

Rethinking Reconciliation: The Missing Link Between TRCs and The Constructive  
Participation of Perpetrators

by

Takuto Shiota  
Honours B.A., University of Toronto, 2005

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in the Department of Philosophy

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## **Supervisory Committee**

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Dr. Cindy Holder, Department of Philosophy  
**Supervisor**

Dr. Patrick Rysiew, Department of Philosophy  
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Dr. James Tully, Department of Political Science  
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## Abstract

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Martha Minow argues that among the goals that a transitional justice system should pursue, reconciliation is equally as important as truth and justice. This is why in her view – and others who have argued similar lines – Truth and Reconciliation Commissions are not a “second best option” to trials. I argue that if we are to accept that reconciliation is a valuable goal, then the practical reality of pursuing reconciliation dictates a need to understand perpetrators in greater depth. This is because unlike truth and justice, reconciliation cannot be forced. Constructive participation is the only way that reconciliation can be achieved. In order to promote constructive participation, I argue that theorists need to do further research into what I call “perpetrator requirements”: the requirements that make perpetrators participate, and participate constructively. To do so, theorists should use an interdisciplinary approach, utilizing research from psychology, anthropology, political science, philosophy, and law.

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## Dedication

Writing a dedication for this thesis seems out of place: it is an extremely depressing subject matter, and it will only be read by a select few. It seems inappropriate to dedicate it to anyone I know because of its subject matter, but it also seems to be mistaken to dedicate it to those who have survived atrocities, to those who will never read the contents of these pages.

I have read a study that found that people who write down their goals are more likely to achieve them in the future. If that is the case, then I feel compelled to use this dedication page, not to dedicate the thesis, but as a place to record its goal, which I hope will be shared by the reader: that this thesis not be a mere academic exercise, but a stepping stone for bettering the world, however small.

## Introduction

*“Two stories haunt me. I heard the first from Dr. James Orbinski, the current president of Médecins Sans Frontières, or Doctors Without Borders, when he served as head of the group’s mission in Rwanda as the genocide unfolded. When he learned that a hospital sheltered several hundred children but was under control of the Hutus, he went to the Hutu leader in charge and asked to take the children and transfer them to a safer place. The leader said no. Dr. Orbinski asked, ‘Do you have children?’ ‘Why, yes,’ the leader replied, proudly pulling out photos. The physician returned to the situation at hand, and said, ‘But these are children too.’ The Hutu leader replied, ‘No, they are cockroaches.’ The next day, half of the children had been murdered.”<sup>1</sup>*

The twentieth century saw an unprecedented number of mass atrocities. While one would like to hope that such atrocities are a thing of the past, the twenty first century has already been marked by a number of them, such as the genocide in Darfur. Indeed, a decade of atrocities in this century has spawned new words into the mainstream media, such as “autocannibalism” (forcing someone to eat a part of themselves), and “re-rape” (systematic, ongoing re-raping of women and girls).<sup>2</sup> Yet the negative effects of mass atrocities do not end once the violence ends. In the course of rebuilding a society in the aftermath of wide-spread violence, these societies are faced with various challenges. Some challenges are difficult because the goals that are being pursued are incredibly hard to implement. These include the rebuilding of infrastructure, as well as the transition – hopefully – to a new regime committed to the respect of human rights. As difficult as these challenges are, others are arguably even more daunting. These issues can be largely categorized as the pursuit of justice. How a society treats the continued presence of perpetrators, victims, and bystanders – the issues of justice and remembrance – creates a

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<sup>1</sup> Minow 2003: 213

<sup>2</sup> Kristof, Nicholas D. “The Grotesque Vocabulary in Congo” [The New York Times](#). The New York Times, 11 Feb 2010. Web. 10 Feb 2010.

series of problems to which there is no single solution or goal.<sup>3</sup> Indeed, because of the complexities that surround the moral, political, and humanitarian issues that arise in post-conflict societies, possible solutions often seem to contradict or infringe on each other. Ultimately, the sheer magnitude and scope of these mass atrocities seem to make any attempt at justice an inadequate one. Yet it is here that the end of the twentieth century also marked some significant, positive changes: transitional justice systems.

One of the important developments in the rebuilding of post-conflict nations has been the creation of transitional justice systems. Transitional justice refers to the institutions that are created in response to societies that are transitioning away from a period of pervasive human rights abuses. Thus, transitional justice systems are typically established in societies that have experienced mass atrocities, authoritarianism, or other forms of repressive/violent regimes. They are usually set up once armed conflict between groups has ceased, and a new political regime and/or policy change is put into place. Transitional justice systems serve as mechanisms to revisit the atrocity, and deal with issues of justice.<sup>4</sup> By doing so, they play a crucial role in helping a society commit to a future without human rights abuses.<sup>5</sup> Transitional systems are meant to be temporary, as a transitional step towards a new society.

One of the recent developments in the transitional justice literature has been increased focus on the concept of reconciliation.<sup>6</sup> The establishment of the Truth and

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<sup>3</sup> This will be discussed in further detail in the first chapter.

<sup>4</sup> There is debate about the appropriate conditions in which transitional justice should be established. Considerations such as timing, the extent of the atrocity, the number of people involved, the number of nations involved, the political situation etc. are all issues that may/may not affect the appropriateness. However, this is an issue that is beyond the scope of this current thesis.

<sup>5</sup> This will also be discussed in detail in the first chapter.

<sup>6</sup> Prager 2003: 1



Reconciliation Commission (TRC) in South Africa increased the prominence of the concept of reconciliation within the literature. TRCs, with their stated focus on the reconciliation of society – instead of the prosecution of perpetrators – are clearly different from traditional trials. Indeed, it is because of this difference that a large literature is focused on comparing the two types of transitional justice – trials vs. TRCs – and determining their relative moral and practical value. Those who advocate for the importance of reconciliation are often concerned with defending it against those who claim that TRCs are a second best option to trials. One of the prime movers in this development has been Martha Minow.

