

**TRUTH COMMISSIONS AND THE PERPETUATION OF THE CULTURE OF IMPUNITY IN
AFRICA: A CASE STUDY OF GHANA AND SOUTH AFRICA.**

BY SAMUEL AMPONSAH-FRIMPONG

UNDER THE SUPERVISION OF PROF M HANSUNGULE

UNIVERSITY OF PRETORIA

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE
DEGREE LLM (HUMAN RIGHT AND DEMOCRATISATION IN AFRICA-2003) UNIVERSITY OF
PRETORIA**

OCTOBER 2003

TABLE OF CONTENTS

Declaration	(iii)
Dedication	(iv)
Acknowledgement	(v)
Abbreviations	(vi)
Legislation	(vii)
List of Cases	(viii)
Table of International Instrument	(ix)

CHAPTER ONE: GENERAL INTRODUCTION AND BACKGROUND

1.1 Introduction	1
1.2 Background	2
1.2.1. Brief political history of Ghana	2
1.2.2. Brief political history of South Africa	3
1.3 Hypothesis	3
1.4 Research questions	3
1.5 Relevance of the topic	4
1.6 Methodology	4
1.7 Summary of chapters	4

CHAPTER TWO: NATIONAL RECONCILIATION COMMISSIONS IN CONTEMPORARY SOCIETIES

2.1 Introduction	5
2.2 Truth and reconciliation commissions	5
2.3 Why truth and reconciliation and not simply justice?	6
2.4 What does truth and reconciliation commissions entail?	8
2.5 The National Reconciliation Commission of Ghana	11

2.5.1 The case for Ghana's truth commission	12
2.6 The South Africa Truth and Reconciliation Commission	15
2.7 Conclusion	17

CHAPTER THREE: THE ESTABLISHMENT OF SOUTH AFRICA TRUTH AND RECONCILIATION COMMISSION AND THE NATIONAL RECONCILIATION COMMISSION OF GHANA.

3.1 Introduction	19
3.2 Truth and Reconciliation Commission of South Africa	19
3.2.1 Promotion of National Unity and Reconciliation Act, Act No. 34 of 1995	21
3.2.2 Did the TRC achieve its objective?	24
3.3 National Reconciliation Commission of Ghana	25
3.3.1 The National Reconciliation Act, Act 611 of 2002	26
3.4 Conclusion	27

CHAPTER FOUR: INTERNATIONAL LAW RESPONSES TO THE CHALLENGES OF TRUTH AND RECONCILIATION COMMISSIONS

4.1 Introduction	28
4.2 The challenges of truth commission to international law	28
4.3 Truth commissions and the perpetuation of the culture of impunity	30
4.4 Responses of international law to the challenges posed by truth commissions	33
4.5 Conclusion	39

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion	40
5.2 Recommendations	43
5.2.1 Respect for international law and rule of law	43
5.2.2 The creation of reparation fund	43
5.2.3 Building and strengthening democratic institutions	44

DECLARATION

I, **Samuel Amponsah-Frimpong** hereby declare that this dissertation, apart from sources acknowledged within it, is my own academic presentation. It has not been submitted previously for any degree or examination in any other university.

CANDIDATE: **SAMUEL AMPONSAH-FRIMPONG**

SIGNATURE:

DATE:day of October 2003

SUPERVISOR: **PROFESSOR MICHELO HANSUNGULE**

SIGNATURE:

DATEday of October 2003

DEDICATION

To Esther, Josephine, David and Jessica; Samuel and Dora for their love and support and to all those who sought and continue to seek after the truth.

ACKNOWLEDGEMENTS

I wish to acknowledge and thank all those who financially, technically and morally assisted me to make this work possible.

I would like to register my profound indebtedness and sincere appreciation to my supervisor Professor Michelo Hansungule for his professional and fatherly supervision of this work. His constant comments and criticisms have given a sense of direction to my work.

I wish to extend my appreciation to the Centre for Human Rights University of Pretoria for the opportunity and the financial support given me.

I wish also to extend my appreciation to the critical observations and comments made by Ms. Lillian Chenwi.

Lastly, I would like to appreciate my friends Takele Bulto and Revai Mildred Makanji for their support in this endeavour.

With such a wealth of support and assistance, errors and omissions remains my sole fault.

ABBREVIATIONS

AFRC	Armed Forces Revolutionary Council
ANC	African National Congress
ATCA	The Alien Tort Claims Act
AZAPO	Azanian Peoples Organisation
BWC	Bacteriological and Toxin Weapons and on Their Destruction
CBW	Chemical and Biological Warfare
CHRAJ	Commission on Human Rights and Administrative Justice
HIPC	Highly Indebted and Poor Country
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
NDC	National Democratic Congress
NPP	New Patriotic Party
NRC	National Reconciliation Commission
PDA	Preventive Detention Act
PNDC	Provisional National Defence Council
PNUR	Promotion of National Unity and Reconciliation
RUF	Revolutionary United Front
TRC	Truth and Reconciliation Commission.
UDHR	Universal Declaration of Human Rights
UNO	United Nation Organisation
USA	United States of America
ZANU PF	Zimbabwe African National Union Patriotic Front

LEGISLATION

1992 Constitution of the Republic of Ghana

Interim Constitution of the Republic South Africa, Act 200 of 1993

Constitution of the Republic of South Africa, Act 108 of 1996

National Reconciliation Act, Act 611, 2002

The Alien Tort Claims Act (ATCA) of 1789 of the USA

Promotion of National Unity and Reconciliation Act, Act 34

LIST OF CASES

Azanian Peoples Organisation (AZAPO) And Others v The President Of The Republic Of South Africa. 1996 (4) SA 671 (CC), 1996

Barcelona Traction Light & Power Co Ltd, Judgment of the ICJ 5 February [1970] ICJ Reports 1, at 32.

Communication 147/95 and 149/96. Sir Dawada K. Jawara v. The Gambia

Communication 137/94, 139/94, 154/96 and 161/97.

International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa and Civil Liberties Organisation v. Nigeria

Supreme Court of Appeal of South Africa. Case No. 404/2002 and 293/2002

Regina v. Bartle and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet

The Prosecutor v. Jean Paul Akeyesu, Case No. ICTR-96-4-T

LIST OF INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights (1948)

International Covenant on Civil and Political Rights (1966)

Convention on the Elimination of Racial Discrimination (1965)

Convention Against Torture (1984)

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. General Assembly Resolution 23391, November (1968)

Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (General Assembly resolution 40/39 of November 1985)

Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, U.N. G.A. Res. 3074

Joint Principles. (Restrictions and Other Measures Relating to Amnesty) UN General Assembly Resolution 2202

Lome Peace Agreement on Sierra Leone, July 7, 1999, S/1999/777

Statute of the International Tribunal, UN Security Council Resolution 827(1993)

Declaration on the Protection of All Persons from Enforced Disappearance, UN General Assembly Resolution 47/133, (1992)

Vienna Convention on the Law of Treaties (1969)

African Charter on Human and Peoples' Rights (1981)

CHAPTER ONE

GENERAL INTRODUCTION AND BACKGROUND

1.1. Introduction

Most African countries have gone through various degrees of politically motivated gross human rights violations. The causes of these among others include colonialism, one party dictatorship, apartheid, violent revolutions and military dictatorship, inter-tribal conflicts and civil wars.¹ The consequences of these are divided societies in which the people are filled with bitterness and pain. These are seen as a potential source of further conflict if nothing is done to heal the society. The likelihood of people taking the law into their own hands in the quest for vengeance cannot be ruled out.² The general assumption is that a divided nation cannot forge ahead and lift itself from her social, political and economic problems.

Truth commissions have been identified as one of the several mechanisms by which countries with bitter past can reconcile their peoples. The clear objective for the establishment of these bodies is to provide a forum where victims and perpetrators of human rights violations would have the opportunity to heal their wounds by openly speaking up about their true feelings.³ Such forums, which take the form of a quasi-judicial institution, are flexible enough to encourage perpetrators to tell the truth. There is a strong emphasis on forgiveness and restoration of victims and perpetrators.⁴

Notwithstanding the above, truth commissions have not received the full cooperation of some powerful persons who were in the very center of gross human rights violations. Most often, truth commissions have woefully failed to take decisive action to ensure that their mandates are respected. This unfortunate situation has the tendency not only to undermine the work of the truth commission itself but also the culture of the rule of law. Again, the fact that truth commissions do

¹ The National Reconciliation Commission of Ghana has received over 3,700 cases of abduction, killings, torture, confiscation of property, ill-treatment, disappearances, violation of human rights and unlawful detentions. See *Ghanaian Chronicle*, 10 July, 2003. "Shared experiences: The leadership of new truth commission in three countries". <<http://www.soros.org/events/truth/#ghana>> (accessed on 6 July 2003).

² Kuenyehia N *The media and the national reconciliation commission in Ghana*. <<http://www.newsinghana.com/news/media-goes-to-school.htm>> (accessed on 10 July, 2003).

³ Tutu D *No future without forgiveness* 260-261.

⁴ Truth and Reconciliation. <<http://home.planet.nl/~loz/maneng75.htm>> (accessed on 12 July, 2003).

not stress on full accountability known to the normal justice system may even perpetuate the culture of impunity, which is even more dangerous.⁵

1.2. Background

Ghana and South Africa have experience politically motivated gross human rights violations in their recent political history. Both countries have resorted to the use of truth commissions to address the past. Whilst the Truth and Reconciliation Commission (TRC) of South Africa has finished and submitted its report to the government, that of Ghana has just started. Ghana certainly has a lot to learn from South Africa.⁶

1.2.1 Brief political history of Ghana

In Ghana, the attainment of political independence in 1957 was generally greeted as a success story by peace loving and freedom fighters all over the world. It was seen a significant milestone in the emancipation of Africa from the might of colonialism. However, the introduction of one party state by Dr. Kwame Nkrumah's government ushered the nation into dictatorship and a cycle of *coup d'tats*.⁷ Between 1966 and 1981, Ghana experienced four military take-overs.⁸ In all cases constitutions were suspended and the Supreme Court abolished. Opponents of these governments were sometimes tortured, killed, detained without trial; their properties confiscated without compensation, dismissals and many more. Those who could afford ran into exile.

The adoption of the 1992 Constitution and the restoration of democracy in January 1993 provided a ray of hope that victims of gross human rights violations might at least have remedies. However, the military authority that supervised the transition unilaterally inserted a transitional provision in the Constitution that effectively indemnified all their actions during unconstitutional eras.⁹ The significance of this action is that victims of gross human rights violation during the revolutions cannot have their cases redressed.¹⁰

⁵ Malamud-Goti J "Transitional governments in the breach. Why punish state criminals?" *Human Rights Quarterly*, Vol 12(1) 1.

⁶ Esterhuysen P (ed) *Africa A-Z continental and country Profile*, 40,321-323.

⁷ Okyere VN *Ghana: A historical survey*. 185-276.

⁸ Esterhuysen (n 6 above).

⁹ Section 34 of the transitional provision of the 1992 Constitution of Ghana.

¹⁰ See n 9 above.

The new government which took power in Ghana in the year 2000 has set up a National Reconciliation Conciliation (hereinafter called “NRC”) to help the nation to deal with its past. The NRC has been operational since January 2003. Even though a lot of chilling revelations have come to the surface, former President Rawlings has adamantly refused so far to appear before the NRC.¹¹

1.2.2 South Africa

The policy of apartheid that was adopted by the white minority government in the country effectively divided the South Africa on racial lines. The banning of political activities, detention of the opponents of apartheid, confiscation of properties of Africans, politically motivated killings and many more created a potentially explosive situation. This situation needed something more than the normal judiciary to heal the nation.¹²

The TRC was therefore set up to help bind the people of the country together and heal the wounds inflicted by the past injustices. The TRC in South Africa did not receive all the cooperation it needed.¹³ Most people have challenged the actual achievements of the TRC. Some victims believe that the TRC failed to address their concerns and at the same time provided undeserved protection for perpetrators of human rights violations.¹⁴

1.3 Hypothesis

This dissertation is based on the following hypothesis:

First, truth commissions can be useful tool in the rebuilding of divided societies with violent political past. Second, operationally, truth commissions can undermine the rule of law, rights of victims of human rights violations and may perpetuate the culture of impunity.

1.4 Research questions

This study therefore shall endeavour to:

¹¹ The National Reconciliation Act was passed by the Parliament of Ghana in 2002 and it became operational in September 2002.

¹² Esterhuysen 322-323.

¹³ Promotion of National Unity and Reconciliation Act, Act 34, 1994.

