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“Race Against Time”: The Politics of Memory in South Africa’s Truth and Reconciliation Process

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Introduction

Madeleine Fullard begins her excellent examination of the South African Truth and Reconciliation Commission’s (TRC) treatment of race and racism with an ironic quote from the TRC’s Report, which acknowledges that:

“We cannot hope properly to understand the history of the period under review unless we give apartheid and racism their rightful place as the defining features of that period. (TRC Report, Chap.1, Vol.1, p.15)

The quote is ironic because Fullard goes on to argue that the questions of race and racism were in fact strikingly absent from the interrogational framework of the TRC, in both its processes and its products. (Fullard, p.1) If she is correct, then the TRC appears to have failed, by its own admission, in its endeavour to craft an alternative historical consensus. On the other hand, Fullard also contextualises this assertion by suggesting that the TRC was a product of its own

historical moment, forged in the negotiated settlement, implemented for the most part during the Mandela era – a product of a short-lived government of national unity – and operating under the Chairmanship of Desmond Tutu, the progenitor of the term “rainbow nation”. (Fullard, p.28)

It is indeed impossible to understand and evaluate South Africa’s truth and reconciliation process, or to make useful comparisons with other societies, without analysing the unique political circumstances that gave rise to it. For this reason, the point is frequently made that the history of the South African TRC – as the mainstay of the reconciliation process – was inextricably linked to the particular evolution of South Africa’s negotiated settlement.¹ However, it is less often acknowledged that this politically fraught frame of reference fundamentally shaped the parameters of the complex truths about the past that were ‘recovered’ by the TRC.

It is argued here that the TRC’s primary mandate to document responsibility for politically motivated gross violations of human rights in the past and to build reconciliation between the dominant political parties, shaped and restricted the modes of memory that the TRC was able to extract from its engagement with the history of the apartheid era. A broad investment in forging a new historical orthodoxy – significantly determined by the TRC’s legislative mandate – had the effect of politically sanitising versions of the past that offered more complex and less predictable understandings of the magnitude and nature of violence and violation under apartheid and its relationship to racial and other identities. As a consequence, the role of the TRC in building reconciliation and preventing future human rights violations has been constrained by its representation of past conflict through party political cleavages, which are construed as analytically detached from broader patterns of criminal violence and community conflict in South African society. In its ‘privileging’ of narrowly defined political violence and its quest for

party political accountability, the TRC may consequently have done more to mystify than to explain historical patterns of violence and violation, which continue to pervade the society after apartheid.

Perhaps the most important casualty of this ‘privileging’ of political violence was the ironic effect this had in denigrating and masking race, class or gender as relevant and *self-explanatory* categories in understanding the dominant patterns and experiences of gross violence under apartheid. The simple political narrative that remains, is striking in the manner in which it cleanses both liberation politics and state violence – associated as they were with the fortunes of particular political parties and movements – of the violent pathologies of South Africa’s systemic social dislocation. The prevalent violence of everyday social life, critical to – and embedded in – racial identity, finds little complex expression in a version of the past that ignores the manner in which the apartheid system that criminalised black resistance politics, simultaneously politicised crime.

This paper will attempt to offer some scrutiny of the South African TRC, for many the centerpiece of the reconciliation process and the locomotive of the post-Apartheid nation-building enterprise. But to be useful, this analysis must reach beyond the somewhat sterile debates over the relationship between the need for national reconciliation and the demands of retributive justice which dominated the early literature on the TRC and transitional justice in South Africa more generally.² In particular, the paper will focus on the amnesty process and the reliance of the legislation which underpinned it, on a clear distinction between politically motivated and *purely* criminal violence during the apartheid era.

The Mandate and Business of the TRC

There are several dimensions to the TRC's legislative and political mandate that shaped its processes and its outcomes in a fashion that "displaced race", to use Fullard's term. This, despite the fact that the TRC itself was a microcosm of the wider society in the manner in which racial tensions fuelled the internal disputes and power struggles amongst its own staff and leadership.

Perhaps the most central factor was the selective sliver of gross violations of human rights, defined as 'killings, abduction, torture or severe ill-treatment' that were the exclusive focus of the Commission's work. The TRC adopted a narrow interpretation of this clause in the legislation to mean physical violence, at the expense of a wider potential interpretation of severe ill treatment as encompassing the more systemic and structural violence that was framed by the every day administrative evil that was Apartheid's crime against humanity. In so doing, the TRC opted to engage with the spectrum of extreme measures that – even by Apartheid's standards – were beyond the boundaries of law, in lieu of an examination of how the race-based system itself masqueraded as a system of law and shaped, in Mamdani's terms, "everything that was distinctive about Apartheid and its machinery of violence". (Mamdani, 2000, p.181) This was explicit in the Commission's report:

“...the Commission resolved that its mandate was to give attention to human rights violations committed as specific acts, resulting in severe physical and/or mental injury, in the course of past political conflict. As such, the focus of its work was not on the effects of laws passed by the apartheid government, nor on general policies of that government or of other organisations, however morally offensive these may have been”. (TRC Report, vol. 1, Chap. 4, pp.63-4)

Based upon this observation, Fullard asserts that race and racism were “de-centred as a critical interrogational framework of the TRC, along with several other key constitutive elements of the parameters of apartheid, including class, gender and ethnicity”. (Fullard, p.4) She goes on to

argue that this was consolidated in most of the processes of the TRC's work and was reflected in the Commission's reports.