Martha Minow's analysis of transitional justice systems is cited virtually everywhere in subsequent treatments of the issue. She argues that the traditional benchmarks of justice and truth are too simplistic to assess the merits of transitional justice systems. Instead, she proposes that the analysis should be done through the concepts of "vengeance" and "forgiveness". By adopting these concepts, she is able to incorporate not only justice and truth, but also issues such as reconciliation, peace, and individual and societal trauma into her analysis of a transitional justice system's success. Minow shows that the problems facing transitional justice are far more complicated than traditionally portrayed. While she acknowledges that it may be impossible to conceptualize these problems fully, she argues that trials and TRCs have the potential to address atrocities in a politically valuable way. According to Minow, TRCs are not just a "second best option" to trials, but provide a viable and productive alternative that has strengths that trials do not. In this thesis, I focus on Minow's analysis of TRCs. I will argue that her analysis must pay more attention to how perpetrators experience TRCs if

we are to accept her conclusions about such institutions' value. In this, the methodology that has been incorporated to understand victims must also be extended to perpetrators.

In recent years, there has been an increasing amount of research done on the psychological, social, and political needs of victims of atrocities. Such research plays a major role in how the transitional justice literature conceptualizes and treats victims. By understanding the needs of victims, theorists are able to better understand the limitations and obstacles that exist in rebuilding society. For example, by understanding the symbolic and psychological/social significance of public apologies, analysts are able to incorporate that aspect into their theories. Yet the understanding that is gained through this research is still limited to one half of the post-conflict society, and ignores the other half. In short, the same kind of research and incorporation has not been done on perpetrators of mass atrocities. I will argue that if reconciliation is to be accepted as a goal, the practical reality dictates a need to better understand perpetrators as well. Although moral arguments may not dictate this need, theorists must understand – in similar detail to victims – what types of obstacles exist for perpetrators. Without it, the current literature cannot come to terms with the dichotomy between the need for reconciliation and the practical difficulties that exist: how does an institution promote constructive participation from those who truly believed that certain children were cockroaches to be exterminated? In this thesis, I argue that theorists are currently lacking the necessary knowledge to properly deal with this dilemma, and that until there is a more complex understanding of perpetrators, this issue cannot be solved.

In the first chapter, I give a brief overview of Minow's works on Truth and Reconciliation Commissions and summarize her arguments regarding such Commissions'

potential merits. Although the criticisms discussed in this thesis can be applied to transitional justice generally – and not limited to TRCs – my argument builds upon the developments that followed the creation and subsequent literature on TRCs. Because of this, most of the focus will be on the literature on TRCs. In chapter two I argue that the experiences of perpetrators are for the most part missing from Minow's discussions, and I explain why this omission is problematic, using the South African TRC as a paradigm case. I use the South African TRC because it is the best documented instantiation of a TRC. In chapter three I assess the implications of my argument for positions such as Minow's as well as for other views in that literature.

## Chapter 1

### The Importance of Remembrance

Martha Minow's work on transitional justice focuses on societies that have suffered through high levels of state-sponsored repression and violence. She draws upon examples such as the Rwandan genocide, repression and torture by the Brazilian government, Hitler and the holocaust, the Khmer Rouge and Cambodia, the Gulags, and South Africa's apartheid, among numerous other examples within the last century. Yet many of these societies, such as South Africa, reunified Germany, Poland and Brazil have emerged as less oppressive regimes. Some have even become democratic.<sup>7</sup> Such transitions however, are marked by difficult decisions and struggles over dealing with the past. This is because while the supposed "justifications" given for these atrocities vary, all these massacres, systemic rapes, genocides and tortures have one thing in common: the regimes which conducted them also systematically attempted to destroy the memory of the atrocity, of victims and of entire groups.<sup>8</sup> Victims' stories, their suffering, and often their entire cultural existence was wiped out of official record and banned from public discourse. Although official bans were lifted once the regime fell, addressing this recent history requires more than a mere reversal of policy.

Societies transitioning from atrocities must attempt basic acknowledgement of the atrocities that occurred. For example, some victims require facts about the atrocities that they suffered: who did it, what were the reasons behind it, when did a loved one die, how

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<sup>7</sup> In the very loose sense of the term. Modern Western democracies, such as Canada, UK, France, and the USA would all be democratic in this sense.

<sup>8</sup> Minow 1998: 1

did they die, location of the remains, etc. Without it, these victims lack knowledge that is essential for their mental health.<sup>9</sup> Knowing and understanding the atrocity is crucial for victims to move on. Failure to understand and deal with the past can lead to a diminished capability to love and act, as well as other post traumatic stress symptoms.<sup>10</sup>

Yet knowledge about the atrocity is not the only thing that victims require. In fact, many victims demand this information from the government even when they know the circumstantial facts about the atrocities. Therefore it is not strictly knowledge and information that they require, but something more. As Thomas Nagel has articulated the issue:

“It’s the difference ... between knowledge and *acknowledgement*. It’s what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene.”<sup>11</sup>

Without acknowledgement, the dehumanization attending that violence is neither corrected nor condemned. Such correction and condemnation is important in establishing the political integrity of the new regime, and subsequently the establishment of a working government with working political proceedings. The act of acknowledgement does this in three ways.

First, acknowledgement reestablishes the respect required to participate as equals in society. By accepting the victim’s account of the atrocities (which would have been repressed and denied officially in the previous regime), acknowledgement signals the willingness to accept the moral and intellectual equality of the victims.

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<sup>9</sup> While memory and remembrance are important for *descendants* of victims, this thesis is primarily interested in the immediate victims. This is because transitional justice institutions are usually established within a short period following the fall of the abusive regime. Given the scope of the atrocities however, everyone in the country is a victim, or a perpetrator, or both. This will be discussed later in the thesis.

<sup>10</sup> Such as depression, eating and sleeping disorders, difficulties with interpersonal relationships etc.