¹⁴ Kevin A & Beatriz V “Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography” 41*OJPCR: The Online Journal of Peace and Conflict Resolution* 4.2: 37-76 (2002) ISSN: 1522-211X | <www.trinstitute.org/ojpcr/4_2recon.pdf> (accessed on 10 July).

1. To delve into the necessity of truth commissions.
2. To examine the question of the compatibility or not of truth commissions and the rule of law.

1.5 Relevance of the topic

It is noticed that special measures are always necessary in post conflict situation to bring about the restoration of normalcy to societies. Truth commissions have been identified as a key to uniting, reconciling and helping the people to confidently deal with their past. Whilst these are noble notions, practically, truth commissions face serious challenges. The dissertation shall seek to highlight these problems and offer recommendations.

1.6 Methodology

I intend to employ:

1. Legal methods, that is, examining treaties, statutes, case law etc.
2. Social legal methods-researching non-legal materials, discussions and where possible limited interviews.
3. Library, internet etc.

1.7 Summary of chapters

The dissertation is divided into five chapters. Chapter one is the general introduction. It gives a brief political history of Ghana and South Africa and their impact on the enjoyment of human rights. The chapter shall also discuss the need for national reconciliation in both countries.

Chapter two discusses truth commissions in contemporary societies. It briefly discusses the establishment of national reconciliation commissions and their mandates. Chapter three focuses on the laws establishing the TRC and NRC of South Africa and Ghana respectively. These legislation shall be considered in detail in order to analyse their objectives to know whether or not they are achievable within their stated mandates.

Chapter four discusses the challenges truth commission poses to international and its implications on rule of law. The chapter shall discuss the issue of amnesty to perpetrators of gross human rights and the perpetuation of the culture of impunity in the light of international law. Chapter five considers the way forward and suggest recommendations.

CHAPTER TWO

NATIONAL RECONCILIATION COMMISSIONS IN CONTEMPORARY SOCIETIES

2.1 Introduction

This chapter gives a brief historical backdrop of the formation of the NRC and the TRC in Ghana and South Africa respectively. It only focuses on the recent political history and the associated gross human rights violations in the two countries. The chapter agrees with the need for such commissions in dealing with the consequences of human rights violation. Mention is therefore made albeit briefly about the objectives of these commissions. The chapter discusses briefly that these commissions may not be able to redress completely outstanding issues on impunity and compensation.

2.2 Truth and reconciliation commissions

In recent years, several countries have instituted official truth commissions charged with among other things, investigating violations of human rights from their (recent) past.¹⁵ Though not legally binding, the Preamble to the Universal Declaration of Human Rights lays down 'that it is of utmost importance that human rights are protected by the supremacy of law'.¹⁶ A government is therefore admonished strongly to investigate and act on all allegations of violations of human rights, and report the violations from the past. The assumption is that nothing justifies torture and other forms of violation of gross human rights. There are certain absolute norms whose transgressions can never be hidden or ignored, such as the murder of a person in custody or torture. It also the case that torture and other forms gross human rights violations cannot go unpunished. Truth commissions concentrate on examining the violation of these values. Some people would have denied these facts so as to avoid facing the moral contradiction of supporting a government that commits them. But if facts are disclosed in a serious, credible manner, they can no longer be denied nor can they be justified. In the past, Africa was characterised with widespread impunity

¹⁵ Hayner P *Unspeakable truths: Confronting state terror and atrocity* 24-31. See Meredith W "Ghana's National Reconciliation Commission". <<http://www.peacemagazine.org/0304/meredith.htm>> (accessed on 14 June 2003). See Kritz J (ed) *Transitional justice: How emerging democracies reckon with former regimes* (1995). See also Kevin, A. and Beatriz, V. "Truth and reconciliation commissions: a review essay and annotated bibliography" <http://www.trinstitute.org/ojpcr/4_2recon.htm> (accessed on 26 July 2003).

¹⁶ See the preamble of the Universal Declaration on Human Rights, 1948.

but now democratisation has opened opportunities to know the truth, try and reconcile individuals, families, and societies torn apart and to start afresh.

Ghana and South Africa have embraced these concepts to help deal with their violent and traumatic political histories. Both countries have officially instituted bodies to investigate politically motivated human rights violations and make recommendations on how to deal with perpetrators and victims of these crimes. The objective is not to seek vengeance legally but encourage the healing of wounds that may have been caused by past human rights violations and forging ahead as a people.¹⁷ It must be noticed however that Ghana and South Africa have different historical backgrounds. For instance, in Ghana unlike South Africa, the crust of the human rights violation was generally not based on racism in the conventional sense. Therefore the approaches adopted to deal with the past were not the same but they nonetheless found themselves on the same path.

2.3 Why truth and reconciliation and not simply justice?

At the second Bram Fischer Memorial lecture, the late Chief Justice Mohammed emphasised that "whatever be the eventual content of law, its objective must always be consistent with justice. Law does not constitute its own justification. Law cannot be built on law. It must be built on justice."¹⁸ It is also true that a good law must be morally acceptable. A lot of issues have been raised as to why resort to truth commission and not simply the corridors of justice as provided for by the ordinary justice system.^{19,20} Most of the human rights violations recorded during the periods under discussion were crimes under both domestic and international law. Important issues like; why should a state deal in some special way with its past? If it selects the path of truth commissions, what assurance can it have that major goals such as reconciliation among groups or catharsis for victims will be realised? For example, will the findings of a truth commission promote reconciliation without companion policies like compensation? Can the goal of deterrence

¹⁷ See section 3 of National Reconciliation Act, Act 611, 2002.

¹⁸ It is to be noted however that the TRC Act is not wholly based on the ideas expressed by Chief Justice Mohammed in the quotation above. See Michael D "Impunity and gross human rights violations in South Africa." <http://www.murdoch.edu.au/elaw/issues/v7n2/donen72_text.html#t2> (accessed on 26 August 2003).

¹⁹ Reed B "Justice: The first casualty of truth?" *The Nation*, 30 April 2001. See Robert I Rothberg & Thomas D (eds). *Truth v. Justice: The morality of truth commissions*. <<http://www.hrw.org/editorials/2001/justice0430.htm>> (accessed on 20 2003).

of massive violations of human rights be realized through selective prosecutions of leaders whose applications have been rejected, or through the narratives of truth commissions?

The ordinary justice system ensures that perpetrators of gross human rights violations are tried and punished according to law.²¹ It also means that victims of human rights violations receive effective and adequately compensated in accordance with law. It is therefore assumed that the normal justice system ensures more accountability than truth and reconciliation commissions whose emphasis is on forgiveness.²² It is argued that there are several reasons why transitional governments should opt for full accountability for past crimes. Not only is it a moral obligation and a legal requirement under international law to bring to justice perpetrators of gross human rights violations, it is also the practical option, for two reasons. First, without punishment there will be no deterrent to prevent perpetrators and their descendants from carrying out the same violations in the future. Secondly, accountability is an essential prerequisite for a successful democratic transition. If past violations of human rights go unpunished, it will undermine the rule of law and the very foundations of the new democratic institutions that are being built thus resulting in impunity.²³ In Rwanda, perpetrators who benefit from truth and reconciliation arrangements are bound to make some personal payment to the victims of the gross human rights violations.²⁴

However, there are practical difficulties associated with defining “accountability” in the fullest legal sense. For one thing, the fragility of transitional governments needs to be emphasised. The old elites of the repressive regime, political or military, often retain the power to destabilize or overthrow the new regime if they fear punishment or retribution at its hands. There is also the problem of sheer impracticality of legal proceedings in every case of wrongdoing. The very nature of the legal system does not always ensure justice. The fact that technicalities in the administration of justice and the expense involved could have been a disincentive to any thorough going investigation. Moreover, it was obvious that vital information could have been destroyed, thereby making both civil and criminal investigation increasingly difficult. In South Africa, for instance, vital evidence that could stand in court was shredded.²⁵

²¹ Carla E “Human rights violations: A duty to prosecute?” 1994 *Vol. No.7 Leiden Journal of International Law* vol 5 para 8.

²² Tutu, (n 3 above).

²³ Malamud-Goti (n 5 above).

²⁴ Klaas de Jonge Interim report on research on *Gacaca* jurisdictions and its Preparations (July-December 2001) [Report I]; Kigali/Paris, January 2002 and “*Activities PRI research team, report: January-March 2002*”; Kigali/Paris, April 2002[Report II].

²⁵ Bell T & Ntsebeza D *Unfinished business, South Africa apartheid & truth* 1-21.

The adoption of the "Gacaca" justice system to redress the post-genocide legal, political and social crisis in Rwanda is very instructive. It portrays the weaknesses of the ordinary justice system in addressing all legal problems in fragile societies when faced with insurmountable problems. In Rwanda, the problem culminating in the adoption of the Gacaca was the lack of adequate facilities to try thousands of suspected perpetrators of the genocide.²⁶ The TRC of South Africa and the "Gacaca" of Rwanda have many things in common. In both cases, non-legal approaches were adopted. Emphasis was not on formal justice as national reconciliation and unity were considered to be of a higher priority in the circumstance. Certainly justice is preferable where it can effectively deal with societal problems. However, recent developments across the globe indicate that more than criminal justice is required to deal with the realities of transitional societies.²⁷ The focus seems to be on political expediency, that is, nation building, looking forward as opposed to living in the past injustice and reconciliation.²⁸ It must be emphasised however that for a truth commission to be meaningful to the ordinary people, justice cannot be completely ruled out. An issue like compensation that is an aspect of justice is very essential to the success of the entire exercise.²⁹

2.4 What do truth and reconciliation commissions entail?

Generally, truth commissions are temporary measures with temporal jurisdictions to investigate and report on human rights abuses over a certain period of time in a particular country or in relation to a particular conflict. Truth commissions allow victims, their survivors and perpetrators to give evidence of gross human rights abuses, by providing an official forum for their accounts. In most instances, truth commissions are also required by their mandate to provide recommendations on steps to prevent a recurrence of such abuses.³⁰ They are created, vested with authority, sponsored, and/or funded by governments, international organisations, or both.

Truth commissions have temporal jurisdiction, which means they exist for a designated period of time, with specific mandate, and adopt a range of processes and procedures, with the goal of producing and disseminating a final report, including conclusions and recommendations.

²⁶ Amnesty International December 2002. "Rwanda gacaca: A question of justice" 1-7.

²⁷ Blaser A "How to advance justice without really trying: An analysis of non-governmental tribunals". 1992 *Human Rights Quarterly*, Vol 14 para 3, 339-370.

²⁸ Tutu (n 21 above).

²⁹ Jose Z "Confronting human rights violations committed by former governments: Principles applicable and political constraints." See Kritz, J. *Transitional justice* (1995) 3-31.

³⁰ Blaser (n 27 above).

Ultimately, the goals of such commissions are to contribute towards accounting and ending for past abuses of authority, to promote national reconciliation and/or bolster a new political order or legitimise new policies.³¹ The Ghanaian and the South African models are unique in the sense that at least the emphasis is on the “truth” which is seen as essential to reconciliation. Truth, it is believed, will also set the record straight about the conflicts of the past. However, recent developments on the so-call spy allegations in South Africa portrays that the truth is yet to come out.³²

In the early 1980s the then Prime Minister, now President Robert Mugabe in a speech promised to “draw a line through the past,” in order to achieve reconciliation of all the parties involved in the conflict.³³ However, there is a difference between the South African scenario and that of Zimbabwe. The reconciliation announced by President Robert Mugabe was out of the magnanimity of the ZANU PF, which had won a clear mandate in an election against the perpetrators. This is somewhat similar to the Ghanaian situation in the sense that the reconciliation effort is solely the brainchild of the new government in Ghana. But there is a difference to the extent that in Zimbabwe “truth” was not stressed in return for amnesty as in the Ghanaian and South African situations.³⁴

The specific functions of a truth commissions vary, but generally speaking, they have the following characteristics. First, commissions set out to establish an official and accurate record of a country’s past. In other words, both the perpetrator and the victim have a role to play. It can be said therefore that the degree of satisfaction is not only related to the quality of the reports but also to the kind of truth they serve. This may entail asking the perpetrators to tell the truth to the population in person, what they had done and why they did those heinous things in a manner

³¹ Truth commissions digital collection, United State Institute of Peace.
<<http://www.usip.org/library/truth.html> > (accessed on 26 July 2003).

³² See the *Sunday Times*, 26 October 2003.

³³ Catholic Commission for Justice and Peace in Zimbabwe and the Legal Resources Foundation. “*Breaking the silence, building true peace*” (A report on the disturbances in Matebeleland and the Midlands 1980-1988) 25-27.

