have increased significantly since 2011 amongst citizens from minority race groups. Furthermore, majorities of South Africans say that the courts and employers regularly discriminate against people based on their race, while more than one-third say the same about landlords. These perceptions are particularly common among Indian citizens."[90]

VI. Conclusion

In conclusion, the large-scale non-implementation of the recommendations cannot be attributed as a failure of the SATRC but the negligence of the successive governments of South Africa, saddled with the responsibility to execute the suggested actions necessary to redress past wrongs, rehabilitate victims of violations of human rights by giving them adequate restitution, ensure that the restoration of dignity of victims is done and offer a reassurance of non-repetition of the carnage in order to serve as a deterrence. Unfortunately, the government betrayed her citizens and gives an impression that the SATRC process failed, while seemingly justifying those who trivialised the achievements of the SATRC and held that the wounds and trauma of about 34 years of crimes and violations of human rights could not be healed with mere words and hugs.[91]

Tshepo Madlingozi captured such mood when he said: "From the perspective of victims, then, the transitional justice process in South Africa has been wholly inadequate. Victims feel used and betrayed. The needs of victims are overwhelming. They include psychosocial needs, education needs, housing and other needs such as proper memorialization mechanisms. There is no political will to resolve these issues. For victims: the past is in the present." He

[90] See Rorisang Lekalake and Sibusiso Nkomo, 'South Africans Generally Tolerant But Report Racial discrimination By Employers And Courts.' The Institute for Justice and Reconciliation. Afrobarometer Dispatch (20 April 2016) No. 84, 1. [http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno84-south-africa-discrimination.pdf] accessed on July 4, 2017

[91] Pearl Boshomane, *supra note* 71

consequently concluded that "from the perspective of victims and survivors, the past 20 years have been 20 years of amnesia, denialism, no reparation, no restitution, no social reconciliation and certainly no justice. We still do not have the truth, there has been no meaningful reparation or restitution, and anti-black racism and white supremacy continue to still stalk our land."[92]

The SATRC, however, carried out its mandate diligently making practical and cogent recommendations. Were these recommendations fully implemented, that would have made a huge difference in the country and quelled many agitations for justice. Indeed, many people "do not believe that Mandela would have left the commission's business so scandalously unfinished, as his successors have."[93] Although life is generally better under the democratic setting as compared to the horror experienced during the apartheid regime, the current challenges in the country are, however, complicated by bad governance, nepotism and corruption, which seemingly have become the trademark of the current president. Mary Kay Magistad concludes: "For all these entrenched problems that remain in South Africa, made no better by what many South Africans consider ineffectual and corrupt governance under President Jacob Zuma, most agree that life now is better than it was two decades ago, and that communal experience of watching and learning from the Truth and Reconciliation Commission's work was a big part of what made the improvements possible."[94] Louise Flanagan captures the essence of the SATRC and the aftermath of the SATRC when she aptly avowed that: "The TRC was never intended to be the end point, it was meant to be just a little bit of the starting point. The great failure was what happened after the TRC".[95]

[92] Tshepo Madlingozi *supra note* 63, 9
[93] See Pearl Boshomane, *supra note* 68
[94] Mary Kay Magistad, *supra note* 76
[95] Elizabeth Stanley, *supra note* 82, 533

CHAPTER FIVE

EVALUATION OF THE TRUTH AND RECONCILIATION COMMISSION AND THE JUDICIAL APPROACHES

I. Introduction

We have seen in preceding chapters a synopsis of some attempts by many countries on the African continent to establish and execute the process of the truth (and reconciliation) commissions. In a more detailed fashion, we also assessed the voyage of the well celebrated South African Truth and Reconciliation Commission (SATRC). This research work did not assess any of the criminal trial procedures, but an evaluation of the two approaches will be done in this chapter.

In this attempt to evaluate the truth commissions and the judicial forms of dispensing justice, an appraisal of the two methods to justice will be done in a form of a comparison between the both systems. The merits and demerits of both approaches will be discussed, while highlighting their strengths and weaknesses. Areas of similarities will be drawn since many times the areas of divergence most likely get more attention. This is effort is not, however, interested in the probable relationship that may exist between the two approaches.

II. Areas of Divergence

The judicial approach as represented by procedures of courts and tribunals[1] is regarded as punitive. The object is lucidly to punish deserving offenders appropriately in consonance with the severity of their wrongful acts, after their guilt has been established. A form of retributive justice is thereby rendered, where accused persons are brought to criminal trials and upon the establishment of culpability, suitable punishment is served. Lucy Allais explains this concept further: “Retributivism is an account of the justification of imposing hard treatment on a wrongdoer in response to her wrongdoing and is distinguished by three central, intimately related features. First, the justification of punishment is seen as intrinsic, rather than as the promotion of some separate good. Second, the justification of punishment is essentially bound up with desert: the idea that it is what the wrongdoer has culpably done that makes punishment

[1] These include but are not limited at the international level to the International Criminal Court (ICC) which came into existence to try persons accused of genocide, war crimes, crimes against humanity and crimes of aggression and the international criminal tribunals which are not permanent but created for specific crimes and trials. The following institutions fall under this category: Nuremburg Tribunal, Tokyo Tribunal, International Criminal Tribunal for Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); the Special Tribunal for Lebanon (STL); Special Court for Sierra Leone (SCSL); International Military Tribunal for the Far East; Special Tribunal for Cambodia; Ad-Hoc Court for East Timor; etc.

appropriate. Third, it is intrinsic to the justification of punishment that it is appropriate to impose it on the guilty, and only on the guilty."[2]

Conversely, the truth (and reconciliation) process adopts the restorative approach to justice. This approach to justice offers a substitute to punishment and imprisonment which are characteristics of the criminal trials. The process brings perpetrators and their victims to a face-to-face meeting in order to find out the truth and thereafter may impose community service on the perpetrator of abuse or require the offender to apologise and reconcile with the victims, thereby ensuring reconciliation and a peaceful coexistence in the community. Restorative justice therefore seeks to repair the damage done to the victim, take care of all parties and promote healing. Inez Stephney opined that at "Nuremberg justice was sought and used as a means of punishment, while the TRC sought truth and used it to heal and as a means of nation building."[3] This inherent advantage of the adoption of the truth and reconciliation shows that it does not only focus on the victim but also on the integration of the larger community for its cohesion and integration. G.G. Knoops then differentiates these notions of justice thus: "they are primarily focussed on retribution and deterrence through prosecution of international crimes. Truth and reconciliation commissions, however, are not engaged in prosecution although their mandates are related to investigation into human rights violations and abuses."[4]