<sup>11</sup> Weschler 1990: 4

Secondly, without acknowledgement, the moral integrity of the political regime (and society) becomes questionable. Proper remembrance involves the official acknowledgement that wrongs were committed, and that the perpetrators were responsible for those wrongs. Such condemnation of the past, combined with a commitment to prevent atrocities in the future, realigns the official moral stance of the political sphere.<sup>12</sup> Similarly, acknowledgement also demonstrates the new regime as one that is morally and operationally separate from the old regime. Perhaps even more significantly, condemnation of the past is a show of force that signals the fact that the new regime is not controlled by, or afraid of, the old regime. Given the absolute control that the old regimes often had, the idea that the new regime is being controlled – perhaps even covertly – by the old regime can be a serious possibility and a fear for many citizens. Acknowledgement indicates that the new regime is not afraid to confront the crimes of the past. It signals that the old regime and its oppressive rules have not continued into the new one, giving hope to the victims and warning potential perpetrators against further violations of human rights.

Finally, a morally respectable foundation is laid for the new regime, and for social and political relations under it. Officially admitting and condemning the atrocities reduces the amount of denial and hate that can be circulated publicly. Prejudicial claims from the past are publicly rejected as morally and legally wrong. This forces bystanders to confront their past choices, and the consequences of implicitly supporting the regime. Such acknowledgement is at the same time a response to the past, a preventative measure, and an educational measure against renewed violence. It highlights the morally

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<sup>12</sup> Minow 2002: 28

problematic assumptions, stereotypes, and prejudices that enabled the oppressive regime to exist.

Acknowledgement has further importance beyond the establishment of political integrity. Indeed, it affects individuals and groups in a significant way. Minow argues that without acknowledgement, individuals are left with memories that are not part of the collective dialogue, or even worse, that will become a forgotten past.<sup>13</sup> That is, the victims' experience and the extent of the atrocity will not become part of the official record. This is problematic because while the victims will never forget, the rest of society might. This can create a situation where one group cannot bring closure – since the collective dialogue never responded to the atrocities – while the other group brings closure prematurely. Thus, this reinforces divisions between these groups, such that it can lead to renewed prejudices, tensions, and violence. Even if it does not lead to violence, this memory loss allows the perpetrators to avoid officially condemning the actions of their own group, since there is no official record to which they must respond to. This in turn can allow the perpetrators to retain the groundwork for dehumanization (e.g. parts of their internal cultural narrative that might label the other group as inferior). As Jean Baudrillard said, “forgetting the extermination is part of the extermination itself.”<sup>14</sup> Failure to remember disrespects the dignity and humanity of the victims, exterminating the memories of their suffering. Victims and their families would therefore see the new regime as a mere continuation of the old, with the atrocities being continued through the official denials of the state. Therefore a response is necessary, and remembrance is necessary for transitional societies.

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<sup>13</sup> Minow 2002: 16

<sup>14</sup> Ibid

Although remembrance is vital, there is also a threat created by remembering too much. Victims dwelling on the past can experience depression, disassociation, hopelessness, and tendencies to blame entire groups, as well as a desire for revenge.<sup>15</sup> That alone is problematic, but it can also lead to increased tensions with the perpetrator group. Reactionary narrative revolts by the perpetrator group may occur, as they might feel disillusioned about the official narrative. An internal cultural narrative which then fantasizes about “the glorious past” may circulate, leading to tensions and the possibilities of renewed violence. In short, Minow argues that too much remembrance can also lead to difficulties in moving forward.

### **Transitional Justice and Theorists**

Some nations/societies have responded to this need for remembrance through formal institutions. These institutions (or what has come to be known as transitional justice), began with the establishment of the Nuremburg trials. While there is now acknowledgement that the Nuremburg trials (and the related Tokyo trials) were far from ideal in their proceedings, they are still a major turning point in history. The Nuremburg trials changed the way that perpetrators were to be treated by the victorious forces. The victors did not attempt a summary execution of the losing side (as was previously the norm). These trials marked the first time that an institution was tasked with responding to the past, its atrocities, and the actions of those responsible. In spite of this, attempts at other international courts were derailed due to the cold war and the political stalemate that it created. Since the fall of the Berlin wall the world has seen many other institutional attempts at responding to past atrocities. Countries such as Argentina and

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<sup>15</sup> Minow 2002: 16



Rwanda have prosecuted perpetrators as part of their response to atrocities, while others such as South Africa have established Truth and Reconciliation Commissions. These institutions have the potential to establish a commitment to fairness and transparency, signaling a clear break from the violence and oppression of the past. Martha Minow is interested in these legal/quasi-legal responses, both at the national and international levels. In particular, her interests are on the emerging alternative institutions, such as Truth and Reconciliation Commissions. With different institutional responses available for post conflict societies, decision makers must attempt an informed choice based on their societies. Proper response and remembrance involves a fine balance of issues and considerations, and needs that must be met (which will be explored later in this thesis).

Minow's project attempts to analyze these institutions and tools, to weigh their pros and cons, and to better understand the motivations and needs that must be met through these responses. It is an exploration of what can and cannot be accomplished through these legal institutions. Her aim is not to establish priorities among these different needs and issues, but to clarify the purposes behind them, and the capabilities of institutions in meeting them. A key part of any analysis is the use of concepts. Rather than endlessly listing all the issues that a society might need to consider, concepts can capture the fundamental needs that exist in post conflict societies. By analyzing transitional justice through these concepts, theorists and law makers can connect and understand the intricacies of individual experiences of atrocities with societal complexities. At the same time, concepts are in their nature abstractions from a full description, and as such necessarily leave out aspects of the situation they are used to represent. Therefore, depending on the concepts that are being used, the understanding

that emerges may not just be partial, but be flawed or compromised. Certain concepts may leave out details that are crucial. One of Minow's main arguments is that this has been the case when it comes to the traditional analysis of TRCs: that the concepts being used to evaluate transitional justice – truth and justice – do not transparently indicate a wider range of concerns that exist. This in effect has made TRCs *seem* inadequate and morally second best compared to trial courts. She argues that when different concepts are utilized instead – vengeance and forgiveness – it becomes clear that TRCs are not a second best option, because they are able to meet many of the goals and needs that trials cannot.