³⁴ As in n 32 above. See Priscilla B H “*Fifteen truth commissions—1974 to 1994: (1994)16 A Comparative Study,*” *Human Rights Quarterly*, 597-655. In Chili the emphasis was on the truth. Ghana and South Africa combine the two values. In this regard, Ghana appears to have borrowed a lot from South Africa.

almost similar to Christian confession. In both countries the Christian philosophy “and ye shall know the truth, and the truth shall make you free” appeared to have been embraced.³⁵ In practice however, this is far from the reality as perpetrators guardedly tried through their lawyers not to incriminate themselves. Moreover, most perpetrators did not share in this belief. Victims of gross human rights violations are expected to forgive and let “bygones be bygones.” There is the assumption that it is both necessary and possible to close the past, however criminal this may have been and even if many criminals remain unpunished or let criminals go scot-free. Second, truth commissions are charged with putting forth recommendations to government for reparations to victims, and for reforms to existing laws or institutional structures in an effort to prevent future abuses. Third, truth commissions aim to contribute to justice and accountability. They can pass on information to prosecutors after their investigations, if there is a competent judicial system functioning in the country. Sometimes the mere publishing of the perpetrators’ names serves social justice, even when prosecution is not pursued. Recommendations from commissions can also contribute to the formulation of new policies to preventing future violations. For example, a commission may recommend the overhauling of an institution that would result in the removal of certain individuals from their positions. Finally, truth commissions aim to promote reconciliation and reduce tensions resulting from past violence. We can learn from the past to make a more secure future.³⁶

Notwithstanding the above, the following questions are still relevant. Are these assumptions really practicable? Do they satisfy all ethical issues, that is, compensation of victims where it is obvious that perpetrators have immensely benefited from past injustice? Who pays for the compensation and is it the taxpayers, which also include the victim? Another serious issue is the potentiality of

³⁵ John 8:32, *King James Version of The Holy Bible*. In South Africa, Arch Bishop Desmond Tutu played a significant role in the whole process. In Ghana, the Most Rev. Palmer Buckle who is a panel member of the Commission was also an advocate of the establishment of a truth and reconciliation commission in the country. See Huber W “The role of the church in situations of transition”. 1991 *Journal for Theology for Southern Africa*. Vol 74:14-20.

³⁶ Jose Z Truth commission: “A Comparative assessment.”
<<http://www.law.harvard.edu/program/HRP/Publications/truth1.htm>> (accessed 30 July 2003).

the perpetuation of the culture of impunity as a result of the fact that perpetrators are more or less allowed to go unpunished for the commission of the most heinous crime.

Moreover, it must be emphasised here that the “truth” in this sense is less than “legal truth”. The method employed to elicit the “truth” may not stand the test of judicial scrutiny. It is easy to make a sweeping confession to avoid prosecution in court. Even though the TRC of South Africa was not a court of law, by its nature, it was obliged to make defensible findings according to established legal principles.³⁷ However, in practice, the TRC did everything possible to ensure that individuals who have already suffered so much were spared of the indignity, the scepticism, and the hostile probing implicit in cross-examination. It meant that the TRC generally accepted oral evidence without cross-examination unless “there were glaring inconsistencies and falsehoods” in it.³⁸ In the case of amnesty statements, even though they qualified for cross-examination during public hearing, at the time of the compilation of its report of the 7127 applications, only 102 had proceeded through public hearing. These and others have the potential of diminishing the value of the “truth”.³⁹

2.5 The National Reconciliation Commission of Ghana

Within weeks of its victory in Ghana’s 2000 elections, the New Patriotic Party (NPP) government of John Agyekum Kufuor announced that a national reconciliation commission would be established. On 9 January 2002, the parliament of Ghana passed the National Reconciliation Act, Act 611. In September 2002 President Kufuor inaugurated the nine-member commission, tasking it with providing Ghanaians the opportunity to account for the past, take stock and go forward as a nation. The Ghanaian NRC is a state-sponsored institution with a mandate to investigate human rights abuses in Ghana during the period 6th March 1957 to 6th January 1993 and to unravel the truth behind these violations.⁴⁰

³⁷ Section 4, Promotion of National Unity Reconciliation Act of 1995.

³⁸ TRC Report, Vol 1, 144.

³⁹ Jeffery A *The Truth About The Truth Commission*, 7-22.

⁴⁰ In January 2002 the parliament of Ghana passed the National Reconciliation Act, Act 611.

2.5.1 The case for the desirability of the truth commission in Ghana

Questions have been asked about why Ghana should even embark on such a project.⁴¹ A truth commission is a costly exercise and Ghana has just joined the community of Heavily Indebted Poor Countries (HIPC). The main opposition party, National Democratic Congress (NDC) argued that the NRC was a political tool that the NPP government would eventually use to destroy the legacy of the former President Rawlings.⁴²

Truth commissions such as those in Argentina, Chile, South Africa and Sierra Leone have generally been instituted where the memory of past atrocities has threatened to overtake transition to thoroughgoing democracy and nationhood. Ghana currently enjoys a relative stability that, on the surface, appears unthreatened by the effects of such violations.⁴³ The above notwithstanding, there were other good reasons for a truth commission in Ghana.

Following independence in 1957, democratic process in Ghana has been repeatedly interrupted by the military seizing political power. Both democratic and military regimes have been responsible for gross abuses of human rights with the magnitude and type of the abuse varying according to the regime of the time. The range of abuses that occurred in Ghana is diverse and complex. The mandate of the NRC seeks to address the violation of rights such as killings, beatings, detention and torture and also other forms of ill treatment such as politically motivated dismissals and property rights violations.⁴⁴ The military has ruled Ghana for twenty of the forty-six years of independence. And, as in many countries, military rule in Ghana has been marked by gross violations of human rights, including killings, abductions, disappearances, detentions, torture and seizure of property.⁴⁵

The worst of the military regimes were the two led by Jerry John Rawlings, three months in mid-1979 as the Armed Forces Revolutionary Council (AFRC) and then, from December 1981 to January 1993, as the Provincial National Defence Council. Rawlings' regimes were unprecedented in the history of the nation. The list of political killings is chilling. Three former

⁴¹ The General Secretary of the NDC, Dr Josiah Aryeh at a news conference to mark the 10th anniversary of the party in Accra referred to the National Reconciliation Commission as a 'Great Leap backwards' Under the NPP." See Gobah T "*Reconciliation Act is partisan, NDC*" <<http://www.graphicghana.com/article.asp?artid=2284>> (accessed on 14 July 2003).

⁴² See n 40 above.

⁴³ See n 38 above.

⁴⁴ See section 3 of the NRC Act, Act 611 of 2002.

⁴⁵ Sarpong "Ghana: What price for reconciliation?" *World Press Review*. Vol 50 para 6.

heads of state (Gen. Akwasi Amankwah Afrifa, Gen. I.K. Acheampong and Gen. F.W.K. Akuffo) were executed in 1979. On the night of 30 June, 1982, some superior court judges and a retired major (Justices F.P. Sarkodee, K.A. Agyapong, Cecilia Koranteng Addow (who was a nursing mother of a three months old daughter) and Retired Major Sam Acquah) were abducted and murdered by agents closely linked with the military junta. In addition to these a number of military officers were murdered, along with many political activists.⁴⁶ Torture was used as part of the Provisional National Defence Council's (P.N.D.C) control mechanisms as well as to extract confessions of crimes of which sometimes the person undergoing the torture had no idea. Methods employed included solitary confinement, detention in a brightly lit room in a manner where the victim lost his or her sense of time and of night and day, cigarette burns applied to male organs, mock executions and severe assault and battery.⁴⁷

Ghana has never had the opportunity to uncover this past and seek redress from those responsible. Before leaving public office, military regimes regularly provided themselves a *de facto* blanket amnesty. Clauses were included in transitional arrangements providing indemnity for officials of the outgoing regime. As part of their supervision of Ghana's transition to democracy in 1992, the military regime under the then Ft. Lt. Rawlings inserted one such indemnity clause into the transitional provisions, thereby ensuring that no official from either of his regimes could be held liable for actions taken during the conduct of their duties. Moreover, no court or tribunal was permitted even to adjudicate any action against these officials.⁴⁸ The effect of this ouster clause and blanket amnesty on international law will be discussed at length in chapter four. It is however right to say that victims can initiate action in an international forum against the government of Ghana on the ground that these provisions are contrary to Ghana's international law commitments. The requirement to exhaust domestic remedies does not apply by virtue of the ouster clauses in the Constitution.⁴⁹

⁴⁶ Huchthful "Reconstructing civil-military relations and the collapse of democracy in Ghana, 1979-1981." See Amnesty International, Ghana, Briefing on Death Penalty. AI Index: AFR 28/001/2000. See also Yidana JJ *Who Killed the Judges* 231-260.

⁴⁷ Okyere 270-272.

⁴⁸ All the constitutions of Ghana coming into force after military intervention had transitional provisions which effectively foreclosed every action against human rights violation during their tenure of office. See section 32 of the transitional provisions of the 1992 Constitution of Ghana.

⁴⁹ See communication 147/95 and 149/96 *Sir Dawada K. Jawara v. The Gambia*. In this communication, the African Commission on Human and People's Rights held that the suspension of the constitution of the Gambia and fundamental effectively removed every domestic remedy from the applicant.

The apparent restoration of democracy in 1992 did not lead to thoroughgoing transition. It did not provide opportunity for the indemnity clause to be contested, for victims of human rights abuse to seek redress or for reconciliation to become a national issue. The military regime quickly metamorphosed itself into a political party, and dubiously won the election in 1992.⁵⁰

Important questions on the violations of human rights remained unanswered. The Rawlings government that supervised the transition from military dictatorship that saw so many gross human rights violations lacked the necessary political will to address reconciliation issues. Many people remained peeved as no avenue was provided to redress their concerns. The NRC is seen as an integral part of the process of consolidating democracy in Ghana. The commission is non-retributive. Its mandate is to promote national reconciliation by establishing an accurate and complete historical record of violations and abuses by public institutions and officeholders during the various periods in which Ghana has been ruled by military regimes.⁵¹

The exposition of the wife of the late General Akwasi Amankwah Afrifa, (one of the three military joint leadership that overthrew Nkrumah government in 1966) at the NRC tells the mood of victims of human rights violations. The General was one of the three former heads of state executed by firing squad in Jerry John Rawling's 1979 *coup d'état*. When the Commission asked why she was before it, she answered:

Afrifa did a lot for this country. He brought smiles to the faces of detainees under the PDA. He brought democracy and even participated in it. For him to be picked up and killed that way. How could soldiers riddle his body with bullets that way? Who authorised them to do that.⁵²

It is obvious from the above discussions that truth and reconciliation was really necessary in Ghana. There is a lot that is unknown about what really took place and who ordered what. In a congratulatory message sent for the inauguration of the Commission, the Chairman of South Africa's commission, Archbishop Desmond Tutu, stated that it would have been tempting for a country like Ghana to sweep old issues under the carpet, embrace its prosperity and move on with eyes averted from the past. Describing Ghana as "a beacon of hope" he exhorted the

⁵⁰ Elections organised after the restoration of democracy in 1992 in Ghana was contested by opposition parties. In 1993, opposition parties boycotted the parliamentary election on the ground that there was no level playing field. Okyere 275.

⁵¹ See n 4 above.

⁵² Alhassan A Mensah K & Morris D "Who ordered my husband's execution?" *Accra Mail*, 10 July 2003.

commission to work with faith, determination, courage and integrity.⁵³ The preamble of the National Reconciliation Act stipulates:

An Act to establish a commission to seek and promote national reconciliation among the people of this country by recommending appropriate redress for persons who have suffered injuries, hurt, damage, grievance or who have in any other manner been adversely affected by abuses and violations of their human rights arising from activities or in activities of public institutions and persons holding public office during periods of unconstitutional government to provide for related matter.

2.6 The Truth and Reconciliation Commission of South Africa

The TRC of South Africa covered the period between 1960 and 1994. The rationale for limiting the activities of the TRC to this period is potentially controversial and bring to the fore the issue of violations of rights prior to that period. For instance, dispossession of Africans of their lands cannot be excluded from gross human rights violation.⁵⁴ However, this period represents the peak of the infamous apartheid policy that effectively created a racial society in South Africa with its attendant gross human rights violations. Undeniably, apartheid recorded one of the worst human rights violations ever in the history of humanity. The mass killing of innocent protestors, including little school children, as evidenced in the Sharpeville Massacre, Soweto Massacre, unlawful detention of political opponents, torture in custody, assassination of political opponents, confiscation of properties and many more. The ban of lawful political activities and other anti-apartheid organisations led to an armed struggle with dire consequences on the already precarious human rights situation in the country. The United Nations classified apartheid as a crime against humanity.⁵⁵

The Commission is based on the final clause of the Interim Constitution, which reads as follows:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future rounded on the

⁵³ Oduro F "Unveiling of Kufour's reconciliation commission can free Ghana from burden of past atrocities." *Cape Times* 5 June 2002. <http://www.ijr.org.za/art_pgs/art39.html> (accessed on 26 July 2003).