Does a criminal trial contribute to national reconciliation or reconciliation between individuals? Does retributive justice as described above ensure a peaceful coexistence after a devastating conflict, essentially where people live together and are neatly interwoven as it is the case in rural Africa? Such an approach could worsen the situation because it is more profitable for the parties to face themselves, tell themselves the truth, apologise for wrongs, forgive wrongful acts and then move forward and then decide to live in peace once again. Else, what may be achieved could be the peace of the graveyard, breeding more animosity with opposing parties waiting for the auspicious provocation to renew violence. This is without prejudice to the Rome Statute which created the ICC empowering it to prosecute certain crimes. Care must be taken

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[2] Lucy Allais, 'Restorative Justice, Retributive Justice, and the South African Truth and Reconciliation Commission'. Philosophy & Public Affairs, Vol. 39, No. 4 (FALL 2011), 331-363, 339-340 [http://www.jstor.org/stable/23261250] accessed June 20, 2017

[3] Inez Stephney, 'The difference between the Nuremberg Trials and the TRC: A lesson to be learnt?'. University of the Witwatersrand, 1999, 2. [http://wiredspace.wits.ac.za/xmlui/bitstream/handle/10539/8093/HWS-401.pdf?sequence=1&isAllowed=y] accessed on June 23, 2017

[4] G. G. J. Knoops, 'Truth and reconciliation commission models and international tribunals: a comparison', Symposium on "The Right to Self-Determination in International Law" Organised by Unrepresented Nations and Peoples Organization (UNPO), Khmers Kampuchea-Krom Federation (KKF), Hawai'i Institute for Human Rights (HIHR) 29 September – 1 October 2006, The Hague, Netherlands, 3. [http://www.unpo.org/downloads/ProfKnoops.pdf] accessed on July 3, 2017

about the long-term effects of such prosecutions in certain societies. This does not connote festering impunity, but admitting mistakes were made and corrections have to be made, not at the cost of societal cohesion and trust which was already breached, but making genuine efforts to be build necessary trust once again for a peaceful coexistence. The societal framework and social orientation in the Western world supports the retributive justice offered by the judicial approach, this is not particularly so in rural Africa where many people are still closely connected to their traditions.

The truth (and reconciliation) commissions are better positioned to find the truth because they are non-judicial or at most quasi-judicial bodies that do not employ legal complexities and technicalities. The process helps to discover the truth and this is one of the strengths of the truth (and reconciliation) commission process. As an advantage, it does not only help the ordinary people to tell their own side of the story but also the alleged offenders to balance the picture, thereby overturning the rumours, lies, unconfirmed truths, myths and denials. Therefore, facts are established and it establishes not only the truth about the victims and the perpetrators but also about the events that transpired. In comparison with the judicial trial system, offenders have more confidence to tell the truth knowing that the truth will set them free and also be beneficial to the victims and the society. Priscilla Hayner concludes: "The purpose of criminal trials is not to expose the truth…but to find whether the criminal standard of proof has been satisfied on specific charges. A measure of truth may emerge in this process, but trials are limited in the truth they are able to tell as they must comply with rules of evidence which often exclude important information."[5]

The truth (and reconciliation) commission favour granting pardon and amnesty to offenders and this is severely criticised. This connotes that the offender gets away with serious crimes such as violations of human rights, sexual exploitation and abuse (SEA) and the evil committed under apartheid. However, pardon and the grant of amnesty is functional when the circle of reconciliation is completed with reparation and the restoration of the victims' dignity. The only Nigerian Nobel laureate Wole Soyinka argues that "reconciliation and healing be grounded in appropriate forms of reparations and the affirmation of the rule of law."[6] Moreover, amnesty is not employed by the truth (and reconciliation) commission process just to obtain knowledge

[5] Priscilla B. Hayner, *Unspeakable Truths*: *Transitional Justice and the Challenge of Truth Commissions* (2nd Edition). New York: Routledge, 2011, 100

[6] Charles Villa-Vicencio, 'Inclusive Justice: The Limitations of Trial Justice and Truth Commissions' in Chandra Lekha Sriram and Suren Pillay (Eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa.* Woodbridge, Suffolk: James Currey, 2010, 51

but also to ensure acknowledgment of guilt by the perpetrators. The reasons or justification for their barbaric actions may be included in the process of application for pardon to reduce culpability when it involves vicarious acts but essentially, the alleged offender gives away something – acceptance of responsibility. Confessions by offenders ensure that they are rendered accountable and their victims acknowledged and compensated. Amnesty was employed in the South African case study based on the prevalent situation where successful conviction in the prosecution of alleged offenders was not feasible because in many cases evidence was lacking, even where strands of evidence were available, some prosecutions were already ending in acquittal in spite of the huge costs of legal proceedings. In such cases, victims were left empty-handed, but amnesty on the other hand evoked confessions and such personal admission of guilt helped to rehabilitate the victims of perpetrators who acknowledged the crimes committed.

Sometimes, amnesty is also closely related to peace deals negotiated with rebels who have committed atrocities, which occasionally ensure that leaders of rebel groups join unity governments after peace is brokered, or even when rebels are defeated and are granted amnesty like in the *no victor no vanquish* declaration by the government of General Yakubu Gowon in Nigeria after the civil war. In such scenario, many do not frown at the granting of amnesty, not because those rebels have not committed heinous crimes but because it is done for a higher good – collective peace. The choice of pardon or amnesty employed in transitional justice serves also the purpose of not only ending conflicts but also building peace in the society. Amnesty offered actually spur offenders to disclose their crime and that helps the commissions to uncover more crimes than the process of prosecution would have done. It must be stated in addition that amnesty is not forever, it is temporary and timebound, making those who do not fulfil the conditions ineligible.

Many opine that the criminal trials which epitomise the retributive justice approach accurately serve justice. The argument is that punishing an offender adequately in proportion to the scale of the crime committed is ensuring that justice is done. The question remains, is justice really served? It could be contended that rather than seeing the process of criminal trials delivering justice, vengeance is rather on display. Based on diverse dispositions and ideological differences, revenge connotes justice for many and this is why the retributive justice dispensed in the judicial system serves proper justice to them. They conclusively argue that revenge could bring satisfaction to victims, their relatives or even their supporters. The pertinent question remains whether this justice or yearning for revenge truly brings satisfaction. The family

members of the murdered Nicole Brown Simpson in the much celebrated OJ Simpson's saga in America had felt they got satisfaction when he was convicted in the armed robbery case after he escaped conviction in the murder case, but years after that, they must now contend with his imminent release and the possibility of OJ Simpson living in their neighbourhood. Does this truly represent what satisfaction implies? This only shows that the approach is divisive and conflicts are mostly not solved but exacerbated. The quest for revenge led to the hurried prosecution and execution of Saddam Hussein but did not ultimately promote peace in Iraq, instead the circle of revenge continued, conflict continued unabated and the country is worse than when the so-called dictator ruled.