### **Concepts and Definitions: Truth**

Some traditional analysis of transitional justice has tried to capture the complexities of transitional societies and their needs through the concepts of “truth” and “justice”. This is because both can be seen as important conditions and means for pursuing remembrance and acknowledgement. Indeed, these two concepts are the conventional concepts that are used in transitional justice literature.<sup>16</sup>

Truth is a key concept because of the vital role it is argued to have in pursuing remembrance and acknowledgement. Remembrance itself does not fulfill its role in transitional societies unless it is a remembrance of something that is true. Otherwise it is merely a statement that there is a group of people who *believe* that atrocities occurred, rather than an acceptance that it truly occurred. Without an acceptance that the atrocities truly occurred, and that people truly suffered, any official statement would further

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<sup>16</sup> For example, see Stanley Cohen, “State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past,” *Law and Social Inquiry* 20(1995)7.

stigmatize the victims. Such an act would officially sanction the view that the victims believe in a false history, and that they falsely accuse the perpetrators of crimes that never occurred. As one can see, this would result in creating a society that is completely opposite to the ones that transitional justice strives to create. Since acknowledgment is the act by which remembrance is officially accepted as truth in the public sphere, such a scenario would simply be denying the victims the acknowledgement that they need. Therefore the results and findings of transitional justice must be officially tied to the concept of truth, and the proceedings must demand truth from the society. The importance of truth can be further understood by analyzing its value in three ways: intrinsic value, extrinsic (or instrumental) societal value, and extrinsic (or instrumental) individual value.

First, there is an intrinsic value to truth itself.<sup>17</sup> After generations of lies, denials, cover-ups and evasions, many people develop an almost obsessive need to know exactly what happened. As mentioned earlier, victims do not merely seek knowledge of the past (for in many societies the truth was always known), but the acknowledgement of that knowledge by official bodies.<sup>18</sup> Acknowledgement reverses denials, freeing the society from its obsession with the cloaked past and enabling it to move on. This is especially the case when it comes to victims of torture.

Victims of torture place a special importance upon truth. This is because during the entire ordeal, the truth – or rather, the denial of it – is used as a way to dehumanize the victim. From the very beginning, those who are subjected to torture are usually accused of being liars. Torture is then often used to force false testimonies and

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<sup>17</sup> Cohen 1995: 18

<sup>18</sup> Govier 2006: 45

confessions that suit the needs of the oppressive regime at the victim's expense. The regime forcibly maintains a monopoly over what is accepted as true and known, and the victims are made very aware of their powerless situation. During torture, victims are often told "Scream all you like... No one will ever know".<sup>19</sup> Finally, if victims are released they must deal with denials. If any abuses become publicly exposed, the abuses are blamed on the victims. Abuses become officially justified on the basis of bogus crimes blamed on the victim. Any attempts to challenge the official rhetoric are met with accusations of lying and fabrication. As one can see, at all of these stages the survivors of torture have been denied the acknowledgment of the truth. These survivors therefore rightly have the need to expose the truth about their suffering, and see it as of intrinsic value.

Secondly, truth serves instrumental needs of the society. For example, without an official recognition of the atrocities, supporters of the previous regime are able to publicly deny occurrence of the atrocities.<sup>20</sup> Such denials clearly split the population into those who recognize the atrocities (most likely the victimized group) and those who deny it (most likely the perpetrator group), creating a rift, and threatening peace. By exposing the truth about atrocities, the extent to which denials can effectively circulate in the public, and in particular, the extent to which they can remain credible can be minimized. However, truth does not merely minimize the rifts of society. It also has the potential for healing the rifts as well. Various stigmas often exist between different groups, regardless of being a perpetrator or victim. Such stigmas are hard to overturn. Nevertheless, by

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<sup>19</sup> Cohen 1995: 19

<sup>20</sup> Many of these "goals" are arguably also achieved by the pursuit of justice as well, and not just the pursuit of truth. Indeed, they are related concepts. This issue will be discussed later in this thesis.

exposing the humanity of the victims, and the truth behind the reasons for the atrocities, truth establishes the groundwork for a united society. Truth exposes what lies were told, and what atrocities were done in the peoples' name by the previous powers. This facilitates the ability of various parties to come to terms with its atrocities. This is because ideally, the seeking of truth does not center on individual blame (as does the pursuit of justice), but on the wrongs that were committed and the unjustifiability of these wrongs.<sup>21</sup> Instead of seeking accountability, it seeks understanding, which is vital for peace.

Thirdly, truth serves instrumental needs of individual victims. There is a therapeutic value in victims telling and describing their own experiences. By describing their own experiences to a sympathetic and open audience, it helps victims bring closure to the past. Knowledge also helps bring closure to families and friends of "disappeared" persons. While the death of their loved one is often assumed by these people, the family members still want to know what occurred. Knowledge of the location of remains is extremely valuable, as it enables the possibilities of proper burials, and paying respects to the murdered loved ones.

Truth therefore serves intrinsic and extrinsic needs for the transitional society. However, the need for truth – and the pursuit of it through transitional justice – becomes difficult due to ambiguities and challenges in the concept of truth. This is because in the transitional justice context 'truth' refers to two types of truth: factual truths and interpretive truths. 'Factual truths' are truths such as numbers and figures related to atrocities (e.g. how many people died, where they died, the killer's identity etc.). Often

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<sup>21</sup> Minow 1998: 78

referred to as forensic truth, it is the basic factual information about the atrocities themselves. At the same time, truth can refer to narrative, or interpretive truths. These truths are not factual (indeed, sometimes they can contradict facts) but they portray the truth of how victims experienced the event. It is the emotional and human experience of the atrocity.<sup>22</sup> The interpretation of an event is often much more important in understanding the extent of an atrocity, rather than recollections of facts. This is because one of the main effects/goals of an atrocity is the deliberate destruction of the dignity and humanity of its victims. Understanding the ‘truth’ of an atrocity must therefore involve the understanding of the human experience of that event. Therefore transitional justice cannot be solely concerned with brute facts.