⁵⁴ Undeniably, a lot of human rights violations took place in South Africa prior to 1960. See Johan De Waal Curie I & Erasmus G *The Bill of Rights Handbook* 2001 428-430.

⁵⁵ In 1966, the UN General Assembly declared 21 March, the anniversary of the Sharpeville massacre, as the International Day for the Elimination of Racial Discrimination. See Reverend Ambrose Reeves: "The Sharpeville Massacre-A Watershed in South Africa." <<http://www.anc.org.za/ancdocs/history/misc/sharve.html>> (accessed on 24 August 2003).

recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The pursuit of national unity, the well being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimisation.

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

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.⁵⁶

The commission was seen as a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.⁵⁷ The objectives of the Commission was to promote national unity and reconciliation in a spirit of understanding that transcends the conflicts and divisions of the past by:

- 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 responsible for committing such violations, by conducting investigations and holding hearings;

⁵⁶ See the preamble of the interim Constitution of South Africa, Act 200 of 1993.

⁵⁷ See the epilogue of the Interim Constitution of South Africa. See paragraphs 16-19 of Mohamed DP in the *Azanian People's Organisation (AZAPO) and Others v. the President of the Republic of South Africa* 1996 (4) SA 671 (CC), 1996.

- facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and which comply with the requirements of the Act (Promotion of National Unity and Reconciliation Act);
- establishing and making known the fate or whereabouts of victims and restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and recommending reparation measures in respect of them;
- compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission and containing recommendations of measures to prevent the future violations of human rights.

The most conspicuous part of the Commission's work was conducted by the Human Rights Violations Committee, which heard the accounts of victims and conducted investigations. Over a period of two and a half years, the Commission conducted hearings across the country. Its findings draw on over 21,000 statements on human rights violations, as well as other documents such as applications for amnesty. The latter, especially from a large number of security policemen, provided information that proved difficult to obtain by other means.⁵⁸

The Commission in South Africa has since submitted its report with recommendations to the president. However several issues still arises which border on impunity and justice. Does truth and reconciliation actually heal society and resolve all outstanding issues?⁵⁹

2.7 Conclusion

From the foregoing it is seen that both Ghana and South Africa had compelling reasons to put in place politically acceptable measures to redress their peculiar recent political history which were full of gross human rights violations. Whilst the need for such commission is clear for South Africa, some Ghanaians think that it is a waste on the scanty resources of the HIPC country.

Moreover, both countries placed a lot of emphasis on truth, reconciliation, national unity, forgiveness and other values. Whilst these values are generally desirable, it is however questioned whether such commissions adequately address other issues such as impunity and

⁵⁸ Enslin P "South Africa=s Truth and Reconciliation Commission as a Model of Peace Education." <<http://construct.haifa.ac.il/~cerpe/papers/enslin1.html> > (accessed on 24 July 2003). Hayner PB "Fifteen Truth Commissions–1974 to 1994: A Comparative Study," *Human Rights Quarterly* vol 16 no. 4, November 1994, 597-655.

⁵⁹ Slovo G "*Making history: South Africa's Truth and Reconciliation Commission.*" <<http://www.opendemocracy.net/debates/article-3-76-818.jsp> > (accessed on 25 July 2003).

justice. Another problem encountered in the South African experience is the rationale for limiting the TRCs activities to 1960-1994.⁶⁰ This is a problem because a lot of serious violations started long before this period. It is also important to question the competence of the parliaments of Ghana and South Africa to act against international norms on the right to litigate. Subsequent discussions will highlight these issues.

⁶⁰ The NRC Act of Ghana focuses on the periods of military dictatorship but gives a window of opportunity to violation gross violation of human rights occurring during civilian regimes. See section of Act 611.

CHAPTER THREE

THE ESTABLISHMENT OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION AND THE NATIONAL RECONCILIATION COMMISSION OF GHANA.

3.1 Introduction

This chapter discusses briefly the establishment of the truth and reconciliation commissions of South Africa and Ghana and their mandates. Since the mandates of these commissions are statutorily defined, relevant portions of laws establishing these institutions shall be considered in order to analyse their objectives so as to know whether they are achievable within their stated mandates.

3.2 The Truth and Reconciliation Commission of South Africa.

As observed in the previous chapter, the TRC was mainly established to unearth the truth surrounding the politically motivated gross human rights violations during the apartheid era. The operations of the TRC were limited to the period between 1960 and 1994.⁶¹ As noticed previously

for decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance.⁶²

The movement toward democratic rule in South Africa brought in its wake a need to effectively deal with the past in order to forge ahead as a nation.

Moreover, the African National Congress (ANC) realised that its original intention to prosecute all apartheid criminals would be politically impossible just as the grant of blanket amnesty demanded by the National Party. Legally it would have been much difficult to prosecute all the people involved in the gross violation of human rights in South Africa.⁶³ It is to be noted that obnoxious laws of the apartheid state backed most of the violations. In this light, those acts were legal. The

⁶¹ Note 33 above.

⁶² Mohamed DP (n 56 above).

⁶³ Esterhuysen (n 10 above 237-239).

difficulty encountered by the prosecution in the Wouter Basson case is a classic example of how difficult it would have been to prosecute all perpetrators.⁶⁴

It was appreciated by those involved in the negotiations that the task of building a new democratic order was a very difficult one because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity.⁶⁵ It was also realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past. Indeed, on the eve of the elections of 14 April 1994, the various parties in the Multiparty Conference involved in the negotiations agreed that a process ought to be developed to attend to the needs of victims as well as offenders. A TRC comprising three committees, namely a Committee on Human Rights Violations that would afford the victims the opportunity to relate their experiences. A Committee on Amnesty to make it possible for offenders to apply for amnesty through the Commission, and finally a Committee on Reparation and Rehabilitation to see to it that the needs of victims by way of compensation is taken care of.⁶⁶ They were designed to ease the transition to black majority rule, while avoiding the danger of a violent social revolution. They set the seal on the compromise settlement that brought in the ANC government and effected a power sharing arrangement between the black leadership and the old white rulers, without disturbing class relations in the country.⁶⁷ This fundamental philosophy was expressed in the epilogue to the transitional Constitution as follows:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflict and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation and not for retaliation, a need for *ubuntu* and not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the

⁶⁴ Major (Dr.) Wouter Basson was a cardiologist and personal physician of former president PW Botha, who headed the Project Coast, which spearheaded apartheid South Africa's Chemical and Biological Warfare programme. He was alleged to have been involved in several killings of the enemies of apartheid. See Supreme Court of Appeal of South Africa. Case No. 404/2002 and 293/2002.

⁶⁵ Tutu (n 27 above) 35-46. See Meiring P *Chronicle of the truth commission: A journey through the past and present-into the future of South Africa* 10-11.

⁶⁶ Meiring P (n 64 above) 36.

⁶⁷ Slaughter B "South Africa: Apartheid victims sue ANC Government for compensation." <<http://www.wsws.org/articles/2002/saaf-j19.shtml>> (accessed on 22 September 2003).

course of the past. To this end Parliament shall under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.⁶⁸

In obedience to the above provision in the interim constitution Parliament enacted in 1995 the Promotion of National Unity and Reconciliation Act 34 of 1995 (hereinafter called "the PNUR Act").

3.2.1 Promotion of National Unity and Reconciliation Act 34 of 1995

The PNUR Act established the TRC. The objectives of the Commission are set out in section 3. Its main objective is to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past". It is enjoined to pursue that objective by "establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights" committed during the period commencing 1 March 1960 to the "cut-off date". For this purpose, the Commission was obliged to have regard to "the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations". It also is required to facilitate;

“...the granting of amnesty to person who make full disclosure of all the relevant facts relating to acts associated with a political objective...”⁶⁹

The Commission is further entrusted with the duty to establish and to make known "the fate or whereabouts of victims" and "restoring the human and civil dignity of such victims" by affording them an opportunity to relate their own accounts of the violations. The Commission is also charged with recommending "reparation measures" in respect of such violations and finally to compile a comprehensive report in respect of its functions, including the recommendation of measures to prevent the violation of human rights.⁷⁰

Section 20(7) of PNUR Act 34, read with other sections of the PNUR Act, permits the Committee on Amnesty established by the PNUR Act to grant amnesty to a perpetrator of an unlawful act

⁶⁸ See n 29 above.

⁶⁹ Section 3 (c) of Act 34. See Tutu 45.

⁷⁰ Note 34 above. See Meiring 10-11.

associated with a political objective and committed prior to 6 December 1993. As a result of the grant of amnesty, the perpetrator cannot be criminally or civilly liable in respect of that act. Equally, the state or any other body, organisation or person that would ordinarily have been vicariously liable for such act, cannot be liable in law under the arrangements of the PNUR Act.⁷¹ To facilitate the Commission's work, the following committees as observed above were established for the purpose of achieving the objectives of the Commission:

- I. The first committee is the Committee on Human Rights Violations, which conducted enquiries pertaining to gross violations of human rights during the prescribed period, with extensive powers to gather and receive evidence and information.
- II. The second committee is the Committee on Reparation and Rehabilitation, which was given similar powers to gather information and receive evidence for the purposes of ultimately recommending to the President suitable reparations for victims of gross violations of human rights.
- III. The third and the most directly relevant committee for the purposes of the present discussion is the Committee on Amnesty. This committee was made up of five persons of which the chairperson must be a judge. The Committee on Amnesty was given elaborate powers to consider applications for amnesty. The Committee had the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty relates. The applicant concerned must have made a full disclosure of all relevant facts. The application must also have provided further that the relevant act, omission or offence was associated with a political objective committed in the course of the conflicts of the past, in accordance with the provisions of sections 20(2) and 20(3) of the Act.

From the above it is seen that only crimes considered being acts "associated with a political objective" could attract amnesty. Where it is established that a wrongful act or omission was politically motivated section 20(7), (8), (9) and (10) operates automatically. Section 20(7) provides:

- (a) 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

⁷¹ However, it is also to be noted that the apartheid crimes were also crimes under international law. It is wondered whether the South African state has the power in law to bind international law with its domestic law. See UN General Assembly Resolution 2202 that made apartheid a crime against humanity. See articles I, II, III, IV OF UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

- (b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability the first mentioned person.
- (c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence.

Interpreting the above provisions in the *Azanian Peoples Organisation (AZAPO) And Others v. The President Of The Republic Of South Africa*⁷², the Constitutional Court held that amnesty for criminal liability was permitted by the epilogue because without it there would be no incentive for offenders to disclose the truth about past atrocities. The truth might unfold with such an amnesty, assisting in the process of reconciliation and reconstruction. Further, the Court noted that such an amnesty was a crucial component of the negotiated settlement itself, without which the Constitution would not have come into being. It found that the amnesty provisions were not inconsistent with international norms and did not breach any of the country's obligations in terms of public international law instruments. The position adopted by the Constitutional Court in this case is however very contentious as it does not reflect the spirit of international law in contemporary understanding and practices. The granting of indemnity at a domestic setting in instances where the crimes involved sins against international law cannot be justified. This will be discussed at length in chapter four.

The Court further held that the amnesty for civil liability was also permitted by the epilogue of the constitution, again because the absence of such an amnesty would constitute a disincentive for the disclosure of the truth. The Court held that the epilogue permitted the granting of amnesty to the state for any civil liability. The Court said that Parliament was entitled to adopt a wide concept of reparations. This would allow the state to decide on proper reparations for victims of past abuses having regard to the resources of the state and the competing demands thereon. Further, Parliament was authorised to provide for individualised and nuanced reparations taking into account the claims of all the victims, rather than preserving state liability for provable and unprescribed delictual claims only.

⁷² *Azanian Peoples Organisation (AZAPO) And Others v The President Of The Republic Of South Africa*. 1996 (4) SA 671 (CC), 1996.

The Court held that the epilogue authorised the granting of amnesty to bodies, organisations or other persons, which would otherwise have been vicariously liable for acts committed in the past. The truth might not be told if these organisations or individuals were not given amnesty. Indeed, according to the Court, the Constitution itself might not have been negotiated had this amnesty not been provided for.