Contrary to the acclaimed position above that the judicial system serves justice, the truth (and reconciliation) process is accused of setting aside justice to promote the objectives of the established commission, suggesting that justice is the price paid, for instance in exchange for national unity and reconciliation by the South African Truth and Reconciliation Commission. However, it must be noted that justice as understood by the Western world is not the highest value that must be protected, and priorities must be weighed to decide what option is best. The South Africans for example, chose to set aside this notion of justice to avoid a probable civil war at the time. Healing the nation was therefore a priority in their own case and the concept of justice should be appraised within the framework of national exigency. Inez Stephney concludes that: "It must be remembered that the TRC was expected to facilitate healing. The concept of justice must be evaluated within the basic nation building precept. It may be that many people would have seen healing as occurring when the perpetrators have been made to pay. But an application of this principle would obviously not fulfil the nation building criterion and would inevitably create more conflict and deepen racial divisions."[7] Reconciliation should therefore be seen as a form and part of the justice process that negates revenge as a notion of strength. Reconciliation does exactly the opposite and elevates forgiveness as strength and humbles the strong.

It is sometimes claimed that the truth (and reconciliation) commissions contravene international law because offenders are not prosecuted in accordance with extant laws. Some cite the Geneva Convention[8] which compels parties to the Convention to enact criminal legislations to prosecute crimes regarded as grave breaches committed by individuals. States

[7] Inez Stephney, *supra note* 3, 5
[8] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287 (Common Article 49 / 50 / 129 and 146)

have the responsibility to prosecute grave offences. The International Criminal Court (ICC) was also created to prosecute certain wrongful acts. However, one can argue that some of these obligations concern matters of international crimes and some of these crimes do not fall within the purviews of international crimes. The internal affairs of States are not within the ambit of the Geneva Convention; the Geneva Convention is not applicable.[9] It is also vital to underscore the point that States should have the leverage to exercise their rights to find solutions to their internal crisis in a suitable manner that will not endanger peaceful domestic coexistence and proper to its domestic legislations.

Interestingly, the truth (and reconciliation) commission approach offers a unique key to success which the judicial system lacks. The persuasive influence of respected personalities in the given society can be brought to bear. The encouragement these personages offer to the populace, due to their moral rectitude and identification with the Community Cause, make it expedient for their voices and perceptions to count. Accordingly, James Gibson gives credence to this, citing the example in South Africa saying that "the roles of Tutu and Mandela were no doubt instrumental in getting people to accept the TRC's collective memory and to get on with reconciliation. Tutu's message of forgiveness, though irritating to many, set a compelling frame of reference for moving beyond the atrocities uncovered. Mandela's constant and insistent calls for reconciliation, coupled with his willingness to accept the findings of the TRC (even when the ANC did not), were surely persuasive for many South Africans."[10] This is practically impossible in a judicial setting for individuals to influence either the outcome of the proceedings or the mood of the victims because personal influence may not count.

The truth (and reconciliation) commission process generates more interest amongst the populace and has more impact particularly in terms of what the citizenry learn and what knowledge they acquire. Most truth (and reconciliation) commissions are broadcasted in the different media of communications ranging from television, radio to newsprint and even live broadcasts on social media is now a possibility. Unlike the court process that is more secretive and not widely covered, the truth (and reconciliation) commissions can be used to educate the populace on the bane of deplorable acts and the necessity to uphold human rights and respect human dignity. Even when criminal trials are broadcasted, they are either delayed to ensure

[9] The Preamble of the sixth recital of the Rome Statute states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

[10] James Gibson, 'The Contributions of Truth to Reconciliation: Lessons from South Africa'. The Journal of Conflict Resolution, (2006) Vol. 50, No. 3, 409-432, 417 [http://www.jstor.org/stable/27638497] accessed on June 21, 2017

compliance with some rules or to edit what redactors adjudged not to be for public consumption; and in addition, their broadcast do not attract public interest as the truth (and reconciliation) commissions. One wonders how many people log in to the website of the International Criminal Court or the Special Tribunal for Lebanon to watch the delayed proceedings in these courts. The proceedings and final outcome of the truth (and reconciliation) commissions could easily be developed into school curricula and formed into learning aids to educate learners on preventive measures so as to make the society safer, while the judgements of courts are mostly of interest to legal minds and are hidden in law reports. This purpose will be defeated where truth (and reconciliation) commissions are held behind closed doors. James Gibson makes allusion to this saying: "Legalistic processes are less successful at capturing the attention of people than simple "truth-telling" events. Without denying the loss of important due process rights when the legalistic process is relaxed, I believe the TRC made its work accessible by allowing ordinary people to tell their stories largely unhindered by adversary style proceedings." [11]

Witnesses have more confidence to express themselves in the truth (and reconciliation) commissions process than in judicial trial. Witnesses in trial setting appear to be on trial themselves; they are grilled with questions during examination-in-chief; drilled by the lawyer on the other side during cross-examination; and battered with friendly questions to minimise collateral damages during re-examination where the cross-examination must have adjusting the burden of proof. The trial procedure preoccupies itself with evidence, rebutting or confirming accordingly, but the truth (and reconciliation) commission process goes beyond this by also letting the witnesses or the victims express their heartfelt feelings. It gives more accessible to ordinary citizens than criminal trial system.

It could be argued that trial justice, which applies enacted legislations end in binding judgements and that helps to maintain the peace by preventing victims from taking laws into their hands, but it barely contributes to further reconciliation either between the parties to the dispute or at the societal level, instead it constitutes a form of vengeance, which does not guarantee breaking the circle of revenge, unlike the truth (and reconciliation) commission

process that does not just look forward but looks backwards in order to move forward. This does not suggest that it neglects the past. It does not neglect the past, it searches to know what took place in the past but with a crucial aim of making the future better.

[11] *Ibid.*

It has often been said that the truth (and reconciliation) commission process is victim-friendly. This is more evident in terms of awarding and paying reparations to victims and even rehabilitating them. The truth (and reconciliation) commissions in their reports usually recommend ways and scope of rehabilitation appropriate to victims and also the proper cost to be paid when compensation is envisaged. The truth (and reconciliation) commission process makes this possible, though powerless in implementing its enforcement. In the criminal trial systems in the court, what the victims mostly get is at most, the conviction of the accused person and little or no attention is paid to rehabilitate the victim or pay compensation in any form. The truth (and reconciliation) commissions make this possible by firstly ensuring that injustice is halted through its activities, silence is broken and wrongful acts are acknowledged. The focus on victims helps to restore the dignity of the victims.