The line between the two types of truth however, is a difficult one to draw. Debates about the independence of truth from interpretation and the role of interpretation in understanding, are relevant to the documents, records, and testimonies that are part of the process of remembrance. Indeed, a working definition of truth is often pursued and demanded by theorists of transitional justice. For example, one could argue that denials are a form of narrative truth (e.g. since perpetrators experienced the atrocity as a non-event). However, accepting denials as equal in ‘truth’ to the victim’s testimonials would clearly be problematic. In fact, it would miss the entire definition of remembrance if denials are accepted. Therefore while there is a need to respect narrative truths, there is also a need to establish some form of official forensic truth about the atrocity.

At the same time, those who are accused of past atrocities should have some mechanisms by which they cannot be found guilty just because of hearsay. To prevent

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<sup>22</sup> These categories of truth (or slight variations of it) are standard in the transitional justice literature. For examples, see Govier 2006: 290-291, and Minow 1998: 85-87, 129

this, theorists and law makers must have some standard of how to find out what occurred. In the process of gathering stories and evidence, one will inevitably come across details that contradict one another (including lies). It is for this reason that one must know when a statement or fact should be assessed as an interpretive, narrative truth (so that the issue is whether it is a wrong interpretation, such as a denial might be), and when a statement should be assessed as a forensic, factual truth.

One must also define the appropriate use of each type of truth (e.g. assessments for factual truth for prosecutions, but narrative truths for other findings). Indeed, this may be the most difficult practical problem that transitional justice faces.<sup>23</sup> This debate is mirrored in other literatures dealing with litigation and the standards of proof, but it is exacerbated in the context of transitional justice due to the fragile nature of post conflict societies.

Truth is vital for the realization of remembrance and acknowledgement in virtue of the intrinsic and extrinsic values that it provides. That being said, there are issues and complications in the very definition of truth. In particular, truths may be factual or narrative, and the situations and institutions may influence which type of truth is more important. These challenges reflect the complex needs that exist in transitional societies. However, as much as truth is seen by theorists to be an effective and suitable concept by which to address the needs of transitional societies, it does not encompass everything that is required for proper remembrance. To have proper remembrance and acknowledgement, another concept must be utilized: justice.

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<sup>23</sup> Minow 1998: 85

## Concepts and Definitions: Justice

Justice is also a key concept and a requirement for proper acknowledgement to take place. For the concept of truth does not indicate that the atrocity was wrong. Put differently, while acknowledgement must be about truths – and is dependent upon it – without a concept of justice, an atrocity cannot be properly condemned as wrong. After all, knowing the truth does not indicate the use to which that knowledge should be put; it does not tell us how to respond to those who are responsible, or to the society within which they operated. The issue of how to treat the continued co-existence of perpetrators, bystanders and victims requires the concept of justice.

The concept ‘justice’, in the context of transitional justice, can be broadly defined as the need for accountability for past wrongs.<sup>24</sup> That being said, it is immediately obvious that the magnitude of the crimes that are discussed in transitional justice makes the possibility of a full accounting impossible. There is nothing that one could possibly do that could respond in equal magnitude to the crimes of taking a life (let alone multiple lives). It is because of this difficulty that the term ‘justice’ in transitional justice literature is often far removed from the general sense of the term.<sup>25</sup> Instead, the term usually refers to the type of justice which is achievable in these difficult circumstances by an institution: punitive (or retributive) justice.<sup>26</sup>

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<sup>24</sup> Minow in fact seems to use them interchangeably. In her 2008 article, she begins a discussion by saying “When weighing priorities, decision makers encounter potential conflict between peace and accountability.” Yet she concludes the discussion with “In this light, seeming trade-offs between peace and justice may be better understood...”

<sup>25</sup> Govier 2006: 144

<sup>26</sup> Restorative justice is discussed in transitional justice literature, but it is often discussed as a way to re-conceptualize TRCs and the amnesty clause. It is essentially a re-casting of the “truth” concept in terms of the concept of “justice”. Other forms of justice, such as socioeconomic justice and distributive justice are often only conceptualized as part of punitive justice (i.e. socioeconomic injustices are only wrong because of the actions by past perpetrators who took advantage of the victim group, *not because* poverty is unjust in its own right).



Punitive justice can take three forms.<sup>27</sup> First and most common is legal punishment, which refers to the adaptation of the standard criminal trial format. It begins with identifying those groups or individuals who were responsible, followed by an assembling of evidence that supports that notion. This is followed by a trial conducted with standard legal procedures. If the defendant is found guilty, specific punishments will be carried out.<sup>28</sup> The second form is compensation/reparations by the perpetrators to the victims. Compensation does not necessarily involve the identification of specific perpetrators, but through social and economic policies (such as an exemption from a tax or affirmative action) it punishes the responsible group through collective restitution.<sup>29</sup> The third form is through lustration, or a banning of former perpetrators from their professional (usually public service) posts. This can be in varying degrees, from outright removal to demotions.<sup>30</sup> As one can see however, the second and third types of punitive justice are policy dependent (unless they are part of a punishment handed out in the first type). As policies, they are actions that must be taken by the new government. In comparison, the first type is not policy dependent, as it is usually done by the judicial branch of the government. Therefore this limits the breadth of justice that transitional justice can pursue. Since transitional institutions are by definition temporary, context specific, and separate from the policy making bodies, they are usually limited to pursuing

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<sup>27</sup> These three forms of justice are from the article she is arguing against, and are implicit in Minow's analysis.