3.2.2 Did the TRC achieve its objectives?

The issue as to whether or not the TRC has lived up to its objectives as spelt out in the Interim Constitution and the PNUR Act is debatable depending on which angle one looks at it.⁷³ However, the amnesty objectives in respect of crimes committed during the stated period in the pursuit of a political agenda was largely achieved.⁷⁴ The brutal perpetrators of apartheid's crimes who appeared before the TRC pleaded for amnesty and in the course of doing so provided cold-blooded details of their crimes. Those who have been granted amnesty by the TRC cannot be sued for civil or criminal damages in South Africa.⁷⁵

As to whether or not victims were satisfied by the Commission's activities, a lot of misgivings have been expressed in this direction.⁷⁶ The main issue centers on the inadequacy of compensation to victims. Speaking during the tabling of the final TRC report in Parliament, on Tuesday 15 April 2003, President Thabo Mbeki, said:

Government will provide a once-off grant of R30,000 to those individuals or survivors designated by the TRC. This is over and above other material commitments. Combined with community reparations, and assistance through opportunities and services, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief... We do so with some apprehension, for as the TRC itself has underlined, no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves, were for monetary gain. We are convinced that, to the millions who

⁷³ The TRC has been accused of being biased in its handling of cases brought before it. See Jeffrey A *The truth about the truth commission* 85-87. See Terry B & Ntsebeza DB *Unfinished business South Africa apartheid & truth*, 1.

⁷⁴ Victims may not be necessarily happy with this and it is also wondered if South Africa has the capacity in international law to grant blanket amnesty to crimes under international law. See Donen M "Convention against torture and other cruel inhuman or degrading treatment (1984) Human Rights South Africa Torture." (*International Law*). Volume 7, Number 2 (June 2000).
<http://www.murdoch.edu.au/elaw/issues/v7n2/donen72_text.html#t2> (accessed on 21 August 2003).

⁷⁵ See section 20 of Act 34.

⁷⁶ See n 118 below.

spared neither life nor limb in struggle, there is no bigger prize than freedom itself, and a continuing struggle to build a better life for all.⁷⁷

The above assertion to the extent that freedom should be seen as a form of reward for the struggle will mean nothing to poor victims. Freedom is enjoyed by everybody, (including perpetrators who lost nothing in both dispensations). The government turned down a proposal by the TRC for a once-off wealth tax on corporations that would be used to finance a fund for the compensation of survivors of apartheid. The TRC proposal has been met with howls of protest from many of South Africa's big companies. They have argued that they are already investing heavily in social responsibility and economic development programmes.⁷⁸ However, the fact that perpetrators who unduly benefited from the past injustice at the expense of the victims, live side by side is a serious cause for concern. Even though the main objective of the TRC was not to attain the normal justice one could expect from a court of law, as far as victims were concerned, some measure of it was highly desirable. Generally speaking however, to the extent that stability of the country was the most desirable objective at the time of the transition, the TRC's role is monumental in the political history of South Africa.

3.3 The National Reconciliation Commission of Ghana

The NRC of Ghana as observed in the previous chapter was in response to the turbulent past of the post-independent Ghana. The failure to institutionalise democracy in the country since independence resulted in gross human rights violations of varied magnitude. The incessant interference by the military in the governance of the country further aggravated the situation.⁷⁹ Most Ghanaians see the passage of the National Reconciliation Act, Act 611 of 2002 as an opportunity the nation must take to redress its past in order to forge ahead in harmony as a nation.⁸⁰ The NRC will among others include in its final report to the government a

⁷⁷ Stoppard A "South Africa: Compensating apartheid victims." *Inter Press service*. Wednesday, 16 April 2003. <<http://www.afrika.no/Detailed/3373.html>> (accessed on 23 September, 2003).

⁷⁸ Note 48 above.

⁷⁹ Okyere 202-262. See Roger H *The death penalty: A world-wide perspective*, revised edition 1996, 187, paragraph 253.

⁸⁰ 10 July 2003 edition of *Accra Mail*. See note 20 above. See Sebarenzi J [Contact Africa] "Ghana: TRC process." <<http://two.pairlist.net/pipermail/contactafrica/2003-March/000374.html>> (accessed on 22 September 2003).

recommendation to set up a reparation fund to take care and address the needs and interests of victims who have lost breadwinners and properties.⁸¹

3.3.1 The National Reconciliation Act, Act 611 of 2002

Section 1 of the National Reconciliation Act (hereinafter “the Act”) establishes the NRC. The NRC is mandated under Section 3 to establish an accurate and complete historical record of abuses perpetrated against individuals by those purporting to have acted on behalf of the state during periods of unconstitutional rule. It is also to recommend redress and institutional reforms. The Commission investigates mainly the periods of military dictatorships in Ghana. This information will be included in the final NRC report and recommendations, which are to serve as guidelines for redressing the human rights violations.

The Commission sits for 12 months from the first hearing, with the possibility of a Presidential extension of six months, if good cause is shown. It is made up of nine members, as appointed by the president, in consultation with the Council of State. A series of committees have also been set up to examine such institutions and bodies as the legal profession, the press, the labour and student movements, and religious bodies and chiefs. The Committees will investigate any involvement these groups may have had in human rights violations during the mandated time frame, and will recommend reforms.

The NRC conducts hearings and investigations into human rights violations, and the circumstances surrounding the abuses. It has the powers of the police in its investigations, and the powers of a court in its hearings. It may search, enter, and remove any property needed in its investigations, and also has the power to subpoena. This does not mean the NRC can arrest people or hand down sentences. It is strictly a fact-finding and recommendation-making body.⁸² Section 4 of the Act provides that for the purposes of attaining its object, the Commission shall:

- (a) investigate violations abuses and of human rights relating to killings, abductions, disappearances, detentions, torture, ill-treatment and seizure of properties suffered by any person within the specified periods;
- (b) investigate the context in which and the causes and circumstances under which the violations and abuses occurred and identify the individuals, public institutions, bodies, organisations, public office

⁸¹ The NRC shall among others propose the establishment of a reparation fund. *Accra Mail* 28 August 2003.

⁸² Section 10 and 11 of National Reconciliation Act, Act 611 gives wide ranging powers to the Commission, including the power of subpoena. So far the commission has restrained itself from exercising these powers in the face of provocations from the former president. See the *Ghanaian Chronicle*, 12 September 2003.

- holders or persons purporting to have acted on behalf of any public body responsible for or involved in the violations and abuses;
- (c) identify and specify the victims of the violations and abuses and make appropriate recommendations for redress;
 - (d) investigate and determine whether or not the violations and abuses were deliberately planned and executed by the state or any person referred to in paragraph (b);
 - (e) conduct investigation relevant to its work and seek the assistance of the police and any public or private institution, body or person for the purpose of an investigation;
 - (f) investigate any other matters which it considers requires investigation in order to promote and achieve national reconciliation; and
 - (g) educate the public and give sufficient publicity to its work so as to encourage the public to contribute positively to the achievement of the object of the Commission.

Sections 10 and 13 of the Act gives the Commission a wide range of powers including the power to issue a subpoena to enable it with the necessary authority to discharge its mandate. The Commission also has an obligation to submit its report to the president three months after the end of its activities. Section 20 of the Act provides that the report shall include recommendations of the Commission on the way forward.

In spite of the mounting criticisms from the main opposition party in Ghana as noticed above, which believes that the Commission is a witch-hunting establishment to denigrate the achievements of the former President Rawlings, it appears that civil society and the Ghanaian public sees it as the best way forward. Since the commencement of its public sitting it has received testimonies from various quarters. Its activities are broadcasted on the National Television station to ensure transparency and also to help the reconciliation process. The Commission however has not stem its authority when the former President Rawlings refused to testify unless a lie detector machine was acquired for him. The success or otherwise of the Commission shall among others depend on its firmness.

3.4 Conclusion

It is observed from the forgoing that the laws establishing both truth commissions have as their focus the reconciliation of the peoples and national unity. Truth is seen as a vital ingredient in helping the people to come to terms with the past in order to move on as a nation. Emphasis however was placed on forgiveness and amnesty to those perpetrators who cooperated with the Commission as evidence in the work of the TRC in South Africa. Compensation of victims as demonstrated in the South African case is also seen to be very important. It is likely that the NRC of Ghana will follow these as well.

CHAPTER FOUR

INTERNATIONAL LAW RESPONSES TO THE CHALLENGES OF TRUTH AND RECONCILIATION COMMISSIONS

4.1 Introduction

This chapter discusses the challenges that truth and reconciliation commissions at the domestic level poses to international law. The extent to which the establishment of truth and reconciliation commission perpetuates the culture of impunity shall be discussed. The chapter shall also discuss the responses of international law to these challenges.

4.2 The challenges posed by truth commissions to international law

The establishment of truth commissions in spite of all the good intentions presents a lot of legal challenges especially to international law.⁸³ Several issues arise bordering on accountability, impunity, justice, reparation of victims and the like. This is mainly because truth commissions are usually set up to deal with the perpetration of “gross human rights violations” of the past. These violations may include torture, extra-judicial killing, enforced disappearance, mass killing of political opponents, confiscation of properties and the like. Most of these crimes are also crimes under international law of which states have universal jurisdiction under international law must do everything to bring to justice.⁸⁴ The question therefore is, can states limit international law with domestic legislation?⁸⁵

Article 26 of the Vienna Convention states that a state party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁸⁶ Customary law and international covenants direct that crimes must be punished. For instance, South Africa signed the Convention against Torture in 1993, and the focus here is on torture because it best illustrates the legal and practical difficulties of effectively implementing an amnesty regime within a domestic jurisdiction

⁸³ Peskin V “International Justice and Domestic Rebuilding: An Analysis of the Role of the International Criminal Tribunal for Rwanda.” <<http://www.jha.ac/greatlake/b003.htm>> (accessed on 26 September 2003).

⁸⁴ See the Statute of the International Tribunal, (UN, 1993).

⁸⁵ *Barcelona Traction, Light & Power Co Ltd*, 1970 ICJ Reports 1, 32.

⁸⁶ See Vienna Convention on the Law of Treaties, (1969).

while simultaneously attempting to comply with international obligations.⁸⁷ Similarly, allegations of chemical and biological warfare programmes by the apartheid South Africans state were in direct contravention of her international commitments. In 1963 South Africa acceded to the 1925 Protocol to the Geneva Convention, banning chemical and biological warfare (CBW). In 1972 South Africa signed the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction (the BWC). In 1975 South Africa ratified BWC. Can the post-apartheid South Africa grant amnesty to those individuals who perpetrated human rights violations with these weapons? ⁸⁸

The UN Human Rights Committee requires that a state which has engaged in human rights violations investigate the facts, take appropriate action, and bring those found responsible to justice, as well as treat and financially compensate the victim.⁸⁹ The UN General Assembly Declaration on Enforced Disappearances provides that persons who have or are alleged to have made people forcibly disappear "shall not benefit from any special amnesty law or similar measures that might exempt them from any criminal proceedings or sanction."⁹⁰

With the entry into force of the Rome Statute of the International Criminal Court (hereinafter called ICC), many issues, which were once theoretical, now have significant practical ramifications. Given the mandate of the ICC and the imperative of removing expectations of impunity for serious international crimes, prosecution is of the highest importance. Also, blanket amnesties are seen as antithesis of the ICC; even in situations of extreme political necessity, to accept a blanket amnesty would be for the ICC to succumb to blackmail. In any case these amnesties does not bound the ICC.⁹¹

⁸⁷ Donen M "Convention Against Torture And Other Cruel Inhuman Or Degrading Treatment (1984) Human Rights - South Africa Torture." *International Law* Volume 7, Number 2 June 2000.

<http://www.murdoch.edu.au/elaw/issues/v7n2/donen72_text.html#t2> (accessed on 22 August 2003).

⁸⁸ Burgess SF & Purkitt HE "The rollback of South Africa's chemical and biological warfare programme."

<<http://www.au.af.mil/au/awc/awcgate/awc-cps.htm> > (accessed on 30 September, 2003).

⁸⁹ Special Weekly Edition for the Duration of the 59th Session of the Commission on Human Rights (Geneva, 17 March 2003 - 25 April 2003) <<http://www.hrdc.net/sahrdc/hrfchr59/Issue5/impunity.htm>> (accessed on 26 September, 2003).

⁹⁰ See Article 19, Declaration on the Protection of All Persons from Enforced Disappearance, (UN General Assembly, 1992).

⁹¹ Robinson D "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court." *European Journal of International Law* Vol. No. 14, Issue 3, June 2003 481-505.