Apologies and remorse are features of the truth (and reconciliation) commissions. A sincere *mea culpa* by those who perpetrated and benefited from a system of repression that subjugated others and robbed them of their dignity and rights is essential for forgiveness. Such persons should also be committed to the follow-up activities of the TRCs, so that their effort and participation constitute a form of penance to aid restitution and integration of victims or survivors. Vengeance, as noted above, is not prioritised in TRC process as seen in Africa as against the Western world. Such Western influence makes some persons in Africa think that the TRC and its process is absurd and unjust as against the African anthropology and philosophy, which was sufficiently discussed in chapter one. On the other hand, criminal trials establish distinct culpability of individual offenders without a collective tag, and probable apologies or remorse from accused persons may only serve to mitigate the harshness of the sentence to be given to the offender upon conviction.

The judicial trials are without uncertainties legalistic and juristic in nature. There are a legal basis and mandates with strict legal procedure and the enforcement of national and international legal instruments where necessary. This approach promotes the rule of law. The court setting connotes an ambience of awe, the proceedings are purely in accordance with laid down rules, the dressing of the judges and legal practitioners depicts their office, and accused persons and witnesses are led by their legal representatives. This is not the case in the truth (and reconciliation) commission process, there is a difference in proceedings without so much formality, legality, formal court setting or guidance from legal practitioners. Unlike the trial process which applies known laws and legal procedures, before the truth (and reconciliation) commission the victims themselves tell their stories in contrast to the criminal trial setting

where legal practitioners representing both the accused persons and the prosecutors make cases on behalf of their clients. The TRC affords the victims, alleged offenders and witnesses to speak without any tutelage from any legal representative, they speak themselves and say what they know happened. The informal approach of the commissions affords them to feel with the victims so that sometimes a stop and weep session is not frowned at, allowing some persons to weep and express their emotions when necessary.

The criminal trials process prefers punishing the past and it doesn't look forward but backward-looking. The establishment of peaceful coexistence is however important. The TRC process therefore fills this gap by looking backwards to enable the ugly past radiate the present with its revelations and shapes a path for the future, while it restores relationships and forges the path of peace for posterity.

The criminal trial system operates on the principle of winner takes all, where offenders are punished and victims feel revenge has been adequately exerted but feel otherwise where it ends in acquittals. On the contrary, the TRC approach seeks to create the win-win situation where offenders could be granted amnesty, victims could receive compensation and have their dignity restored, and the community could have symbolic and communal restitution. Thus, it paints a larger picture of peace and reconciliation. The TRC process in the way promotes a re-humanisation of both perpetrators and victims, so that the community could commence to reengage themselves in a new relationship as human beings.[12] Laura Mc Leod opined while contributing to the issue that "rather than viewing the process of justice as a dispute between offenders and state law – which in most cases leads to a win-lose outcome – the process of restorative justice involves all stakeholders in a conflict – including the larger community – in identifying obligations and solutions, thus promoting dialogue and mutual agreement and contributing instead to a win-win outcome."[13]

Another difference between the judicial and the truth (and reconciliation) commission approaches is the financial cost of operating and maintaining the established institutions. The monetary cost of running and maintaining the criminal tribunals is relatively higher than that of the truth (and reconciliation) commissions. In comparison to judicial tribunals, the financial

[12] See Cori Wieleng, 'Comparing Approaches to Reconciliation in South Africa and Rwanda'. Conflict Trends'. 42,[http://repository.up.ac.za/bitstream/handle/2263/18038/Wielenga_Comparing%282011%29.pdf?sequence=1&isAllowed=y] accessed on June 24, 2017

[13] Laura Mc Leod, 'Reconciliation through Restorative Justice: Analyzing South Africa's Truth and Reconciliation Process'. Beyond Intractability [http://www.beyondintractability.org/library/reconciliation-through-restorative-justice-analyzing-south-africas-truth-and-reconciliation] accessed on June 20, 2017

cost[14] of running the truth (and reconciliation) commissions is cheaper and more manageable. The higher financial cost as reflected in the criminal trials does not, however, guarantee success or that convictions will be achieved in such prosecutions. Erin Daily articulately puts this in proper perspective while highlighting that "[i]n South Africa, the choice of criminally prosecuting the leaders of the apartheid regime was bluntly presented to the citizens: the [approximately US $1.3 million] 'in taxpayer-supported court costs' that were spent to prosecute the former Minister of Defence yielded an acquittal. Punishment for wrongs is important, but so are electricity, medical care, jobs programs, education, housing, and so on."[15] Contrary to the higher pecuniary cost on the criminal tribunals, the South African Truth and Reconciliation Commission for instance had a budget of $18 million.

Closely related to the foregoing is the duration of the processes or how long their proceedings last. While the duration of the truth (and reconciliation) commissions are relatively shorter, the criminal trials in the judicial settings are on the contrary longer. For instance, the former President of Ivory Coast, Laurent Gbagbo, who has been on trial at the ICC in The Hague and detained at the ICC detention centre, is still attending hearings at the Court. Recently, the Appeals Chamber of the Court reversed the Trial Chamber and ordered a review of the conditions of his detention as to whether he should be released. He is 72 years old and has been in detention since November 2011. An earlier application for his release was denied by the Trial Chamber but on appeal by the defence team, the Appeal Chamber ordered a *de novo* review.[16] Long-term criminal trial as a measure of conflict resolution such as the foregoing scenario just mentioned and the state of affairs at the unending prosecution *in absentia* at Special Tribunal for Lebanon, is neither beneficial to the victims nor the alleged offenders. It could be perceived ultimately as a failure. Rather it weighs victims down and it is beneficial to no one except those paid in so far as the courts subsist.

Lastly, location could play a role in this effort to compare and contrast the judicial and the truth (and reconciliation) commission approaches. Many of the criminal tribunals have been mostly sited outside of the countries where the alleged crimes were committed. Possibly, this

[14] The ICC for instance had a budget of €139.5 for 2016 alone according to its website information as against for instance the annual budget of $18 million for the SATRC. [https://www.icc-cpi.int/about] accessed on May 28, 2017

[15] Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*. International Legal Perspectives (2002) 12:1&2, 73-183, 104. [http://center.theparentscircle.org/images/dc6b8763212c4002b3587f5ce0573c26.pdf] accessed on June 10, 2017

[16] See more details in Wade Herring, 'ICC Appeal Chamber Reverses Decision on Laurent Gbagbo's Detention; Orders New Review'. International Justice Monitor. July 21, 2017. [https://www.ijmonitor.org/2017/07/icc-appeals-chamber-reverses-decision-on-laurent-gbagbos-detention-orders-new-review/] accessed July 24, 2017

contributes to the rise in the cost of the criminal tribunals since the courts may have to visit the *locus in quo* where necessary and also convey witnesses, accused persons and their victims to and from the country involved and the location of the court. The bills for the legal representatives of certified indigent alleged offenders, who cannot afford the cost to maintain their legal representatives, are taken care of by the ICC, for instance. This is not always the case with the truth (and reconciliation) commissions since they are most established in a certain country and the commissions carry out their functions in the territory where the alleged crimes were committed.