<sup>28</sup> Cohen 1995: 23

<sup>29</sup> Ibid

<sup>30</sup> Cohen 1995: 25

the legal punishment type of justice. It is for this reason that the concept of justice in the transitional justice literature – usually – refers to justice of the legal punishment type.<sup>31</sup>

Like truth, the concept of justice can be understood as being reflective of the needs of a post-conflict society. Under the conception of justice that is standard in transitional justice – legal punishment – justice has four values. As was the case with truth, pursuing justice has intrinsic and extrinsic value to the victim, as well as to the greater society. Although these different views do not necessarily contradict each other, depending on the definition, they can be either seen as intrinsic or extrinsic values.

First, there is a belief that justice should be pursued for the sake of justice itself – much like truth.<sup>32</sup> This belief in the intrinsic value of justice comes from the idea that establishing/upholding the rule of law has value in and of itself: “Applying the rule of law in these cases expresses the hope that legal institutions can handle such issues without betraying the ideals of law.”<sup>33</sup> After all, for legal punishment to be pursued, a rule of law is a precondition.

Secondly, justice has the ability to signal a permanent end to the previous regime. Without establishing some sort of official demand for accountability for abuses, it is hard for a society to establish itself as a legitimately new regime which respects the equal rights of all its citizens. In a transitional context, anything that impedes the pursuit of justice can be seen as a triumph of the previous regime. If there are the sufficient conditions to make it difficult/impossible for the new regime to pursue justice – whether that is due to threats of renewed violence, dependence upon the perpetrator class, or any

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<sup>31</sup> Most writers recognize this and address the limitations of what kinds of justice can be achieved through transitional justice.

<sup>32</sup> Cohen 1995: 22

<sup>33</sup> Minow 1998: 26

other considerations – the old regime can be seen as ensuring their continued influence in the new. Not only is this seen as a weakness of the new regime, but as an indication that the old regime could possibly return to power in the future. Therefore justice serves to signal a break from the past, a new commitment to human rights, and a respect for all its citizens. Justice also serves to separate the new regime from the immoral use of power, such as taking bribes, hiding evidence, and other crimes that – while on their own might not constitute human rights abuses – may carry forward to the new regime.

Thirdly, those who believe that justice should be pursued for retributive reasons believe that those who commit wrongs *deserve* punishment.<sup>34</sup> This is based on the idea of just deserts.<sup>35</sup> As such, justice is done *if and only if* they are punished. Anything else would not be justice at all. Therefore while this view still maintains a need for accountability, it is the act of punishment itself that constitutes justice. Although the victims often do not gain anything back (indeed, it is impossible to gain back a murdered husband, or a decapitated limb), it seems only fair that the perpetrators suffer through a response that at least attempts to force responsibilities upon perpetrators for their crimes. It is this fairness that is seen as the primary definition of justice, which provides this definition with an intrinsic value to justice that is punishment dependent.

Finally, others believe that justice serves to reinforce social norms. Justice acts as a deterrent to would-be perpetrators through the threat of punishment.<sup>36</sup> As such, justice is seen as a symbolic act which serves as a type of moral education for the public at large. It is a symbol of, and a respect for, the equality of victims as human beings. Victims of

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<sup>34</sup> Govier 2006: 134

<sup>35</sup> Cohen 1995: 22

<sup>36</sup> Govier 1995: 137

atrocities are often faced with denials of the abuse, are charged with false crimes, and stripped of social standings and benefits. Without an effective official response, social standings are hard to overturn. Effective institutional responses – and thus the realization of the value of justice – are often viewed as those responses which recognize the victim's suffering in an unwavering way. That is, an unwavering commitment to take seriously the atrocities and identify and force the perpetrators to be accountable. The more effective the response, the more it serves as a moral education for the public, and the more just the response. Thus, under this view the moral education component is seen as an intrinsic value of justice as well.

### **Trials and Truth Commissions**

Truth and justice, although treated as independent concepts, are in practice related. In order for proper justice to be upheld, it must be based upon an accurate knowledge of what occurred. Otherwise it becomes arbitrary, a victor's justice. Truth and peace also rely on justice, in that without some form of accountability, the new regime cannot legitimately separate itself from the previous regime (as discussed earlier). Not only does that threaten peace, but also the legitimacy of the new regime's official findings about past atrocities. Yet traditionally these two concepts are seen primarily as a dichotomy, because their practical realization clearly puts them in conflict with each other. This is because the institutions that are most adept at demanding accountability are trial courts, and the institutions most adept at finding truth are Truth and Reconciliation Commissions.

Trial courts are most proficient at demanding accountability and pursuing justice (so much so, that "justice" in transitional justice is generally assumed to mean some form

of trial). Part of this notion of justice includes a respect for due process: proper notice, legal representation, presumed innocence and cross examination. These measures enable trials to be as impartial as possible, concerned only whether a defendant is or is not guilty of specific crimes at specific times. The standards of evidence are therefore very high, and only the most conclusive evidence is (in theory) accepted in trials. Trials therefore claim that their findings and decisions are just, in relation to specific charges.

The sentences and findings that come out of trials are not about the specific defendant, but only about the specific charges that the defendant faces. How a defendant is related to the greater society, and their personal narratives of how they experienced atrocities are of no concern, unless they are relevant to specific charges. As one can see, these types of information would fall under ‘narrative truths’. Trials have an inherent tendency to ignore narrative truths, since narrative truths do not indicate the factual circumstances of a crime (i.e. how a defendant or the victim feels about the crime does not reveal whether he/she committed the crime). Narrative truths are treated as inconclusive and unreliable at best, and completely irrelevant at worst. Furthermore, trials are unconcerned with factual truths that do not directly play a role in informing the judge/jury about the guilt of the accused. For example, trials are not concerned with societal factual truths (such as the total number of murdered people, or how repression at the state level played a role) because truths beyond the implications for the charges are again, irrelevant. This clearly shows a lack of depth in the truth that can be found through trials. It is for these reasons that – overall – the trial process impedes or ignores truth.