The Genocide Convention and the Convention against Torture contain explicit obligation to punish violators. The later also contains explicit obligations to punish violators and provides that "each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities."⁹²

4.3 Truth commissions and the perpetuation of the culture of impunity

It has been argued that grants of amnesty and concomitant impunity (exemption or protection from penalty or punishment) will generally result in the violation of the victims' rights and may well be in violation of international law.⁹³ The reasons for questioning the granting of amnesty, whether issued by a truth commission or by the fiat of a ruling regime, are manifold.⁹⁴

Firstly, the granting of amnesty (loosely read "impunity") to a human rights perpetrator is the victim's ultimate injury. In Ghana, there is little or no express sign of contrition from the former regime under which a lot of gross human rights violations were recorded.⁹⁵ Obviously, many victims see "reconciliation" without contrition by the perpetrators (or their punishment) as a cruel joke. The prosecution of those responsible for a victim's suffering is, for many victims, of central importance, and thus dispensing with prosecution is an irreparable injury.⁹⁶

Secondly, a grant of amnesty is likely to reinforce a culture of impunity because those with power realise that they need not incur punishment for the crimes they commit.⁹⁷ Impunity poisons everyday life and condemns future generations to unresolved problems. Sierra Leone, in a somewhat different context, illustrates the folly of trading justice for truth. The brutal civil war waged by the rebel Revolutionary United Front (RUF) was characterised by the

⁹² Lord Browne-Wilkinson *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other Ex Parte Pinochet*. (Opinion of the House of Lords) on 24 March 1999.

<<http://news.bbc.co.uk/1/hi/world/302487.stm>> (accessed on 10 October 2003).

⁹³ Bell R Truth commissions and war tribunals. *Index on Censorship*, 5, 148.

⁹⁴ Note 26 above.

⁹⁵ Note 34 above.

⁹⁶ Edelenbosch C Human rights violations -- a duty to prosecute? 1994 *Leiden Journal of International Law*, Vol. No.7(2) 5-22.

⁹⁷ Boraine A Levy J & Scheffer R "Dealing with the past, truth and reconciliation in South Africa." 112-116.

most revolting abuses, including the rebels' signature atrocity of cutting off the arms of civilians. A peace agreement signed in July 1999 included, a blanket amnesty and a truth commission. In a historic move, the UN, under pressure from rights activists, backed away from the pact's amnesty, but no steps were actually taken to bring the perpetrators to justice. Not surprisingly, within months the rebels were at it again.⁹⁸ Only when they made the mistake of attacking UN peacekeepers, was rebel leader Foday Sankoh arrested, and a UN-sponsored tribunal was established to try Sankoh and his henchmen.⁹⁹ Commenting on the Lome Peace Agreement Kofi Annan, the UN Secretary General observed:

The agreement provides for the pardon of Corporal Foday Sankoh and a complete amnesty for any crimes committed by members of the fighting forces during the conflict from March 1991 up until the date of the signing of the agreement...I instructed my Special Representative to sign the agreement with the explicit proviso that the United Nations holds the understanding that the amnesty and pardon in article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.¹⁰⁰

Thirdly, granting amnesty via truth commissions has led to a trend of sham "truth" commissions springing up wherever the powerful fear that the truth may lead to their reconciliation with a prison cell.¹⁰¹ In South Africa, the National Party Government demanded a blanket amnesty for its functionaries. Fortunately, this was rejected by the ANC but it eventually gave birth to the TRC which came as a compromise and the fruit of the intense negotiations.¹⁰² Similarly, in Sierra Leone the RUF was particularly interested in the non-prosecution of Foday Sankoh¹⁰³.

Fourthly, it is also asserted that the victims may perceive impunity that is granted by or extends into a period of transitional democracy as a profound blow because the decision to grant it is no longer in the hands of a dictatorial regime but is taken by a democratic government. For instance, in South Africa, some survivors and their families - such as the Bikos, the Mxenges, the Harouns,

⁹⁸ Hirsch JL *Sierra Leone, Diamond and the Struggle for Democracy* (2001) 58-7; 77-88.

⁹⁹ See UN, Seventh Report of the Secretary-General on the UN Observer Mission in Sierra Leone, July 30, 1999, S/1999/836.

¹⁰⁰ Seventh Report of the Secretary-General on the United Nations, Observer Mission in Sierra Leone, U.N. Doc. S/1999/836, 30 July 1999, para. 7.

¹⁰¹ Article IX of the Lome Agreement on Sierra Leone, provided for a blanket amnesty RUF criminals to get Foday Sankoh to sign the accord.

¹⁰² Note 95 above.

¹⁰³ Note 86 above.

and the Ribeiros - objected to the creation of the TRC from the very outset. They protested the absence of justice in bringing perpetrators to book. They criticised the abrogation of their rights to bring civil suits against perpetrators. And most of all, they rejected what they considered to be the imposition of a flawed remedy to their pain in the interests of national reconciliation and have sought legal solutions through the Constitutional Court and more recently, the High Court. In this sense, reconciliation on a national basis has maintained and intensified the trauma for some survivors. Rather than helping heal their wounds, the TRC process has only managed to exacerbate their pain and suffering.¹⁰⁴

Further, resort to truth commissions may not be sufficient to discharge a state's duties under various instruments of international law. There is no denying that international law requires States to hold perpetrators of genocide, war crimes, crimes against humanity and torture criminally responsible for their actions. This is not an option but a question of basic legal obligation.¹⁰⁵

There are instances where crimes were inconclusively investigated and certain personalities were punished under the existing domestic criminal justice system, even though some key figures were left untouched. In Ghana for instance, the murder of the three superior court justices and a retired military officer as noticed above was never conclusively investigated. Even though the then government swiftly prosecuted and punished some personalities closely associated with the Provisional National Defence Council under the former President J.J Rawlings, allegations linking the former president himself, his wife and some other personalities in the government to the crime still persist in Ghana.¹⁰⁶ Supposing some people come forward before the National Reconciliation Commission of Ghana to admit to the commission of the crime will they be entitled to amnesty? The 1992 constitution of Ghana emphasizes on "freedom, justice, probity and accountability."¹⁰⁷ Can it be said that truth commissions defeats the stated objective of the 1992 constitution?

¹⁰⁴ Winslow T "Reconciliation: The road to healing? Collective good, individual harm?" Vol. 6 No. 4&4 December 1997. <http://ccrweb.ccr.uct.ac.za/two/6_34/p24_winslow.html> (accessed on 6 October 2003).

¹⁰⁵ Parlevliet M (1998): "Considering truth: Dealing with a legacy of gross human rights violations." *Netherlands Quarterly of Human Rights*, Vol. 16, 141-174. See Linton S "Khmer rouge trials are vital, but would not solve everything." *Phnom Penh Post*, Issue 11/26, December 20, 2002 –January 2,2003. <<http://www.phnompenhpost.com/TXT/comments/kr.htm>> (accessed on 3 October 2003).

¹⁰⁶ One of the architects of the December 31, 1981 *coup d'etat*, ex-Corporal Matthew Adabugga told the National Reconciliation Commission (NRC) that the Chairman of the erstwhile Provisional National Defence Council (PNDC), Flt-Lt JJ Rawlings, ordered the killing of the Three High Court judges and a retired military officer in 1982. He said Flt-Lt JJ Rawlings popped champagne, after he was informed that the four persons had been murdered. <<http://www.prosecute-rawlings.com/id27.htm>> (accessed on 24 September 2003).

¹⁰⁷ See the preamble of the 1992 Constitution of Ghana.

In South Africa during the Dr. Wouter Basson's trial, the defense argued that there was no precedent under South African law to charge citizens for actions in other countries and a general amnesty issued on the eve of Namibian independence in 1989 protected all South African police and military members from criminal prosecution prior to that date. The presiding judge, Willie Harzenberg, ruled that six of the eight murder/conspiracy to murder charges against Basson had to be withdrawn on the grounds that the Criminal Procedure Act did not allow prosecution in a South African court for crimes committed in another country. Strangely, he also ruled in a manner that almost contradicted the defence case that Basson was indemnified from prosecution by the Namibian amnesty.¹⁰⁸ The enthusiasm with which Dr. Wouter Basson, who had expressed a lot of indignation for the TRC of South Africa enjoyed the amnesty granted by the Namibian state clearly portray that even unrepentant criminals can also benefit from it.¹⁰⁹ This is a dangerous recipe for impunity. Dr Wouter Basson had to be *subpoenaed* to give evidence before the TRC. Earlier on he had launched an application in the Cape High Court contending that his rights in terms of section 35 of the interim Constitution would be infringed if he were compelled to testify. The High Court ruled that he should testify.

Even though the TRC wanted to use flexible approach to get both victims and perpetrators to cooperate with it, perpetrators generally frustrated the work of the Commission with legal technicalities. At the end of the day, it appeared that victims were made to make too many concessions.¹¹⁰

4.4 Responses of international law to the challenges presented by the establishment of truth commissions

As observe above, the establishment of truth commissions presents practical legal and moral dilemmas to transitional regimes and also for international law.¹¹¹ Several issues as observed above are automatically raised. Can society's need for healing override the search for justice?

¹⁰⁸ Supreme Court of Appeal of South Africa. Case No. 404/2002 and 293/2002

¹⁰⁹ A court has to order him to appear before the TRC. When he finally appeared, he had to be warned of the fact that the TRC could have him arrested for contempt before he answered the questions the TRC asked him.

¹¹⁰ See the preamble of the 1992 Constitution of Ghana.

¹¹¹ See the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (UN, 1968). General Assembly Resolution 23391, November 1968. U.N. Declaration on the Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, UNGA Resolution 3074.

Can one "sacrifice the pursuit of justice as usually understood for the sake of promoting other social purposes such as reconciliation"? Where victims are dissatisfied with the compensation package as is the case in South Africa, can they bring action against perpetrators who are known to have benefited immensely from the past injustices in South Africa? Another fascinating question is "[W]ould an apartheid criminal who has been granted an amnesty be liable to be prosecuted for crimes against humanity in a non-South African court?"¹¹² Judge Richard Goldstone in his *For Humanity* observes;

No doubt that such a prosecutor [of a foreign court or the future ICC should not be inhibited by national amnesties. In international law they clearly have no standing and would not afford a defense to criminal or civil proceedings before an international court or a national court other than that of the country that grants the amnesty. That does not mean that in deciding on an investigation or prosecution, the prosecutor will not take into account the circumstances of the amnesty.¹¹³

Lord Browne-Wilkinson giving the judgment of the majority in the Pinochet's case observed:

Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984...The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution."¹¹⁴

Moreover, if there is no remedy for aggrieved persons locally, it provides a fertile ground to pursue such a matter in an international forum. It would mean that there is no domestic remedy to be exhausted. Article 56(5) of the African Charter on Human and Peoples' Rights, 1981 provides that "[C]ommunication relating to human and peoples' rights referred to in [Article] 55 received by the Commission, shall be considered if they are sent after exhausting local remedies, if any

¹¹² Barcelona Traction (n 84 above).

¹¹³ Goldstone R *For Humanity* as quoted in "*Justice: The First Casualty of Truth*" as above in note 81.

¹¹⁴ Lord Browne-Wilkinson, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Other, Ex Parte Pinochet*. (Opinion of the House of Lords) on 24 March 1999.
<<http://news.bbc.co.uk/1/hi/world/302487.stm>> (accessed on 10 October 2003).

unless it is obvious that this procedure is unduly prolonged.” This provision suggests that where there is no domestic remedy to be exhausted, the Commission may dispense with that condition. The rationale for the existence of this rule derives from the consensual nature of international law. States are afforded the opportunity to give effect to their international obligations.¹¹⁵ Exhaustion of local remedies is also a requirement under other international adjudication bodies. The Article 5(2) of the Optional Protocol to the ICCPR (UN, 1966) refers to available domestic remedies that need to be exhausted, unless their exhaustion is ‘unreasonably prolonged’. This is also the case with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment Punishment (UN, 1984). Article 22(5)(b) provides for the exhaustion of domestic remedy if any. It is therefore obvious that amnesty granted by truth commissions at the domestic levels can be challenged outside South Africa in the sense that it takes away the right of the victim to initiate an action.¹¹⁶

What is obvious however is the fact that there cannot be any meaningful arrangement without the compensation of victims of gross human rights violation. Kritz observes that compensation and restitution serve three important functions.

First, it aids the victim's to manage the material aspect of their loss. Second, it constitutes an official acknowledgment of their pain by the nation...Third, it may deter the state from future abuses, by imposing a financial cost to such misdeeds.

International law increasingly acknowledges the state's obligation to provide restitution.¹¹⁷ Besides the above, there is an overwhelming international jurisprudence to the effect that victims must be fairly compensated for human rights violations they have suffered. Article 2 (3), ICCPR each State Party to the Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall

¹¹⁵ Evans & Murray *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000*, 2002 81.

¹¹⁶ The African Commission on Human and Peoples' Rights has held that where there is an ouster clause in the domestic statute taking away applicant's rights, then there is no domestic remedy to be exhausted. See Communication 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa and Civil Liberties Organisation v. Nigeria*.