She says this was evident in the submissions made to the Commission by political parties. The Nationalist government and the right wing Freedom Front effectively extinguished racism in their accounts of their past actions, preferring to describe past conflicts as clashes between Afrikaner and African nationalism. This representation of the past as a clash of nationalisms not only disguised patterns of racial privilege, but also obliterated this as a base for understanding the racialized nature of economic power and exclusion. For their parts, the Democratic Party, the ANC and the PAC did more to acknowledge race, but the DP detached this from any understanding of economic privilege, the ANC opted for framing the conflicts of the past in the typology "colonialism of a special type" and the PAC claimed to be fighting both racism and multi-racialism. (Fullard, pp.7-10)

Fullard is only slightly less critical of the Commission's Human Rights Violations hearings, on the basis that statements of victims were only accepted if they fell within the narrow interpretation of acts committed in terms of the Commission's mandate. On this basis, she observes that the Human Rights Violations statements in fact became a key "site of displacing the language and practices of racism from the accounts of the past..." through a process in which victims were forced to "pluck out" the incident of killing, torture or severe ill treatment from a lifetime of racially-based violations. (Fullard, p.12) However, she does temper this perspective in very important ways, which give the lie to any simplistic notions of a monolithic process which wilfully orchestrated the racial discourse out of sight. She observes:

“... TRC HRV statements and testimonies were not entirely devoid of race. While political affiliation was the dominant prism through which the violation was articulated, perceptions of race and racism run through victims’ statements in both explicit and implicit forms. Black victims’ accounts were often a double account: the sharply denoted literal account of the violation, and a ‘connoted’ implicit account made up of indirect testimony about the racially constructed relations of power that determined every aspect of their lives: where they lived and worked, their own births, schooling, family circumstances and absences explicable only by the labour demands of apartheid. These asstance references to the geography, spatiality and chronology of their lives, constrained often to mere context, formed an ‘un-interrogated’ landscape in which the gross human rights violation stood.” (Fullard, p.12)

For ordinary people, the TRC’s legally mandated politics of memory did not so easily triumph over the implicit myriad of ways in which race and racism structured and textured their lived experiences. For these reasons, the Human Rights Violations hearings provided the forum where the discourse of race is to be detected in the workings of the Commission, but less by design than by the power of memory and testimony shaped from below. The Human Rights Violations Committee could simply not ignore the blurred boundary between the history of violence deemed socially understandable by virtue of its definition as ‘political’ and violence condemned as anti-social because of its purely criminal nature. Thus, the Human Rights Violations Committee did also hold hearings where questions of responsibility were not strictly framed in terms of party political affiliation. These included hearings that exposed the role of criminal gangs (such as the Noxie, Koffifi and Three Million Gangs) in political assassinations, as well as

a series of sector-based hearings that looked into the role of business, the health sector, the faith community, the media and the judiciary under apartheid.³

Fullard also acknowledges that the questions of race and racism did enjoy some overt consideration and debate, through the TRC's "sector hearings". In large part, these hearings engaged with a wider context through the various ways in which the institutions in these sectors were complicit with apartheid. Nonetheless, they stopped short of offering a systematic interrogation of the terrain of structural violence of apartheid.

By contrast, the TRC's amnesty hearings, which were perhaps the most legally and politically controversial aspects of the Commission's functioning, did more to mask racism and the import of racial identity in the conflicts of the past, than did any other dimension of the Commission's functioning. It is therefore to an examination of the amnesty process that this paper will now turn in more detail.

Amnesty Through the Cases

The TRC's mandate in respect of amnesty was first framed in the post-amble to the (interim) Constitution, which stated that:

“In order to advance [...] 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.”⁴

This imperative was elaborated in the Promotion of National Unity and Reconciliation Act 34 of 1995, which provided that a recipient of amnesty would be released from all criminal and civil liability.⁵ However the Act also set out a number of conditions that had to be met for applicants to be granted amnesty. Firstly, in terms of section 20(1)(b), the actions of the applicant must

have amounted to a delict or an offence. Secondly, and more importantly, amnesty applicants were required (section 20(1)(c)) to give a full and truthful account of the incidents in respect of which they were seeking amnesty--the critical requirement of full disclosure as a *quid pro quo* for indemnification. Thirdly, and most important of all for the purposes of this paper, was the requirement under section 20(3) of the Act that the incident in question had to constitute an act associated with a political objective.

Thus, drawing heavily on the principles of the 'political offence exception' in extradition law, and the concomitant definition of a political offence within the international context, the Act sought to ensure that only conduct associated with the past political conflict in the country would qualify for amnesty. Beyond this, the Act also provided some detailed criteria for assessing whether an applicant's conduct would qualify as being politically motivated or not. These included: the motive of the perpetrator; the context in which the incident took place; the nature and gravity of the incident; the object or objective of the conduct (and, in particular, whether the targets were political enemies or innocent parties); evidence that the act in question had been committed in the name of a known political party or organisation, such as the existence of any orders or expressions of approval relating to it; and, finally, the proportionality of the act to the objective pursued. Finally, the Act also provided that, where a perpetrator acted for personal gain or out of spite or malice towards the victim, the conduct in question would not qualify as an act associated with a political objective. In short, the amnesty process relied on the notional ability to make a clear distinction between violent acts that were political in nature, as opposed to those that were deemed to be merely criminal.