As mentioned earlier, truth is an important need for victims and post conflict societies. If truths are impeded or ignored in trials, then trials disregard a vital need that transitional justice must address. For example, information about the extent of violence, as well as the origins of the pattern of violence cannot emerge from court findings. To do so through trials would be practically unfeasible, unless numerous trials are set up that are widespread,<sup>37</sup> and someone summarizes the similarities and the relations of each trial to others. Even then, many truths could be hidden, since many oppressive regimes are prudent in hiding facts that would expose their guilt. Overall, all these realities that are part of the trial process makes the exposure of truth very difficult. This difficulty is further exacerbated due to another issue: the very high standard of reasonable certainty that is required by trials.

Trials are by definition<sup>38</sup> – with their due process and presumed innocence – an institution which demands a high level of reasonable certainty in their findings. While the idea of “reasonability” is fairly plastic and context and/or trial specific, this standard is still going to be much higher than the one employed by TRCs, as will be discussed later. For example, in an ideal circumstance trials would not only demand a full confession by the perpetrator, but also various corroborating physical/scientific evidence, as well as several witnesses that completely agree on the facts. Furthermore a just decision from a court must come through due process, which at least guarantees respect for the rights of defendants ahead of truth seeking.<sup>39</sup>

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<sup>37</sup> Across socioeconomic differences, locations, time periods etc.

<sup>38</sup> This refers to the modern, western type of trials which transitional justice literature is concerned with.

<sup>39</sup> Minow 1998: 9

There are other problematic consequences that follow from this high standard of truth. For example, a perpetrator may only be charged and found guilty for one of the many crimes that they committed. Due to the fact that a defendant can only be found guilty if there is no reasonable doubt about his/her culpability, it means that while a perpetrator might be found guilty for one crime, he/she might not be found guilty of others. Indeed, this is often the case with transitional justice trials. Since the societies that transitional justice are generally concerned with are those with state sponsored (or other group sponsored) violence, high level decision makers are often involved in many decisions that led to many atrocities. Yet high level decision makers are infrequently caught with sufficient evidence of their involvement in all the atrocities that they were involved in. Therefore usually they are only found guilty of a handful of specific murders, rather than the numerous cases that they were involved in. In such a scenario, a certain sense of justice might be served, but the truth about other crimes might remain hidden. Thus information about those who were murdered, and specific incidents concerning their disappearance becomes lost. It then becomes, at least at the official level, a forgotten incident. If the forgetting of extermination is indeed part of the extermination, then the perpetrators and the previous regime have still “won”, and justice has not been properly served. Even if survivors know that their perpetrator was the same one as the one who was found guilty of a different crime (and not theirs), there are problems. This circumstance would not fulfill the need for acknowledgement, which comes only through official recognition of the crimes. Acknowledgement (and not just knowledge), as earlier discussed, is vital to victims. Therefore this circumstance would fail in exposing truth in the most meaningful way. Combined with the fact that the

adversarial method promotes the hiding of truth by the defendant,<sup>40</sup> trials seem to be at logger heads with truth seeking.

Furthermore, practical limitations on resources such as time and money make it impossible to charge everyone of every crime, and therefore the bigger picture of how atrocities were committed becomes even harder to establish (at least in an official manner). This enables those who are not charged to walk away with their lies and crimes forgotten, along with the truth that their victims seek. Other practical complications exist. There is no evidence that shows that trial courts lead to a peaceful, reconciled society. While truth might heal (as discussed earlier), there is no evidence that criminal prosecutions console victims or help them overcome grief, low self-esteem, and other psychological harms.<sup>41</sup> Nor is there any precedent of international criminal courts deterring human rights violations.<sup>42</sup>

In comparison, Truth and Reconciliation Commissions are often thought of as being more adept at finding truths, especially truths that are more suited to the needs of transitional societies. Its emphasis on truth and healing over justice is made obvious by its name. Its most famous example, the South African TRC, with its amnesty clause, clearly holds justice as a secondary goal compared to truth and peace, since amnesties violate the need to punish (putting aside arguments that the perpetrators are punished through guilt and social stigmas). This is particularly true when one considers that in transitional justice, “justice” usually refers to the legal, punitive type. Instead of justice

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<sup>40</sup> The adversarial method, which is used in most trials, ensures that the goal of the accused is to use truths in an instrumental way to further the case for their innocence, rather than to expose as much truth as possible to better the society.

<sup>41</sup> Minow 2008: 180

<sup>42</sup> Minow 1998: 180



and punishment, TRCs emphasize hearing victims' and perpetrators' stories and placing them in a collective narrative of the past. This enables the society to better understand the truth of its own atrocities, both at the societal and individual levels. Thus, TRCs are suited for societies that endured widespread denials of atrocities, since they are able to gather more stories and link them together (a process which trials have extreme difficulty with).

Truth commissions are also better suited to societies that have endured multiparty conflicts. Unlike trials, TRCs do not require extensive investigations and the high standard of reasonable<sup>43</sup> certainty. This enables them to process many more stories and incidents than trials ever could. Furthermore, through the acceptance of narrative truths, TRCs can allow slightly different narrative accounts of the same event. Rather than finding a canonical version of specific incidents, TRCs are able to accommodate different parties and their stories.

TRCs are also less likely to inflame divisions, which can be a threat in trial proceedings. This is because unlike trial courts, the TRC does not hold its proceedings in an adversarial manner. In an adversarial setting, those accusing and those defending must argue against each other. This is inherently divisive. Instead, TRCs with amnesty clauses can make the complete exposure of crimes a benefit to the accused, rather than a hindrance (as is the case in trial courts). The proceedings therefore are able to expose truths, but without the inherent division created in adversarial courts. Thus, societies with multiparty conflicts can be better accommodated through TRCs instead of trials.