¹¹⁷ Kritz, N J "The Dilemmas of Transitional Justice," in *Transitional Justice*, Kritz NJ ed. (Washington, D.C. *United States Institute of Peace Press*, 1995) 29-30.

have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

Similarly, Article 9 (5), of the ICCPR provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Article 14 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (UN, 1984) provides that each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (UN, 1965) provides that States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. Article 8 of the Universal Declaration of Human Rights (UN, 1948) provides that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance requires that victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.¹¹⁸

It is to be noted that several victims of apartheid are seeking justice outside the jurisdiction of South Africa. This is a clear indication that most victims are not satisfied with issues on compensation and the granting of amnesty to perpetrators, against whom they cannot initiate action in South Africa. Ed Fagan, a US lawyer has filed a suit in a U.S. court, on behalf of

¹¹⁸ See Articles 4, 5, 6, 8, 11, 12 and 13 of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power. General Assembly resolution 40/39 of November 1985.

apartheid victims, for damages of billions of U.S. dollars against Anglo American, the South African mining house -- now based in London -- and its De Beers diamond company. Anglo-American has rejected the lawsuits. Claims have also been filed against the South African energy company, Sasol and Flour International, an oil company. A number of other multinational corporations and international banks have been hit with similar lawsuits.¹¹⁹ The companies are accused of financing the minority white regime between 1985 and 1993, in violation of UN-imposed sanctions. The banks' loans allegedly allowed the cash-strapped regime to buy arms and continue its oppression of the black majority.¹²⁰

Recent development globally indicate that the international community believes that international law must not be undermined. When ethnic and political violence in former Yugoslavia in 1991 and in Rwanda in 1994 erupted in genocidal acts and crimes against humanity, the Security Council of the United Nations responded by quickly establishing special tribunals in The Hague and Arusha to try leading perpetrators for their crimes.¹²¹ A similar response was given to the gross human rights violations in East Timor.¹²² In Sierra Leone, The UN established a criminal tribunal alongside the TRC in the country. Leading personalities in the RUF, including Foday Sankoh have been charged before the tribunal. In a dramatic situation, the tribunal has also indicted the former President Charles Taylor of Liberia.¹²³ The former president of Serbia is also being tried in the Hague for his involvement in the gross human rights violations during the war that led to the disintegration of the former Yugoslavia.¹²⁴

The above provisions impose obligations on States that constitute the international community not to frustrate victims of human rights violations in their quest for justice. States have an obligation to strengthen their institutions to give effect to the enforcement of international norms. Concerning the enforcement of international law, the risk is not that states may overstep their competence but

¹¹⁹ Winer, S. "USA: Seeking justice for apartheid victims through the court." *AlterNet*, 24 June 2002. <<http://www.corpwatch.org/news/PND.jsp?article=2829>> (Accessed on 24 September 2003).

¹²⁰ The Alien Tort Claims Act (ATCA) of 1789 of the USA essentially allow companies trading in the US to be sued for internationally recognised human rights violations anywhere in the world. The Alien Tort provision formed the basis of the multi-billion dollar claims in the 1990s against Swiss banks, and German and Austrian firms which used forced or slave labour during the Nazi era. See note 112 above.

¹²¹ Note 82 above.

¹²² "Universal jurisdiction: The duty to enact and enforce jurisdiction." AI Index: IOR 53/017/2001. 1 September 2001.

¹²³ "Sierra Leone: Recommendations on the draft statute of the special court", November 2000 (AI Index: AFR 51/83/00). See note 81 above.

¹²⁴ Note 113 above.

rather than by looking for excuses to justify their incompetence, they condone the impunity of the most serious crimes which certainly goes against the *raison d'être* of international law.¹²⁵

However, national amnesties, pardons and similar national measures of impunity for the worst imaginable crimes not only have no place in an international system of justice, but also are prohibited under international law.¹²⁶ They are also inconsistent with the duty to bring to justice those responsible for violations recognised in the Preamble to the Rome Statute. The states parties to the Rome Statute have affirmed;

that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation...to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

The Rome Statute also provides "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".¹²⁷ Therefore, as explained earlier on, amnesties at the national level cannot prevent courts of another state or an international criminal court from investigating and prosecuting persons suspected of such crimes.¹²⁸

The House of Lords permitted the Magistrate's Court to determine whether the extradition of the former President of Chile could proceed despite a national amnesty and a similar measure of impunity.¹²⁹ A trial court in Argentina held that amnesties for crimes against humanity violated

¹²⁵ Pinochet Case, Decision of the Tribunal of First Instance of Brussels, 6 November 1998, para. 3.3.3 (English translation in Luc Radomes, *Belgian Tribunal of First Instance (investigating magistrate)*, November 8 1998, *93 American Journal of International Law* 700, 702 (1999). See AI Index: IOR 53/017/2001. 1 September 2001.

¹²⁶ Ambos K (1997): "Impunity and International Criminal Law: A Case Study on Colombia, Peru, Bolivia, Chile and Argentina", *18 Hum. Rights Law Journal* volume 1, 7.

¹²⁷ See Rome Statute, Preamble, paras 4 to 6. See Bassiouni M C and Madeline H M eds. "Accountability for International Crimes and Serious Violations of Fundamental Human Rights." *1996 Law and Contemporary Problems* volume 59.

¹²⁸ Articles 25 and 18 of the Joint Principles. Article 25 (Restrictions and Other Measures Relating to Amnesty).

¹²⁹ David S Opening Address, Universal Jurisdiction Conference, December 2000, Vol.35 *New England Law Review* 233-234.

international law as incorporated in Argentine law.¹³⁰ A French investigating judge "concluded that Chile's amnesty law had not deprived French courts of their jurisdiction to prosecute crimes committed against French citizens." (76) Another French judge has held that a Mauritanian amnesty which covered acts of torture had no legal effect in France and would not be recognised.¹³¹

4.5 Conclusion

The above discussion portrays the challenges truth commissions pose to international law. It has also been observed that truth commissions have the potential to encourage the culture of impunity. Whilst it is generally accepted that somehow peoples must come into terms with their painful past and forge ahead to face the future, a lot of misgivings, however, have been expressed from several angles as to whether or not truth commissions are the best way forward.¹³² The fact that truth commissions in many respects undermine international law is a serious cause for concern. Contemporary practices of the international community in the face of rising gross violations of human rights points at the fact that prosecution of perpetrators or at least, the leaders of and or instigators of such crimes has been preferred over domestic amnesty which may lead to impunity.

¹³⁰ Simon and Del Cerro Case, Order of 6 March 2001, Case No. 8686/2000, *Juzgado Nacional en lo Criminal y Correccional* Federal No. 4, Buenos Aires.

¹³¹ Brigitte S International Decisions: In re Pinochet - Tribunal de grande instance (Paris), 1999 Vol. 93 *American Journal International Law* 696-699.

¹³² Benomar J "Confronting the Past. Justice after Transitions." 1993 *Journal of Democracy*, Vol. 4(1) 3-14.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

It has been observed from the preceding chapters that truth and reconciliation commissions have become very popular recently and have actually been employed by many transitional governments in one form or the other.¹³³ Transitional societies face a number of dilemmas. New governments are caught between calls for revenge, the need to distance themselves from the old regime, and the need to adhere to the new democratic principles. However, transitional governments are also mindful of the complexities involved in the prosecution and punishment of the old order. The new order must also decide who in the chain of command to prosecute; whether to prosecute the person who gave an order or the underling who executed it. Should prosecution be limited to violations of human rights, or extended to economic mismanagement? The new order must also decide what punishments are appropriate.¹³⁴

Most transitional governments have resorted to the use of truth commission. In doing so several variables are taken into account. The preceding chapters have discussed them at length. However, in sum, the following are generally considered in the formation of truth and reconciliation commissions,

1. the need to come into terms with the painful past.
2. the need to reconcile all the people (victims and perpetrators) in order to forge ahead as a people to face the future.
3. the need to prevent further socio-political upheaval and bloodbath.
4. the fact that it would be generally impossible to legally redress all issues involved in the past violation of human rights of the victims.

As a result of the above, values like peace, reconciliation, truth, forgiveness without forgetting, nation-building, economic prosperity and national unity are exalted above the traditional notion of justice through legality.¹³⁵ Both Ghana and South Africa have adopted this approach in

¹³³ Neil J K (n116 above) 29-30.

¹³⁴ Govier T "The ethics of forgiveness". *Interaction*. Vol. 6, No. 3. Fall 1994 10.

¹³⁵ Stephen R *Peace-Building and Conflict Transformation*, 1995 129-152.

redressing their past human rights situations.¹³⁶ Both countries faced the challenges of transition from dictatorship into popular democracy. Ghana and South Africa experienced a history of politically motivated gross human rights violation albeit they differed in form and substance.

In South Africa, the root of the human rights violations was colonialism and policy of racial discrimination that matured into the infamous apartheid. The implementation of the apartheid policy and its concomitant resistance by the black majority resulted in the violations of human rights.¹³⁷ In Ghana, the excitement that greeted the attainment of political independence in 1957 and the pride that she was the first country south of the Sahara to have achieved this feat was almost whittled away by several socio-political and economic failures after independence. Various forms of dictatorships plagued the country leading to politically motivated gross human rights violations.¹³⁸

In both Ghana and South Africa, the early 1990s presented the opportunity to democratise. In South Africa this period marked the beginning of the unbanning of banned political parties like the ANC, Communist Party and the Pan Africanist Congress. The release of political prisoners and generally, the liberalisation of the socio-political environment happened within this period. The period however recorded one of the bloodiest moments in the political history of the country. With intensive negotiations from all stakeholders, the transition to democracy was successful. The establishment of the TRC to help unravel the past gross human rights violations in the country, compilation of report on same and the possible recommendations to the government on the how best to rehabilitate and compensate victims and grant amnesty to those perpetrators who availed themselves to the process.¹³⁹

In Ghana, the military junta that supervised the transition to popular democracy quickly transformed itself into a political party and handed over power to itself in an election that was widely condemned in the country as bogus and rigged. In many respects, the transition in Ghana was not thorough going enough to redress the human rights violation of the past. However, with the defeat of the NDC in the 2000 elections, the new leadership announced the formation of a

¹³⁶ South Africa established shortly after the transfer of power from the white minority government to the democratically elected government. In Ghana however, the NRC was started ten years after the restoration of democracy largely due to the lack of the necessary political will of the former government.

¹³⁷ See note 54 above.

¹³⁸ Note 47 above.

¹³⁹ See the PNUR Act, Act 34, 1995 and the National Reconciliation Act, Act 611 of 2002.

NRC.¹⁴⁰ Even though the idea of the establishment of NRC idea was keenly challenged by the former government, it is however obvious that Ghanaians in general are in favour of the values it espoused, that is, reconciliation, national unity, knowing the truth about past gross human rights violations, a possible compensation of victims and the like. Although the name of the Commission in Ghana did not mention the word “truth” as is the case in South Africa, a careful consideration of the laws establishing the TRC in South Africa and NRC in Ghana shows that they stand for almost the same goal.¹⁴¹

It has been observed earlier in preceding chapters that the TRC of South Africa has completed its work and submitted its report and recommendations to the government. The government of South Africa has actually started to act on the recommendations. The government of South Africa has actually initiated some work on the recommendations of the TRC. The government has announced the payment of R 30,000 to victims.¹⁴² Many perpetrators have also been granted amnesty. This means that they may not be asked to account for their involvement in the violation of human rights either criminally or civilly in South African courts. It has also been noticed from above that many victims are not happy and have actually initiate action in the USA for compensation from some companies which flouted the UN sanctions against the criminal institution of apartheid and financially aided it.¹⁴³ In Ghana the NRC is still hearing cases and may submit its report and recommendations by the end of year 2004. It is however obvious that a similar recommendation may be made by the NRC of Ghana.

It has been observed that to the extent that truth and reconciliation commissions exalt values such as truth, reconciliation, nation building, healing, forgiveness without forgetting, moving forward and the like, they are on the surface very positive.¹⁴⁴ However, weighing idealism against reality, truth and reconciliation commissions have the tendency to undermine international law and perpetuate the culture of impunity.¹⁴⁵

¹⁴⁰ Sarpong (n 44 above).

¹⁴¹ See section 3 & of NRC Act, Act 611.

¹⁴² See President Thabo Mbeki’s address to the South African parliament on Tuesday 15 April 2003 (n 76 above).

¹⁴³ Note 118 above.

¹⁴⁴ Christie K *The South Africa Truth Commission* 2000 68-199.

¹⁴⁵ Note 96 above.