The cases that came before the amnesty committees, however, presented the reality of a somewhat more blurred dividing line between politics and crime under apartheid than could easily be navigated by these clumsy quasi-judicial proceedings. Indeed, it is arguable that such a clear distinction between political and criminal violence was only sustainable, precisely by constructing a version of the past that was detached from the seismic dislocation that shaped the lives of black South Africans. And this in turn was often heavily dependent on accepting the existence of a deep chronological divide--drawn along the line of South Africa's first democratic elections in April 1994--separating an era of brutal political conflict from a new age in which political strife had all but ceased, only to be replaced by equally pervasive violence of a strictly anti-social and criminal nature.

A total of 7 116 applications for amnesty were received and administered by the TRC's Amnesty Committees. Of these, only 1 167 applications were successful, and fully 5 143 (more than two thirds of all applications) were refused administratively in chambers.⁶ Of these refusals, 3 559 (relating to more than half the total number of applications) were based upon the fact that no political objective was established.⁷ A further 47 applicants were deemed to be applying for amnesty for offences committed either out of malice or for personal gain, 183 were refused on the basis that they denied guilt rather than admitting it (but irrespective of whether they might, as a matter of fact, have been innocent), and 85 were refused for failing to make full disclosure (Coetzee, 2003: 193). From these figures it is self-evident that a significant majority of amnesty applicants were already convicted offenders seeking retrospectively to define their offences as political. If nothing else, this is already a powerful indicator that the boundaries between political and criminal motivations were subject to considerable debate and at least potentially open to

manipulation through the amnesty process. These difficulties were duly acknowledged in the TRC's final report:

“In many such cases, it was difficult if not impossible to obtain police or court records. Even where court records were traced, applicants often averred that they had lied to the trial court to escape punishment. It was also not uncommon to learn from applicants that they had concealed the political motivation for their deeds in their court evidence, as this would at the time have been regarded as an aggravating circumstance. This left the Committee with the dilemma of having to decide whether an applicant had disclosed the truth in the amnesty application or whether this new version was also just an expedient stratagem. Obviously, these difficulties also arose in ‘hearable’ matters.” (TRC, Amnesty Report, 2003: 37.)

The TRC's demand for a neat and clear-cut division between politically motivated violence committed in the name of a known political organisation on one hand, and criminal violence on the other, thus proved much harder to deal with operationally than it had been to frame legislatively. The most significant problems presented themselves in the daily workings of the Amnesty Committees where the problem of determining which acts were deemed to be political and which were not, proved to be very controversial--and often appeared to be resolved arbitrarily. In particular, there were three categories of application that presented particular problems for the Amnesty Committees because, at first glance, the incidents to which they related appeared to be “common crimes”. As described in the TRC's Final Report (2003), these three categories were witchcraft killings, the activities of self-defence units (SDUs), and operations (particularly robberies) undertaken by combatants from the Azanian People's Liberation Army (APLA). Each of these problem areas was imbued with its own subterranean discourse of racial, ethnic and cultural identity, yet this dynamic to the conflicts remained shrouded by the quasi-judicial proceedings of the Amnesty Committees.

Witchcraft killings

The issue of witchcraft killings understandably elicited much debate (and obvious confusion) within the Amnesty Committee. It was ultimately decided that all such cases should be dealt with in one cluster and were thus referred to two public hearings. Aggregating these cases and treating them as broadly similar rather than opting to scrutinise the differences between them, created problems of its own, but this did not prevent the Committee from reaching the somewhat trite conclusion that:

“A belief in witchcraft was still widely prevalent in certain rural areas of South Africa. Moreover, it became clear to the Committee that the issue of witchcraft had -- at certain times in some rural places -- been a central factor in some of the recent political conflicts between supporters of the liberation movements and the forces seeking to entrench the status quo. The former were of the opinion that traditional practices and beliefs related to witchcraft had been exploited by the latter to advance their positions.” (TRC 2003: 40)

The Report goes on to quote the view that apartheid politics had turned traditional leaders into targets for the politicised youth who ‘intimidated traditional leaders in such a way that the latter had little or no option but to sniff out so-called witches’. The Report also notes that, in Venda in particular, the liberation forces used cases of witchcraft to politicise communities, and that, where activists were ‘perceived as having died as a result of witchcraft, community organisations took steps to eliminate those they believed to have been responsible for the deaths’. Finally, in what can only be regarded as an admission of its confusion, the Report notes that, ‘within this framework’, each application was decided individually and according to its own merits. (TRC, 2003: 40-41.)⁸ It is clear that these broad-based anthropological explanations of witchcraft failed to resolve the fundamental dilemma that, on occasion, these culturally-specific practices were manipulated for political purposes. In other cases, a political veneer was used creatively to rationalise killings which in fact had their origins in much more local, or even intimate, social and domestic conflicts.