III. Areas of Convergence

From the foregoing, it could be argued that both methods are mutually exclusive; therefore, one method may not be adopted at the expense of the other but a better option may be the option of a dual-pronged approach. The possibility of adopting a dual approach where necessary for the two approaches to complement each other may therefore be muted. In this sub-chapter, the points of convergence of the two approaches will be examined, but finding some points of convergence between the two approaches that appear to be diametrically opposed could be a tricky or difficult.

Although it has been argued that the truth (and reconciliation) commission approach puts an end to vengeance, the same could also be said about the judicial process. Where the accused person in a criminal trial is prosecuted, found guilty and sentenced accordingly, the aggrieved party tends to sheath the sword at this stage without resorting to self-help. By so doing, the circle of vengeance is broken because the law has taken its course and the matter becomes *res judicata.*

Basically, both processes are aimed at settling disputes between conflicting parties. The approaches may differ but both provide necessary platforms for the resolution of conflicts irrespective of the outcome of the process. This is not dependent on whether the parties are satisfied or not, neither is it predicated on whether the process is judicial or non-judicial, what is important here is that both approaches seek to bring about an acceptable resolution of the prevailing disputes.

Associated with the above point of convergence is the ability of both processes to make findings and apportion blames where necessary. The TRC method ends up making findings in the process of making investigations, so also the criminal trials approach. The level of findings may differ because the TRC has more capacity to unearth details of past abuses. Judgements

are delivered at the end of trials where the guilty party is convicted after culpability is established; blames are apportioned before commissions and recommendations are made on the way forward. The role of the truth commission to apportion blames is attested to by James Gibson: "The most puissant characteristic of the collective memory created by South Africa's TRC was its willingness to attribute blame to all parties engaging in the struggle over apartheid."[17] In addition, in making findings, both approaches help to establish the history of past wrongs and record accordingly irrespective of which gains wider publicity.

An interesting similarity that the two approaches share is the fact that the outcomes of both approaches are not always accepted. Similarly, disputes are not always settled irrespective of the initial objective to do so and not every party is satisfied with the outcome of the approaches. It is evident that after court judgements, some parties are left dissatisfied and they use the appeal mechanism where it is available. Although there are no appeals in the truth commission process, there are instances where some parties or affected persons have gone to court to challenge the recommendations contained in the report of some commissions.[18] Parties are therefore not always satisfied and victims' satisfaction could be dependent on individual differences, cultural affiliation and social orientation.

The implementation of the recommendations of the truth and reconciliations commissions' reports or the enforcement of judicial pronouncements can be challenging. We saw in previous chapters the snag constituted by many political leaders in Africa in terms of the implementation of reports and the recommendations therein. Even though one could argue that such situation is less prevalent in the judicial process, particularly the criminal trial process, enforcement sometimes also poses some challenges in the court system.

A contentious analogy found in the two processes is that prevention of further abuses is an objective of both approaches. This deterrence could be specific or general. Some argue that the criminal trial is the process capable of producing deterrence since the truth and reconciliation commission process encourages amnesty and forgiveness, it is incapable of serving deterrence. It could be argued otherwise, for this writer is convinced that both approaches serve deterrence to prevent future reoccurrence, although prevention is not a foregone conclusion. Alex Boraine sheds light on this when he concluded that "the public shaming of the perpetrators was at least

[17] James Gibson, *supra note* 10, 417

[18] The Liberian experience as seen in chapter three, page 59 and note 110, where individuals went to court to challenge the constitutionality of the TRC's recommendations and a similar case also in chapter four, pages 84-85, where Mbeki and the ANC went to court to challenge the findings of the TRC about the ANC.

as effective in this regard as convictions in a criminal trial. It was no easy thing for perpetrators to describe their evil deeds with family, friends, and society looking on."[19] Apart from the perpetrators having to publicly confess to their crimes, those who do not confess their wrongdoings intending to conceal their level of culpability will have their identities registered and forwarded for onward prosecution once credible evidence is adduced to their alleged crime. This also acts as a powerful deterrence because future perpetrators are discouraged. The plausibility of this view is dependent on perception but ordinarily, the sense of shame the African traditionally has makes the process ordinarily a deterrent.

In the process of criminal trial and truth commission proceedings, there is the likelihood that alleged offenders being prosecuted or investigated could deny their involvement or level of involvement in the wrongful act. Accused persons could deny their actions in both processes. It is often the case in a criminal trial where accused persons plead not guilty and where evidence is weak and culpability not established, such accused persons got scot-free, but denial in the truth commission process could end differently when the truth commissions employ the carrot approach by offering incentives for the accused person to confess.

Finally, holding offenders accountable and establishing the responsibility for criminal offences committed are not only found in the judicial approach but also in the truth (and reconciliation) commission approach but in the case of the latter in a different scope. Both institutions ought to be independent and in the course of discharging their functions, both processes could face challenges including challenge of legitimacy.

IV. Conclusion

The above comparison indicates that both approaches are valuable in the process of conflict settlement. The adoption of a single approach without a look at the other measure towards achieving the objective of societal cohesion may be counter-productive. Such intended results and how it plays out in certain societies becomes pertinent to attaining success. The truth (and reconciliation) commission approach to justice continues to gather more interest and looks promising in contributing to a more peaceful and humane world.

The growth in awareness and adoption of the truth (and reconciliation) commission approach could also be a sign of the failure of the application of the judicial approach alone. Arguments however abound why the TRC approach is untenable because it appears to treat offenders too

[19] Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford: Oxford University Press, 2000, 293

lightly based on the perception of some, who conclude that the process is insufficient based on their beliefs, cultural or religious orientations. Nevertheless, culture and social orientation definitely play a role in the acceptance and rejection of this approach.

Unfortunately, the impacts of the TRCs cannot be massively felt where the reports are not implemented. When the implementations of the various reports transcend the whims and caprices of selfish leaders and the effects of the TRCs are felt, most criticism against the approach within and outside Africa will subside because TRC does not represent the absence of accountability but confessions of offenders are the beginning of accountability. Without gainsaying, this does not mean that the TRC approach can easily achieve reconciliation because some persons find it difficult to forgive and let go of hurt. It may therefore not always be a path to reconciliation but when achieved, forgiveness benefits all, aids the reconciliation process which is humbling for offenders.