It has been noticed that contemporary international law tend to favour accountability and effective compensation of victims of gross human rights violations. Any form of political machination based on expediency to frustrate this is inconsistent with international law.¹⁴⁶

5.2 Recommendations

5.2.1 Respect for international law

In the light of the above therefore it is submitted that states actions that may have undermining effect on international law and the rule of law in general must be discouraged at all cost. It has been observed that the virtues espoused by truth and reconciliation are generally desirable. However, the tendency to exalt political expediency above certain higher international norms such justice, accountability, fair compensation for victims and survivors of gross human rights violation must be viewed with the necessary suspicion wherever it happens. The arrest and trial of Mr. Milosovicth, the former president of Yugoslavia, the trial of Gen. Pinochet, the former dictator of Chilli, the trial of the key leaders of the Rwandan genocide by the International Tribunal and the indictment of former President Charles Taylor are good examples at curbing impunity and deterring human rights violations by politicians. It is simply not right to exalt political expediency above rule of law both at the international and domestic levels. It is therefore suggested that where there is enough evidence, the arrest and prosecution of key figures like heads of state, military authorities and other high-ranking officials would be preferable.¹⁴⁷

5.2.2 The creation of reparation fund

It is also recommended that states, multi-nationals corporations, churches, and individual powerful personalities who in one way or the other aided and abetted in the gross human rights violation must be made to account for their misdeeds. Since the rehabilitation of victims of human rights violations is a key to any meaningful reconciliation and healing, it is recommended that perpetrators who benefited from the human rights violations must be made to contribute towards this end. If it becomes the sole responsibility of the state, it defeats the ends of justice, as the taxpayer's money will be overstretched. It is to be noted also that both victims and perpetrators are taxpayers. If the taxpayers' money were used to pay for the rehabilitation of victims, it would

¹⁴⁶ Drinian Robert F & Kuo T "Putting the world's oppressors on trial. The torture victim protection act." 1993 *Human Rights Quarterly*. Vol. 15 (3), 605-624.

¹⁴⁷ *The Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T. See Barbara C "Beyond Milosevic, long-range justice raises fears of eroding sovereignty." *New York Times* July 1, 2001.

mean that the victim is paying for his or her own compensation. It is obvious that some perpetrators unduly benefited from the past human rights violation. Moreover, there is need for a clear definition of reparation that is effective and consistent with South Africa's obligations in the UDHR and other international instruments.

5.2.3 Building and strengthening democratic institutions

It is important that the transitional governments concentrate, among other things on the building and strengthening of democratic institutions to ensure that gross human rights violations are not repeated in the future.¹⁴⁸ Any form of unnecessary reversed discrimination must be avoided.¹⁴⁹ There is need for commitment to the new dispensation of democracy and respect for human rights from political leadership, bureaucracies, civil society organisations and non-governmental organisations and the citizenry in general. Citizenry activism requires that people do not see themselves as recipients of rights only, but also the bearers of the responsibility to ensuring that rights are respected, protected and promoted.¹⁵⁰

¹⁴⁸ Lotter (Hennie) HPP *Injustice, violence and peace. The case of South Africa*. 140-147.

¹⁴⁹ Mappes TA & Zembaty JS *Social ethics, morality and social policy*, 159-197. See George S "Reverse discrimination, the future, and the past." *Ethics*, Vol. 90, October 1979, 81-87.

¹⁵⁰ Gyimah-Boadi "The role of the citizen in the consolidation of democracy in Ghana." 2000.

Word Count	17409
Font Type	Arial
Font Size	11
Quotation	10
Footnotes	9
Format	1.5 Line Spacing
Pages	44

BIBLIOGRAPHY

Books

- Bell T & Ntsebeza D (2001) *Unfinished business, South Africa apartheid & truth*. Red Works, South Africa.
- Boraine A *et al* (1994) *Dealing with the past, and reconciliation in South Africa*. Cape Town, Institute of democracy in South Africa.
- Christie K (2000) *The South Africa truth commission*. London, Mcmillan.
- Esterhuyhesen *et al* eds (1998) *Africa A-Z, continental and country profile*. Pretoria, Africa Institute of South Africa.
- Evans & Murray eds (2001) *The African charter on human and peoples' rights: The system in practice 1986-2000*.
- Gastrow P (1995) *Bargaining for peace, South Africa and the national peace accord*. Washington DC, US Institute of Peace.
- Hayner P (2001) *Unspeakable truth: Confronting state terror and atrocity*. New York, Routledge.
- Holy Bible (King James Version).
- Hirsch JL (2001) *Sierra Leone, diamond and the struggle for democracy*. London, Lynne Rienner.
- Huntington SP (1991) *The third wave: Democratisation in the late twentieth century*. London, University of Oklahoma Press.
- Jeffrey A (1999) *The truth about the truth commission*. Johannesburg, South Africa Institute of Race Relation.
- Johan De Waal *et al* (2001) *The bill of rights handbook*. Cape Town, Juta.
- Lotter H (1997) *Injustice, violence and peace, the case for South Africa*. Volume 56 Book Inquiry Series.
- MaGraw-Hill Books Inc.
- Mappes TA & Zembaty JS (1982) *Social ethics, morality and social policy*. New York,
- Mathabane M (1990) "Kafir boy." New York, Touchstone.
- Meiring P (1999) *Chronicle of the truth commission: A journey through the past and present-into the future of South Africa*. Vanderbijlpark, Carpe Diem Books.
- Kritz NJ (1995) *The dilemma of transitional justice*. Washington DC, US Institute of Peace.
- Kritz NJ ed (1995) *Transitional justice: How emerging democracies reckon with former regimes*. Washington DC, United States Institute of Peace, volume 3.
- Okyere VN (2000) *Ghana: A historical Survey*. Accra, Vinojab Publications.
- Roger H (1996) *The Death Penalty: A World-wide Perspective*.

Stephen R (1995) "Peace-Building and Conflict Transformation", chapter in *Ethnic Conflict and International Relations*, Dartmouth Publishing.

Tutu MD (1999) *No future without forgiveness*. New York, Doubleday.

Verwoerd & Mabizela M (2000) *Truth drawn in jest*. Cape Town & Johannesburg, David Philip Publishers.

Yidana JJ (2002) *Who Killed The Judges?* Accra, Bismi Enterprise.

Zalaquett J (1995) "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints" Kritz NJ ed (Washington DC United States Institute of Peace Press).

Articles and Journals

Ambos K "Impunity and international criminal law: A case study on Colombia, Peru, Bolivia, Chile and Argentina" (1997) *18 Human Rights Law Journal* vol 1-7.

Amnesty International, *Sierra Leone: Recommendations on the draft Statute of the special court*, November 2000 (AI Index: AFR 51/83/00).

Babara C "Beyond Milosevic, long-range justice raises fears of eroding sovereignty." *New York Times* July 1, 2001.

Bassioni MC & Madeline HM eds "Accountability for International Crimes and Serious Violations of Fundamental Human Rights." *Law and Contemporary Problems* 59 (Autumn 1996).

Blaser A "How to advance justice without really trying: An analysis of non- governmental tribunals." 1992 *Human Rights Quarterly*, 14(3):339-370.

Burges SF & Purkitt HE "The rollback of South Africa's chemical and biological warfare programme." <<http://www.au.af.mil/au/awc/awcgate/awc-cps.htm>>.

Brigitte S "International decisions: In *re Pinochet - Tribunal de grande instance (Paris)*", (1999) *93 American Journal International Law*. 696-699.

Carla E "Human rights violations: A duty to prosecute?" 1994 Vol. 7 *Leiden Journal International Law* 5-8.

David S Opening address, Universal Jurisdiction Conference, December 2000, (2001) *35 New England Law Review* 233-234.

Donen M *Convention Against Torture And Other Cruel Inhuman Or Degrading Treatment (1984) Human Rights South Africa Torture (International Law)*. Volume 7, Number 2 (June 2000). <http://www.murdoch.edu.au/elaw/issues/v7n2/donen72_text.html#t2>

Donen M "Impunity and gross human rights violations in South Africa." <http://www.murdoch.edu.au/elaw/issues/v7n2/donen72_text.html#t2>

Drinian R & Kuo T "Putting the World's Oppressors on Trial. The Torture Victim Protection act." (1993) *Human Rights Quarterly*, 15(3):605-624.

Enslin P "South Africa's *truth and reconciliation commission as a model of peace education*." <<http://construct.haifa.ac.il/~cerpe/papers/enslin1.html> >"

George S "Reverse discrimination the Future, and the Past." *Ethics, Volume 90*, October 1979.

Govier T "The ethics of forgiveness". *Interaction*. Vol. 6, No. 3. Fall 1994. P.

Gyima-Boadi (2000) "The Role of the Citizen in the Consolidation of Democracy in Ghana."

Hayner PB "Fifteen truth commissions-1974 to 1994: A comparative study," *Human Rights Quarterly*, v. 16, no. 4, November 1994.

Kevin A & Beatriz V "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography" 41 *OJPCR: The Online Journal of Peace and Conflict Resolution* 4.2: 37-76 (2002) ISSN: 1522-211X | <www.trinstitute.org/ojpcr/4_2recon.pdf>

Klaas de Jonge Interim report on research on *Gacaca* jurisdictions and its Preparations (July-December 2001) [Report I]; Kigali/Paris, January 2002 and "Activities PRI research team, report: January-March 2002"; Kigali/Paris, April 2002 [Report II].

Kuenyehia N "*The Media and the National Reconciliation Commission in Ghana*." <<http://www.newsinghana.com/news/media-goes-to-school.htm>>

Linton s "Khmer rouge are vital but won't solve everything." *Phnom Penh Post*, Issue 11/26, December 20, 2002 – January 2, 2003. <<http://www.phnompenhpost.com/TXT/comments/kr.htm>>

Meredith W "Ghana's national reconciliation commission." <<http://www.ccds.charlotte.nc.us/History/Africa/save/brackett/bracket.htm>>

Oduro F "Unveiling Kufour's reconciliation commission can free Ghana from the burden of the past atrocities." *Cape Times* 5 June 2002. <http://www.ijr.orgza/art_pgs/art39.html>.

Parleviet M "Considering truth: Dealing with a Legacy of Gross Human Rights Violations." 1998 *Netherlands Quarterly of Human Rights* 16.

Peskin V "International justice and domestic rebuilding: An analysis of the role of the international criminal tribunal of Rwanda." <<http://www.jha.ac/greatlakes/b003.htm>>

Reeb B "Justice: The first casualty of truth?" 30 April, *The Nation*.

Robert I et al (eds) Truth v. Justice: The morality of truth commissions. <<http://www.hrw.org/editorials0430.htm>>.

Robinson D Serving the interest interests of justice: Amnesties, truth commissions and the International Criminal Court. 2003 *European Journal of International Law* Volume 14, Issue 3, 481-505.

Reeves A "The Sharpeville massacre-a watershed in South Africa." <<http://www.anc.org.za/ancodocs/history/mics/shareve.html>>.

Sarpong G "Ghana reconciliation: At what price?" June 2003 *World Review* 50,6.

Slovo G "Making history: South Africa's truth and reconciliation commission."

<<http://www.opendemocracy.net/debates/article-3-76-818.jsp> >

Slaughter B "South Africa: Apartheid victims sue ANC government for compensation."

<<http://www.wsws.org/articles/2002/jul2002/saaf-j19.shtml>>

Stoppard A "*South Africa: Compensating apartheid victims.*" *Inter Press Service*,

Wednesday, April 16 2003. <<http://www.afrika.no/Detailed/3373.html>>

Gobah T "Reconciliation act is partisan"

<<http://www.graphicghana.com/article.asp?artid=2284> >.

Winslow T "Reconciliation: The Road to Healing? Collective good, individual harm?"

<http://ccrweb.ccr.uct.ac.za/two/6_34/p24_winslow.html>.

Winer S USA: Seeking Justice For Apartheid Through the Courts. AlterNet, June 24, 2002. <

<http://www.corpwatch.org/news/PND.jsp?articleid=2829> >.

REPORTS

Breaking the Silence, Building True Peace (A Report on the Disturbances in Matebeleland and the Midlands 1980 to 1988) by The Catholic Commission for Justice and Peace in Zimbabwe and the Legal Resources Foundation.

Report of the TRC of the Republic of South Africa.

Seventh Report of the Secretary-General on the United Nations, Observer Mission in Sierra Leone, U.N. Doc. S/1999/836, 30 July 1999.

Menno T. Kamminga, *The Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, in International Law Association, *Report of the Sixty-Eighth Conference held at Taipei, Taiwan, Republic of China, 24-30 May 1998*, 563, 569 (London 1998).