Self Defence Units (SDU)

The cases relating to SDUs proved equally taxing. To begin with, the political argument that these structures were set up in self-defence by communities that were under attack would -- on a strict legal interpretation -- have rendered such conduct lawful. This would have disqualified the members of such units from applying for amnesty for their actions. Furthermore, as noted in the TRC's Final Report, many of the incidents in which SDUs were implicated involved crowd or group conflicts that made the assessment of individual motive and accountability nearly impossible to establish. By their own admission, many of the applicants indicated that they attacked 'communities' perceived to be aligned with a rival political organisation without knowing whether individuals were even members or supporters of that organisation. What remained entirely unarticulated was the centrality of these internecine battles to the era of what was frequently referred to in the commercial media as "black-on-black" violence, spanning both the urban townships of the Witwatersrand and in the rural hills of KwaZulu Natal.

Then there were members of ANC-aligned SDUs who applied for amnesty for robberies undertaken to support their activities, only to fall foul of the ANC's general policy of disavowing such "fundraising" methods. The result was that these applications failed. After yet another convoluted debate, the Amnesty Committee (TRC, 2003: 42-3) finally acknowledged that, whilst public hearings on SDU-related applications had helped to clarify the political background to these offences, 'they did not always enable the Committee to reach an informed decision on every individual case'. Later in its report, the Amnesty Committee goes even further in recognising the overlap between politically motivated and criminal activities, adding that:

“The areas in question were, moreover, gripped by large-scale, ongoing and indiscriminate violence, where the maintenance of law and order had all but collapsed. Testimonies at the hearings depicted a grim picture of day to day survival as communities came under attack by clandestine forces, often operating with the tacit approval and even support of the security forces ... It was often difficult to draw a distinction between legitimate SDU operations and criminal actions. Local criminal elements exploited the violence and civil strife for their own ends. Some SDUs became a virtual law unto themselves, even acting against fellow SDU members ...” (TRC, 2003: 43-44)

Azanian People’s Liberation Army (APLA)

The APLA cases presented further anomalies. The most obvious of these was that – on the basis that their organisation’s formal adoption of a policy that sanctioned robbery as a means of sustaining political activity – APLA operatives could apply for and expect to be granted amnesty for such acquisitive offences, whereas members of ANC-aligned SDUs could not. It was acknowledged in the TRC’s Final Report that APLA’s position often made it difficult to distinguish between acts associated with a political objective committed by *bona fide* members of the organisation and purely criminal acts of robbery--often coupled with serious assault and/or murder--committed for personal gain (TRC 2003: 45-6.) However, rather than offering any sociologically or criminologically credible perspective on the complex and fluid boundaries between political and criminal violence amongst black township youth, the Committee’s findings come down to making a rather formalistic distinction based on party political ‘policy’. APLA’s official position on the ‘repossession of property’ only complicated matters further. Where applications for amnesty were made in relation to the theft or robbery of cash and other valuables used to sustain APLA operatives, their commanders sought to defend such activities politically as the legitimate repossession of goods to which the African people of South Africa were entitled. Yet it was also acknowledged by APLA’s parent organisation, the Pan Africanist Congress (PAC), in its submission to the Commission, that many APLA ‘Task Force’ members

were recruited from the ranks of known criminals, both in and outside prison, specifically because people with criminal records were best suited to the task of 'repossessing' property by means of theft and robbery (TRC, 2003: 45.)

Race, Political Affiliation and Implied Authority

The APLA cases also raised directly the critical question of whether racial motivation was sufficient to associate a killing with a political objective. In other words, could individuals such as the murdered white American exchange student Amy Biehl, members of the King Williamstown Golf Club and the patrons of Cape Town's Heidelberg Tavern and the Crazy Beat Discotheque in Newcastle become legitimate targets simply because of the colour of their skin?⁹

In her ground-breaking research analysing the inconsistencies and anomalies in over 70 of the first amnesty decisions handed down, Maria Saino (1998) points out that, despite the centrality of race and racism within the South African conflict, some racially motivated killings were deemed to be sufficiently closely associated with a political objective to warrant amnesty, but others were not.¹⁰ Saino confirms that these assessments relied heavily on a formalistic analysis of the ideology of particular political parties. So, whilst in the APLA cases race was deemed to be a sufficiently 'political' motivation to warrant amnesty being granted, the Amnesty Committee refused amnesty for similar attacks by applicants affiliated to political parties that did not publicly sanction such acts. So, for example, ANC SDU member Molefe Tshukudu's application for amnesty for killing a white woman (because he perceived whites as the enemy) was refused, as indeed were the applications of several other SDU members who killed whites in the townships as part of their wider mandate to protect their communities from outsiders (Saino, 1998: 14).