This therefore calls for a cooperative attitude between the two approaches. In this regard, the TRC could be adopted as a prelude to prosecution and criminal trials could follow thereafter where necessary for instance in cases like genocide, war crimes, etc. A clear focus is thus set on reconciliation in the society and reintegration where necessary, as seen in the case of the Ugandan combatants. A sole approach aiming at punishing perpetrators by means such as fines, penalties or confinement will not achieve what its counterpart in the restorative justice process does in reconciling and reintegrating all parties in society. An approach which recognizes that in order to heal, people need to be able to tell their stories and hear the stories of others.

CONCLUSION AND RECOMMENDATIONS

Retributive justice is not the only form of justice and should not be foist on all situations and peoples. An alternative, restorative justice, is central to the African culture and tradition, and holds more positive benefits to the perpetrators of crime, victims of crime and the larger society. Tutu opines that restorative justice is a characteristic of traditional African jurisprudence. He goes further to say: "Here the central concern is not retribution or punishment but, in the spirit of Ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture in relationships."[1]

The exigency for conflict resolution in Africa originates from the sad history of conflicts in Africa. Conflicts in Africa are caused and exacerbated by different reasons. Frequent conflicts and preventable suppressions in forms of slavery, colonialism and apartheid have produced the fertile ground for the violations of human rights, disregard for human dignity, sexual exploitation and abuse, and the commission of other heinous crimes on the continent. Similarly, leadership crises and election disputes have caused serious tensions leading to civil strife and civil wars in Africa, which are accentuated by very deep ethnic and religious sentiments on the continent. Regrettably, many African leaders and politicians utilise such divisions to veil their ineptitude while misleading unsuspecting citizens, who then fight each other to the benefits of the so-called leaders.

Lamentably too, there are different self-serving foreign interests which influence events to the detriment of the people on the continent. They fuel the catastrophes for their own benefit. After the storm, however, efforts are made to bring the carnage to an end, followed by the establishment of different measures to dispense justice and find lasting solutions to the crises. The truth (and reconciliation) commission approach has been the usual favourite common to all the geographical regions in the continent. The numbers of different commissions testify to this assertion. The resemblance this approach bears to mainly the traditional African dispute settlement captured by the culture and the concept of *Ubuntu* makes the TRC approach more suitable and readily embraced on the continent. The TRCs have been largely successful in

[1] Desmond M. Tutu, Desmond Mpilo Tutu, *No Future Without Forgiveness*. London: Rider Books, 1999, 51-52

reconciling many communities in Africa, have contributed to the restoration of the dignity of many abused victims, ensured that victims are compensated, former combatants are reintegrated back into their communities, and individual, symbolic, community and national reparation are put in place. These steps have aided reconciliation in many countries and it are worth commending, to be cherished and protected.

However, the establishment and performance of these commissions in many African countries have been bedevilled by lots of inadequacies such as, but not limited to, the absence of a legal framework, paucity of funds, undue interference, lack of relevant support, in particular insufficient support staff, lack of due publicity for the final report making the citizens incapable of knowing them, and lack of or delay in implementation of final report's recommendations. Such negative realities and pejorative commentaries on the exercise of many commissions could be misleading. This arms the quiver of many critics to say that the TRC approach offers nothing other than granting amnesty to offenders. On the contrary, it is not so because you don't throw the baby away with the bath water. It is good to understand where the fault lies and place the blame where it belongs. If successive governments have bridged the gap by providing requisite infrastructures and economic empowerment for the alleviation or eradication of poverty, unemployment and entrenched good governance by providing the wherewithal for all citizens to thrive economically, new agitations for equality and fair treatment would have been minimised and the TRC wouldn't have been termed a failure by some.

The success or otherwise of a TRC indeed depends on which perspective one perceives the impact of the TRCs in Africa. The perspectives range from the lens of the victim or those associated directly with the victim to the assessments of the larger society domestically or the international community. Nevertheless, the perceptions still differ from individual to individual or from society to society based on ideological orientations, beliefs and convictions. The attention this approach has generated indicates that it has something to offer. Can more regions in the world emulate this African favoured approach to dispute resolutions and make the world a more peaceful place to live in? Can the UN through UNESCO teach children the value of forgiveness? Like Tutu will say, there is no future without forgiveness, and they have a greater future ahead of them. The notion of *Ubuntu* could be further developed and assimilated in other cultures to help in building universal integration and world peace.

The notion of *Ubuntu* could be seen in some humanitarian activities and other sectors of world politics but there is the need to bring it down to the realm of dispute settlement and the

dispensation of justice. Vengeance and punishment could therefore be deemphasised, not because victims do not have the right to it but because humanity and human relationship should have a higher priority. Therefore, the culture of the African people is a catalyst that enhances reconciliation by prioritising societal interest.

The interest that the concept of *Ubuntu* has generated among non-African scholars should necessarily go beyond academic discourse and be translated into concrete adoption of its positive constituents for universal benefit. As seen in preceding chapters, there were previous attempts before the South African Truth and Reconciliation Commission. The apartheid situation was on the world stage or the presence and involvement of whites drew more attention to that of the South African experience. Consequently, it is more of an African issue rather than just a South African matter and invariably, more about learning from Africa than just from South Africa because it is an African perspective. In tears, personal hurts are released, not in submission or cowardice but with inner strength and moral courage letting go of retarding pains and forgiving the past in order to move on.

Religion also plays a role, coupled with culture, in making the above expression feasible. Indeed, Desmond Mpilo Tutu as chairman of the SATRC relied on cultural values as well as the Christian values as he steered the ship of the Commission and he guided and counselled perpetrators, victims and witnesses. Thus, Alex Boraine concluded: "In order to address this question, which relates not only to South Africa but to all nations that have been caught up in violence and conflict, we should start by considering various approaches to reconciliation. Two important approaches are the Christian understanding and the African philosophy of *ubuntu*."[2]

The adoption of the restorative approach of the TRCs ultimately helped to create a credible record of atrocities of the past, while also unravelling the faces of perpetrators behind heinous acts and proposed ways of making offenders to be held accountable for their misdeeds. They provided the platform for victims to ventilate their emotions, recreate and tell their stories and thereby getting healed of their grief and pains. A prospect is given for legislative interventions in order to make new laws to redress the ugly past and prevent a future repeat, while helping to create administrative structures and institutions to cater for preventive measures. It could be regarded a successful approach irrespective of its imperfections, while such limitations as noted above could be perfected to achieve better results.