Fullard notes that similar approaches were taken in cases dealing with white perpetrators who espoused race as the criteria for the selection of their victims. She quotes the Chairperson of one Amnesty Committee hearing in this regard:

“...while I am on this point, earlier I asked you the combination of aspects that have nothing to do with politics, the racism of this attack,... [is] quite clear from the utterance of the applicant..., he does not refer to his political opponents here, he refers here in a racist manner, to black persons. He does not refer to politics, the racism in that sentence is tremendous.” (Quoted in Fullard, p.17)

In assessing this, Fullard concludes:

“...the amnesty process acted to silence race from the accounts of perpetrators and organizations, driving it underground into other forms of expression and language. Few security force amnesty applicants would state that their racist views and environment made it simply easier to kill and torture blacks. Rather, they framed their actions in the organizational imperatives of crushing the ANC or communism, and the language used is that of combating terrorism and the defence of a *Christian* as opposed to *white* way of life. Racism became a dirty and illegitimate explanation or excuse... Amnesty applicants accordingly denied any racist inclinations... This denoted an understanding of racism as being a personal belief rather than a structure of power relations and exploitation.” (Fullard, p.17)

On the question of political affiliation, the Committee was very generous in its interpretation of support for the liberation movements (including membership of SDUs and street committees), whilst at the same time being relatively strict about what constituted a publicly known political organisation as set out in sections 20(2)(a) and (d) of the TRC Act. Saino (1998) points out that, when Jean du Plessis and Cornelius van Wyk, sought amnesty for acts committed on behalf of the Nasionale Socialistiese Partisane, the Amnesty Committee refused their application on the basis that this was not a known political organisation.¹¹ On the other hand, the Committee had previously granted amnesty to Boy Diale and Christopher Makgale whose only political affiliation was stated as being that they were acting ‘on behalf of the Bafokeng people’.¹²

More relevant to the sometimes shaky distinctions that the Committees were forced to make between political and criminal acts, were the interpretations of when applicants were deemed to be acting with the 'implied authority' of a political organisation. In the case of the United Democratic Front-affiliated Mdantsane 12, members of a township street committee were denied amnesty for the commission of a "necklace murder" on the grounds that they had acted beyond the scope of their implied political authority. In explaining its decision, the Amnesty Committee ruled that the manner in which the victims had been killed served as proof that the killers had acted out of enmity rather than any political motivation.¹³ However, Saino (1998) notes that, in another case of necklacing, amnesty was granted to one Norman Gxekwa on the basis that he had been given a letter of support by the Uitenhage branch of the ANC. She concludes from this that implied authority only seems to be limited in such cases if the perpetrator cannot obtain formal support for his or her actions from the organisation in whose name they were carried out (Saino, 1998: 10).

The most widely known case on the question of implied authority was that of Clive Derby Lewis and Janusz Walus who claimed to have acted in accordance with the beliefs of the Conservative Party (CP) in assassinating the then head of the South African Communist Party, Chris Hani. In his failed appeals against the decision of the Amnesty Committee to refuse him amnesty, Derby Lewis sought to found his claim of implied authority on his own very senior status within the CP. But it would seem that this was outweighed by the testimony by the CP leader, Ferdi Harzenberg, who insisted that the CP neither knew nor approved of the assassination plot. As a result, the murder of one senior black politician by a white political rival--both members of well

known organisations at opposite ends of the political spectrum--was held not to have been carried out in pursuit of an authorised political objective.

Overall, the most significant contradiction that embroiders all of these particularly difficult findings of the Amnesty Committees was clearly and explicitly the question of race or racism as a political motive for gross violations of human rights. As pointed out earlier, in some instances racially motivated violence was deemed to be inherently 'political' and carried out in the name of a known political organisation, whilst in others it was not. The result was that some applicants were granted amnesty for such actions, whilst others were denied it. The issue here is not whether the individual findings in these cases were 'fair' or not. What is essential to point out, however, is that 'privileging' certain acts of political violence, and seeing race, class and gender as subsidiary to party-specific political motivations, had the ironic effect of shrouding rather than illuminating them as intrinsically political and *self-explanatory* characteristics essential to any understanding of the dominant patterns and experiences of violence under apartheid. Indeed, the Amnesty Committee's formalistic approach to defining violent conflict in terms of political responsibility and affiliation also disguised the impact of patterns of marginalisation and exclusion that reached beyond mere party identity in shaping the violent nature of South African society. Against this background, it is inevitable that achieving some kind of reconciliation between political parties in fact has limited efficacy in preventing violence that remains rooted in patterns of exclusion that are not adequately addressed by formal processes of negotiated political change. As the nature and distribution of violence itself transmutes through the transition, a frame of reference limited to the party political sphere simply cannot come to terms

with the complex relationship between political and criminal violence embedded in the seismic dislocations wrought by apartheid and their enduring impact down the years since 1994.

In its attempts to separate politics and crime for the purposes of building reconciliation at a political level, one of the greatest flaws of the TRC was thus its failure properly to engage with the complex nature of criminality and the racial discourse which punctuated this. Not only did the amnesty process ignore many of the complexities consequent upon the historical criminalisation of political activity, but as noted above, it was also incapable of accommodating the extent to which the politicisation of crime represented the flip side of the same coin. This compounded the political dynamics of the negotiated post-apartheid settlement which frequently served to define reconciliation by reference to the party-political process associated with formal democratisation. Implicit in this was the danger that such political processes might dismantle the scaffolding of apartheid society, yet fail to engage directly enough with the socio-economic needs, the experiences of race, class and gender, and the complex identities and historical traumas of ordinary South Africans.

Violence in Transition

The real challenge in assessing transitional justice interventions lies in monitoring, and grappling with, both the changing patterns of violence and social conflict that dominate post-apartheid society and which are animated by racial identity, and the easy slide across the boundaries between political and criminal violence that have always complicated analysis of South African life. Therefore, by penetrating the veil of continuity and change in the patterns of social conflict in South Africa, this paper seeks to point to some of the (perhaps inevitable) limitations of the TRC as a mechanism of *restorative justice* in the true sense of the term. These limitations are

embedded in its historical imperative and its explicit mandate to deal with the issues of violence and reconciliation exclusively by reference to issues of political responsibility, narrowly defined.

To the extent that the TRC is seen as one of the founding moments in the building of a new nationhood in South Africa; to the extent that the Commission is understood as a primary mechanism for resolving past conflicts and ending violence; and to the extent that it is promoted as the pre-eminent means of achieving national reconciliation; this paper will argue that the TRC has, at best, only begun a process that still confronts a range of unresolved challenges. At worst, it is suggested that the political context that gave rise to the remarkable creativity and innovation embodied in the South African TRC, may nonetheless have contributed to framing a somewhat narrow understanding of restorative justice and violence prevention based upon a rather static perspective on the nature and history of conflict in South African society.¹⁴

This narrowed, politically orthodox, history of conflict in South Africa, risks hiding from view the consequences of the criminalisation of an urban black working class by a succession of laws which were themselves illegitimate, but which increasingly sanctioned, and indeed even rendered it “noble”, for the black majority of South Africans to be on the wrong side of the law. The social history of the apartheid era is in fact an account of massive and widespread dislocation in which human beings were forced to endure lives in the most precarious and deprived of settings, punctuated by daily violence and violation. By comparison, orthodox political history tends to portray a twentieth century in which the polite voices of protest continued to fall on deaf ears until rationally, and in sober knowledge of the gravity of the decision, this protest turned to violent resistance. This version of history frames a liberation

discourse which then reached out to the popular classes--the industrial working class, the urban youth and the rural poor--with the result that, eventually, most of black South Africa was galvanised in a moral and well-orchestrated struggle against the apartheid regime which, in turn, systematically mobilised the full force of the state against the politically voiceless majority. As noted above, this simple political narrative is particularly striking in the way that it cleanses both liberation politics and state violence –associated as they were with the fortunes of particular political parties and movements – of the criminal pathologies of South Africa’s distinctive, racially skewed, social development.

Of course these competing visions of history – each with its own version of the truth – predated the TRC process. Indeed, as Posel and Simpson (2002) point out in the introduction to their edited volume evaluating the Commission, the TRC merely took the sorts of questions familiar to scholars of the past about the nature of truth, evidence, representation and agency out into a much more heated public and politically contested domain.¹⁵

Through this prism, the greater problem with the work of the Amnesty Committee may well have been that the obsession with individual accountability for the most severe human rights abuses was not offset by a broader historical process of truth recovery that engaged more substantially with the everyday systemic damage done to the social fabric of South Africa and the entrenched collective identities fostered by it. Instead, despite the anomalies embedded in the TRC’s amnesty process--and the sometimes unfortunate implications for both the amnesty applicants and their victims—it is arguable that the nature of the political compromises that underpinned that process required that a clear distinction between political and criminal actors be made. The

historical and current reality is, of course, both more complicated and less comforting than such a neat distinction. The fact is that twentieth century South Africa bore witness to a host of political and social movements that will never find a place in the lexicons of political orthodoxy; movements both politically articulate and chillingly anti-social, movements enraged by, and yet symptomatic of, the psychological damage caused by South Africa's particular patterns of race-based dispossession and marginalisation. Perhaps the most striking of these movements are those that adopt the discourse and practices of social banditry. The resilient sub-culture of such movements is disturbing precisely because it tampers with the boundary between acquisitive crime and political nobility. It hovers ambivalently between an aspiration to social equality and anti-social violence, between disdain for the current order and contempt for social order in general.¹⁶ Youth-based social banditry in particular, thrives in an environment of widespread upheaval associated with indiscriminate violence, coupled with sustained experiences of racially defined marginalisation and an absence of social justice or effective economic redress.

Although space does not allow for it here, an analysis of the trajectories of youth violence in South African society both before and after its formal democratisation and the constitutionalisation of its politics, illustrates very powerfully the *slide* that was often made by young marginalised black men between involvement in political and criminal violence.

Elsewhere, I have argued that, in reality, the experiences of marginalisation and alienation that shaped much of young men's engagement in political organisation, and the violence of liberation during the 1970s and 1980s, remain largely unchanged as a source of resilient identities that underpin the involvement of the present generation of young men in criminal gangs in the post 1994 period (Simpson: 2001).