[2] Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford: Oxford University Press, 2000, 360

The composition of the South African National anthem[3] is a testimony to the reconciliation in the country and the intent to move on into a better future. The National Anthem is carefully worded in different languages spoken in South Africa. How many anthems in the world are so fashioned? It is a call for unity irrespective of the ugly past and an admission that South Africa belongs to all, irrespective of the value the African person places on ancestral land. The English wordings of the anthem attests to this when it says: "Sounds the call to come together and united we shall stand, let us live and strive for freedom in South Africa our land." Whether a better future has dawned years after the TRC in South Africa or if the recommendations of the SATRC have been fully implemented is a germane question. As seen in chapter three, the implementation of these recommendations could be better.

This writer recommends, irrespective of noticeable flaws associated with the TRCs and their record in Africa, that Africa has a cherished and transmittable value in the notion of *Ubuntu*, which could be developed and emulated by other regions in the world irrespective of divergent cultures or ideological orientations. African leaders must begin to act accordingly and treat findings of the commissions they set up with respect and dignity. They should not only publish TRC reports but should go ahead to implement them and not give the impression that they are taking their own people for granted by vitiating the worth of the work of the commissions and the goodwill of the people. The people have the right to be adequately informed.[4] The process must permeate the society, capturing the attention of all segments and strata of the society. If the society is to be changed by the revelations and conclusions of a truth commission, then the people must be appropriately informed and subsequently pay attention to such information.

Furthermore, it must be emphasised that the lack of, or the delay in the implementation of final reports in deplorable. Human dignity should be clearly respected, lip service commending the recommendations contained in final reports at their presentation are insufficient. The reports are the legacies of the truth (and reconciliation) commissions' work; the implementation of the recommendations of the final reports is vital to the preservation of their legacies, else they are generally forgotten and discarded. It is therefore not enough for victims to ventilate their minds and get disillusioned by the same leadership that should protect their interests. Such further actions will strengthen the position that the TRC approach offers and its inherent advantages and make it more credible and enticing. Such positive affirmative actions would reduce the

[3] Inno Nazionale Sudafricano, *Nkosi Sikelel' iAfrika* (South African National Anthem, with lyrics) - https://www.youtube.com/watch?v=NBKjWRjwMkY

[4] Article 19 of the United Nations Declaration on Human Rights guarantees the right to information, as well as Article 9 of the African Charter on Human and Peoples Rights and other human rights instruments.

claim that TRCs in Africa are mere elite compromises or that they are born out of pressure from external influence.

African leaders need to do more to avoid further crises in the continent by avoiding leadership tussles and quitting at the expiration of their term. Selflessness, sincerity and working for the common good will also ensure that future conflicts are prevented. African leaders should deliver good governance, build infrastructures, provide good education, shun corruption, avoid being mercenaries at the detriment of their own people and redeem the battered image of Africa. Africa has enough resources to take care of her population and should not perpetually remain a continent of unending conflicts and crime, poverty and hunger, sickness and migrants-contributing enclave. One wonders if African leaders possess the quality of *Ubuntu,* or have they been corrupted by the bug of *unubuntuness* through loss of traditional values orchestrated by globalisation? Lasting solutions cannot be realised without the sincerity of purpose from African leaders irrespective of whatever approach to dispute settlement is employed after any crisis.

The African populace should therefore unite with one purpose and goal and be determined to stop turning against themselves at any slightest provocation. They need to realise that they have a common enemy in the inept politicians, corrupt civil servants and dubious foreign and local contractors. With people power, they should vehemently demand a true change for common good on the continent, stop the carnage rather than creating conflicts which will lead to further repressions, extra-judicial killings, different forms of violations and exploitations. The politicians are not worth fighting for, fighting for them after elections will only serve them and their families. Africans must also desist from colliding with exploitative foreign interests that are not beneficial to the continent and its people. Shunning such tendencies that encourage the sale of arms to ethnic militias for political, economic and selfish benefits will enhance peace in Africa which will yield the needed development on the continent.

Colonialism and globalisation are undoubtedly threats to the core African values and traditions. The culture and tradition of the various ethnic groups on the continent must be preserved. Shifting attention to young people in Africa will aid the realisation of this objective. Young people must be told their history, stories of their traditions be retold to them and school curricula could be designed in such a way as to accommodate this objective. Special attention should be given to training teachers that will teach history in our schools rather than banning teaching of history as a subject in schools for dearth of history teachers as it was done in Nigeria

few years ago. It is good to make hay while the sun shines, elderly ones who are still alive and active and mentally alert enough to retell the story should be incorporated in this regard to archive these stories and traditions.

Tertiary institutions in Africa should not shy away from this challenge but should institute researches that will help to investigate the situation and proffer clear ways forward. In this vein, international organisations such as the African Union (AU) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and NGOs involved in peacebuilding could invest in this project so that this objective could be achieved. These measures are essential to facilitate the adoption of preventive measures, not just to await the breaking out of conflicts and begin to deliberate on which approach to dispensing justice to adopt.

There are inherent advantages in the TRC approach but a hybrid approach to dispute resolution is also a possibility. Either the two approaches go hand in hand or the TRC approach precedes the judicial approach particularly for offenders, who deride or abuse the process of the former. Another hybrid form could be designed to encapsulate all attributes of retributive, restorative, distributive, economic and regulatory justice dispensation. It should be a process that will punish where necessary; restore dignity of victims; empower disadvantaged victims; stabilise economic development for the benefit of all; and put in place proper regulatory measures to enjoy social justice.

The TRC process could therefore be recommended in a society where national cohesion has broken down, even after genocide, to enable opposing groups to discuss their grievances and achieve national reconciliation. A different strategy could be employed in achieving this goal. For instance, amnesty could be restricted by rigorous conditions when the scope of violations and the degree of accountability are grave, particularly in societies where reconciliation, forgiveness and propitiation are less acceptable. Trials can punish offenders but the truth (and reconciliation) process could be integrated to restore peace and forge reconciliation in the society.

Correspondingly, the process of the TRC could be reinforced and enhanced. More powers should be given to future commissions and their mandates be strengthened and widened. When a commission lacks essential powers to investigate core burning issues of violations and deprivations in the country, it will lack respect and integrity before the populace, thereby making its work almost insignificant. The issue of legal background at the point of

establishment must not be overlooked. A commission properly set up by an enacted legislation will be emboldened to carry out its functions diligently. In such legislations, the powers, functions and mandates of the commission should clearly be delineated. In addition, an enforcement clause should be included to forestall the situation where African leaders disregard the outcome of the commissions they established and also guarantee the independence of the commission.

One of the criticisms against the establishment and performance of the TRCs in Africa is the grant of amnesty, which we have discussed. Although this writer believes that amnesty should be embraced and granted, its award should, however, be predicated on stringent conditions. Such conditions must be clear and unambiguous. The South African experience proved that amnesty can be very effective in evoking confessions from perpetrators, who as a result of the offer of amnesty came forward freely, unlike in Nigeria for instance, where some military generals were scared of their fate and thwarted the efforts of the commission. It must be borne in mind that this TRC approach provides healing effects not only for victims but also restores national cohesion while bringing a degree of healing to a deeply wounded and divided society.

In establishing future commissions, attention must be paid to the quality of commissioners and persons chosen to head the commission. Where respected and experienced personalities and experts are appointed into the commission, the likelihood of improved acceptance is high. Appointing religious leaders is good based on the perception and disposition of many to religion in Africa; however, this should not be the norm but individuals who are locally acceptable and internationally credible be appointed to execute such a vital assignment.

Funding is very essential to the work of a commission. The fact that funding a commission is cheaper than financing a criminal tribunal does not mean that the commission does not need money and this aspect should be neglected. Lack of funds will obviously hinder the pace, quality and integrity of the work of the commission and, on the contrary, a well-funded commission will find it easier to achieve its objectives and deliver on its promise. It will enhance its work and make it more credible and independent.

Finally, the study established in chapter one that *Ubuntu*, though a term indigenous to southern Africa, is a concept known to different African ethnic groups with different nomenclatures and its notion plays a role in conflict settlement making the TRC approach on a familiar terrain in Africa. Chapter two provided a working definition of TRCs, analysed the general features of the TRCs and scrutinised areas where they differ in practice, and then ensconced the fact that

TRCs have been established in many parts of the world. Chapter three goes further to assert that many commissions have been set up on the continent with some successful and others partly successful, leaving them with the issue of implementation of the recommendations of many of the commissions. In chapter four the SATRC was acknowledged as not only the most famous but the best in Africa because it was well planned and executed, and irrespective of criticisms and inherent limitations, it was a huge success. Chapter five finally shows that the TRC approach has more to offer in terms of reconciliation and social cohesion than retributive justice. Therefore, Africa should exchange with the world its values as encapsulated in the TRC process despite its current limitations. But once the suggested measures proposed above are put in place and with the desired political will, a near perfect form of dispute resolution would have been created. However, more efforts could be expended on preventing conflicts than seeking ways to resolve them.

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ABSTRACT

The history of Africa cannot be told without stories replete with slavery, colonialism, apartheid, wars, ethnically propelled strife and conflicts. These conflicts have in their turn precipitated gross violations of human rights and other abuses. Against usual expectations of criminal trials of perpetrators, the Truth and Reconciliation Commission (TRC) approach was adopted in many parts of the continent, indicating a clear preference for this approach to dispensation of justice.

My research work dedicates itself to investigating what the TRC approach is and why the TRC is warmly embraced in Africa. The research found out that an aspect of the African culture and its traditional dispute resolution system play some roles in the seeming positive disposition towards the TRC approach. It came to the conclusion that the concept of *Ubuntu*, which finds expression in different nomenclatures in many African ethnic groups, influences the need to channel more energy to achieving reconciliation by healing wounds, realising societal cohesion while placing the communal good above individual benefits. *Ubuntu* lays a foundation for the adoption of the restorative approach to justice in Africa.

A descriptive qualitative method was adopted by the research to decipher which African nations have established and executed a TRC. While selected commissions in Africa were looked at, the South African Truth and Reconciliation Commission was evaluated in detail. The synopsis and detailed evaluation indicate that most of the TRCs were successful despite their limitations.

Conclusively, *Ubuntu* is a cherished African value that other parts of the planet could develop and emulate. However, the vital role of political leadership in Africa in ensuring peaceful coexistence and in the proper implementation of the recommendations of the final reports must be similarly underscored. It is therefore hoped that African leaders, foreign interests and other stakeholders will not only apply the clearly beneficial TRC approach to dispute resolution but endeavour to apply it in a proactive prevention of conflicts in Africa.

ABSTRAKT

Die Geschichte Afrikas kann nicht wiedergegeben werden, ohne Erzählungen von Sklaverei, Kolonialismus, Apartheid, Kriege und ethnische Konflikte. Diese Konflikte haben ihrerseits enorme Verletzungen von Menschenrechten und anderen Missbräuchen ausgelöst. Gegen die üblichen Erwartungen von Strafverfahren der Täter, wurde die Vorgehensweise der Truth and Reconciliation Commission (TRC) in vielen Teilen des Kontinents angenommen, was auf eine klare Präferenz für diese Methode der Gerechtigkeit hindeutet.

Meine Forschungsarbeit widmet sich der Untersuchung dessen, was der TRC-Ansatz ist und warum die TRC in Afrika gutgeheißen ist. Die Forschung ergab, dass eine Aspekte der afrikanischen Kultur und ihr traditionelles Konfliktresolutionssystem einige Rollen in der scheinbar positiven Einstellung zum TRC-Ansatz spielen. Ich kam zu dem Schluss, dass das Ubuntu-Konzept, welches in vielem Sprachgebrauch in mehreren afrikanischen ethnischen Gruppen Ausdruck findet, die Notwendigkeit fördert, mehr Energie in Versöhnung durch die Heilung von Wunden zu investieren, um den gesellschaftlichen Zusammenhalt zu stärken und gleichzeitig das Gemeinwohl über die individuellen Vorteile zu erheben. Ubuntu legt eine Grundlage für die Annahme des restaurativen Ansatzes zur Gerechtigkeit in Afrika.

Eine beschreibende qualitative Methode wurde in der Forschung angewendet, um zu zeigen, welche afrikanischen Nationen, die einen TRC gegründet und durchgeführt haben. Während ausgewählte Kommissionen in Afrika in Betracht gezogen wurden, wurde die südafrikanische Wahrheits- und Versöhnungskommission im Detail ausgewertet. Die Synopse und die detaillierte Bewertung zeigen, dass die meisten TRCs trotz ihrer Einschränkungen erfolgreich waren.

Schließlich ist Ubuntu ein geschätzter afrikanischer Wert, den andere Teile des Planeten entwickeln und nachahmen können. Allerdings muss die entscheidende Rolle der politischen Führung Afrikas bei der Sicherstellung einer friedlichen Koexistenz sowie bei der ordnungsgemäßen Umsetzung der Empfehlungen der Abschlussberichte gleichermaßen unterstrichen werden. Es ist daher zu hoffen, dass afrikanische Führer, ausländische Interessen und andere Stakeholder nicht nur den eindeutig vorteilhaften TRC-Ansatz zur Streitbeilegung anwenden, sondern sich proaktiv bemühen, weitere Konflikte in Afrika zu verhindern.