In recent research undertaken at the Centre for the Study of Violence and Reconciliation in Johannesburg, comparable trends in the underpinnings of sustained violence present themselves in other arenas as well. Pervasive patterns of vigilante violence illustrate perfectly the continuity and change in activities that are deeply rooted in South Africa's political past, but which increasingly acquire new meaning in the context of popular 'private justice' responses to criminal activity. (Harris: 2001a; Dixon and Johns: 2001). Ground-breaking research into the experiences of former combatants, including veterans of both the South African Defence Force (SADF) and the liberation armies, as well as former SDU members, powerfully illustrates the limits of social reintegration and demobilisation and the long term impact of experiences of marginalisation and alienation on these former fighters--many of whom have been 'redeployed' from the political struggle to the criminal underworld (Gear: 2002). Similar issues of continuity and change in the gendered dimensions of organised criminal violence also present themselves in some single-sex migrant hostels, which were historically the organisational flashpoints of political conflict in the 1980s and 1990s.

In South Africa today, sustained racially and ethnically motivated hate crime is dramatically prevalent. Based on an exclusionary politics, the growth of xenophobia and violence directed at foreigners suggests that the nation-building endeavour may well have operated with exclusive rather than inclusive consequences (Harris, 2001b) leading to the development of a dangerous and damaging kind of *rainbow nationalism*. Discriminatory social attitudes remain entrenched and the patterns of violent crime that dominate the current South African landscape have become new vehicles for re-racialising and both physically and emotionally re-dividing the 'new' South

Africa. They have also been the vehicles for popular outrage that has driven a retreat by government from many of its commitments to a human rights regime in the name of fighting crime through ostensibly ‘tougher’ forms of law enforcement.

Finally, studies of ongoing patterns of violence in Kwa-Zulu Natal by Rupert Taylor, (2001; 2002) confirm these trends on a regional basis where it is clear that historical political conflicts have become endemic in ‘warlord’ fiefdoms and are premised as much upon material investment in ongoing conflict, as on a particular set of political power relations. For Ellis (1998), the persistence of such localised struggle is the product of a similar blending of politics and common acquisitive crime that historically underpinned much of the violence of the so-called ‘third force’ – including through the roles of criminal middlemen, political patronage of gangs and militias, organised crime interests, etc.. Indeed, he notes that:

“The fact that local violence between competing factions is nowadays generally regarded as criminal rather than political in nature should not blind us to the fact that many of the participants are the same as those who were regarded as political actors when Apartheid was still in place.” (Ellis, 1998: 297-8)

Conclusion

It is patently obvious that these sustained fault-lines in South Africa’s social fabric cannot be attributed to any specific failings or operations of the TRC. However, there are challenges implicit in this analysis that may well serve to enable others who – confronting comparable social and political dilemmas – may contemplate similar transitional justice arrangements. To remedy some of the limitations of South Africa’s approach to transitional justice in dealing with emerging patterns of violence, others might consider linking that process with a range of other strategies, including a more carefully planned package of measures for redress and reparation for

the victims of human rights violations, the closer integration of prosecution mechanisms in the criminal justice system, clearer links with programmes of institutional transformation and a higher, and more sustained, level of investment in civil society organisations critical to the work of repairing the social fabric of a divided and traumatised society.

Whatever the failings of the new democratic government to anticipate and deal with these shifting patterns and root causes of violence through implementing effective transformation and delivery programmes, this paper's critique of the TRC's amnesty process also offers some insights into the dangers of an engagement with racial politics that is conveniently suspended at an ideological or party-political level. This narrow engagement with the experiences of privilege and powerlessness embedded in South African society, fails to adequately scrutinise the ongoing processes of marginalisation (entrenched in institutional practice) that shape the resilient anti-social identities that have become such a feature of contemporary South African society. From this perspective, it is most important that any retrospective justice initiatives avoid detaching their engagement with past conflicts from the forward-looking objective of driving change and transformation. But if transmuting forms of violence in a transitional democracy are to be addressed strategically, the creation of appropriate processes of transitional justice must, in turn, be matched by effective programmes of social justice aimed at redressing sustained race-based social and economic inequalities.

There is a grave risk that out of the testimonies and confessions of a few, a truth will be constructed that disguises the way in which black South Africans, who were systematically oppressed and exploited under apartheid, continue to be excluded and marginalised in the

present. The sustained or growing levels of violent crime and antisocial violence, which appear to be new phenomena associated with the transition to democracy, are in fact rooted in the very same experiences of social marginalisation, political exclusion and economic exploitation that previously gave rise to the more ‘functional’ violence of resistance politics.

The above analysis has far-reaching implications for how we understand the roles and challenges of transitional justice interventions, including the South African TRC. Such an understanding requires both a sophisticated analysis of the dangers of impunity and a healthy scepticism about the overstated claims that the restorative justice enterprise has worked neatly in preventing further violence through building reconciliation in South Africa.

In many ways, South Africa’s democracy has given new shape to a politics of exclusion which is not inherently redressed by the formal political equality of representative electoral processes.

Whether these experiences of marginalisation are based upon the enduring politics of race, class or patriarchy; or the experiences of uneven regional development and the limitations of state service delivery; or whether they are shaped by patterns of cultural, linguistic, ethnic or religious exclusion – these identity-based perceptions map another range of fault-lines for future conflict that may threaten sustainable peace in South Africa in the decade or more that lies ahead.

Most importantly, whatever the other achievements of South Africa’s embryonic democracy, it is clear that the benefits of economic citizenship have yet to reach those most in need. In the context of a black economic empowerment discourse that services the exclusive needs of a small

elite – these experiences of sustained social and economic injustice underpin high levels of frustration which present risks of both violent politics and crime.

These are the fault-lines that threaten durable peace in South Africa. They are the social problems that should worry self-satisfied politicians and should temper their celebration of reconciliation and nation-building, lest it becomes an arrogance which assumes that these historic gains are irreversible.

1. See A. Boraine, 'Reining in Impunity for International Crimes', in C.C. Joyner and M. Cherif Bassiouni (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17-21 September 1998* (Siracusa, 1998), pp. 221-4; G. Simpson, 'Proposed Legislation on Amnesty/Indemnity and the Establishment of a Truth and Reconciliation Commission', Submission to the Minister of Justice for South Africa (Johannesburg, 1994); G. Simpson and P. van Zyl, 'South Africa's Truth and Reconciliation Commission', *Temps Moderne*, 585 (1995); G. Simpson and P. van Zyl, 'Witch-hunt or Whitewash? Problems of Justice in Transition in South Africa', Centre for the Study of Violence and Reconciliation (CSVR) Occasional Paper (Johannesburg, 1997).

² For a critical engagement with this debate, see: Simpson and Van Zyl (1995); Bassiouni and Joyner (1998); Minow (1998); Van Zyl (1999); Rotberg and Thompson (2001); Hayner (2001); Wilson (2001); and Simpson (2002).

³ The sector hearings were limited in scope and somewhat selective in their coverage. Their outcome was largely inconclusive and they arguably had little in the way of institutional impact.

⁴ Constitution of the Republic of South Africa Act 200 of 1993.

⁵ Section 20(7)(a) of the Act went on to extend this indemnification to all institutions or persons who would otherwise have incurred vicarious liability for the applicant's wrongdoing. This is particularly significant as this had the effect of indemnifying both the State for the actions of its agents, as well as political parties or organisations for the actions of their members. In 1996, the Constitutional Court upheld this provision in the AZAPO case.

⁶ Only 362 amnesty applications were refused after a public hearing. In a further 139 cases, amnesty was granted for some incidents but refused for others. 258 Amnesty applications were entered and then withdrawn without being adjudicated, there were 40 duplicate applications, one case where amnesty was not applicable due to the applicant having been acquitted and six cases where amnesty was granted for certain incidents, but the application withdrawn for others.

⁷ A further 658 were refused due to the applications being in respect of incidents that fell beyond the cut-off date for amnesty while 196 failed to specify any relevant offence and a further 409 applications were deemed to be defective or incomplete. It is extremely frustrating, and somewhat bizarre, that the precise racial and gender profile of successful and unsuccessful applicants is nowhere to be found in the TRC's Final Report.

⁸ In passing it is impossible to resist the comment that there were of course those--particularly on the white Right of the political spectrum--who considered the TRC process itself to be an elaborate, politically-motivated, witch-hunt. That said, the evidence of a man mixing concoctions to poison his political enemies which was presented at the trial of the government chemist and biological weapons expert, Wouter Basson, makes it tempting to conclude that a certain amount of 'witch-sniffing' was indeed an essential element in the TRC's investigations.

⁹ See the Final Report of the Amnesty Committee (TRC, 2003: Chapter 3, p. 45) for references to the treatment of these cases in the Commission's Interim Report and for the point that there were also analogous cases to these

involving the killing of black people by members of the white right-wing organisation, the Afrikaner Weerstandsbeweging (AWB).

¹⁰ For a further discussion of cases dealing with racially motivated killings, also see Wilson (2001: 84-92).

¹¹ Amnesty Decisions for applications 1051/96 and 1050/96. In fairness to the Committee, it must be acknowledged that, the organisation allegedly consisted of no more than four members: the applicants du Plessis and van Wyk and two others who had died in the course of the incident for which amnesty was being claimed.

¹² Amnesty Decisions for applications 80/96 and 81/96.

¹³ Amnesty Decision for applications 126--137/96.

¹⁴ For a slightly more generous view of the TRC and a fuller discussion of the notion of restorative justice in this context, see Villa-Vicencio (2003) and Zehr (1997).

¹⁵ Posel and Simpson (2002) note the irony that the renewed political confidence in the pursuit of truth manifested in the establishment of the TRC has emerged at a time when many historians--rushing to embrace post-modern theories in the ascendancy elsewhere in the academy--have abandoned it as a fruitless and impossible project. Indeed, the growing global enthusiasm for truth commissions represents a reassertion not merely of the possibility, but also the profound political importance, of uncovering objective historical truth as a route to resolving conflict and doing restorative justice in societies emerging from authoritarian and violent pasts. The nature and consequences of the truth-finding enterprise in such societies are placed in context by Felipe Fernandez-Armesto (1998: 3) when he laments that, 'trapped between fundamentalists who believe they have found truth, and relativists who refuse to pin it down, the bewildered majority in between continues to hope there is a truth worth looking for, without knowing how to go about it or how to answer the voices from either extreme'.

¹⁶ I am indebted to Jonny Steinberg for some useful discussion on this, some of which was captured in a draft funding proposal for research on prison gangs which has subsequently been completed and published.