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<sup>43</sup> More specifically, the degree of evidence required to be considered reasonable is lower than trials.

TRCs can also indicate and capture the emotional and human experiences of the atrocities better than trials. In TRCs, narrative truths are valued intrinsically, rather than as an instrument towards justice. As such, TRC proceedings enable a better understanding of how actual victims experienced the atrocities, putting a human face and a human story on the crimes. The process also does not put the victim in a situation where they are called into doubt through cross-examination. This is important, for victims require sympathetic listeners to move past their experiences. Cross-examination has the potential to treat the victim exactly as the previous oppressive regime did: castigation of claims and the integrity of the victim. The TRC therefore respects the dignity of the victims and the victims' stories in a way that trials cannot.

TRCs are also suited where courts themselves are associated with oppression.<sup>44</sup> By the time violence has ended, victims can have a negative view of the court system. This is because in many oppressive societies, the courts are puppet courts which are in reality controlled by the oppressive regime, and are used as an instrument to further their agendas. Therefore by holding a TRC instead of trials, the transitional justice proceedings are distanced from the previous regime and its courts.

Thus, the TRC is able to report on truths, and promote reconciliation in ways that trials cannot. However, it is these same strengths that hamper TRCs in pursuing justice and accountability. In fact, the amnesty clause offends many victims who want justice done to the perpetrators.<sup>45</sup> For them, it seems as though the accused are getting away with their crimes, without having to serve a sentence or suffer other punishments. Some might see the TRC itself as an acknowledgement that peace depends on the participation

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<sup>44</sup> Minow 2008: 179

<sup>45</sup> Ibid

of individuals who otherwise might be targets of prosecutions. Such dependence can be seen as a resignation to the fact that the previous regime still has influence, and can get away with crimes in the new society. Others might accuse the TRC as an oppressive witch hunt, since it does not have the protections and standards for finding truth that trials have: it enables the victorious side to express their stories without cross examination. In the same vein, the presumption of innocence in the accused is also not required, threatening potentially innocent people.

As one can see, there seems to be a practical trade-off between trials and truth commissions. Trials are more suited to the pursuit of justice and the enforcement of human rights norms. On the other hand, TRCs are better at finding facts and the promotion of societal peace and reconciliation. Put differently, the *practical* reality of pursuing truth and societal reconciliation entails certain *practical* limitations on the ability to pursue justice. Framed in these terms, there is a dichotomy between the need for truth and reconciliation versus the need for justice. To illustrate this point further, Minow recalls a story in which Luis Moreno-Ocampo (the first prosecutor of the International Criminal Court) presented a thought experiment to a group of 400 lawyers and teachers. The thought experiment consisted of a scenario in which a mass atrocity is currently occurring, and an individual has been identified as a probable perpetrator of these abuses. While investigations into human rights abuses and prosecutions must follow, Moreno-Ocampo asked these academics if they would be willing to accept a request from the probable perpetrator to postpone prosecution – not even to forgo it – so that he/she could negotiate peace in the troubled region.<sup>46</sup> Minow claims that human

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<sup>46</sup> Minow 2008: 176

rights advocates would likely view this as unacceptable, since it sacrifices the principle for practical improvements.<sup>47</sup> These advocates have a strong point in insisting that the pursuit of justice should always be prioritized over practical limitations raised by other needs. Rights and the pursuit of justice need to be followed equally among all citizens. Any exception to this due to practical considerations threatens integrity and increases the potential for abuse by future actors. It is by guaranteeing that no one, no matter what situation, is above the law, that justice and rights can have true purpose.

Yet at the same time, if peace is secured, the immediate personal and societal benefits seem to do more for the victims than the pursuit of justice in the midst of violence.<sup>48</sup> It might also enable a more extensive trial on the part of the accused, with more hearings, witnesses etc. due to the freedom from the threat of violence. Any answer to this dilemma however, seems to prioritize either peace or justice, such that they are inevitably in opposition to each other. In short, Minow suggests that the trade off is perhaps between “unsentimental respect for human life and safety, and their abstract idealization.”<sup>49</sup> Minow sees a similar problem when one considers the dichotomy between truth/reconciliation and justice. That is, the practical limitations of pursuing justice and truth have led to a trade-off between trials and TRCs. Yet as Minow points out, theorists have typically concluded that TRCs are a second best choice to trials.

According to Minow, the traditional literature argues that TRCs are only valuable because there is not enough time and resources to properly mediate peace (perhaps through force), investigate truths, pursue justice against all perpetrators, and provide

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<sup>47</sup> Minow 2008: 175

<sup>48</sup> Ibid

<sup>49</sup> Minow 2008: 176

monetary compensation to victims. TRCs and their strengths do not originate from within, but only in relation to the practical constraints that trials must face. In other words, if trials had infinite time and resources, then they could find out more truths than TRCs, and bring justice more effectively to more people than TRCs ever could. Thus, TRCs are a second best option if truth and justice are conceptualized as the goals of transitional justice. In response, Minow argues that truth and justice are not the primary concepts that should be used. In order to have a better, systematic evaluation and understanding of transitional justice, she proposes that a new conceptualization of the issues be established. By using these new concepts, Minow is then able to argue that TRCs are an equally viable option to trials.

### **New Concepts: Vengeance and Forgiveness**

Martha Minow sees her project as one that assists and provides the means for developing a vocabulary, in order to assess the goals and limitations of different institutional responses to mass atrocities.<sup>50</sup> Although the concepts of truth and justice are an effective way to understand many concerns that exist within transitional societies, she argues that they still fall short of considering other equally important goals. She argues that because of this short-coming, TRCs are mistaken as a second best choice to trials.

Minow proposes that the underlying issue lies elsewhere, in the tension between vengeance and forgiveness.<sup>51</sup> Recall that Minow argues that the primary need is remembrance. Justice and truth are means by which to pursue remembrance and acknowledgement. Different institutions, whether they are trials or TRCs, are therefore

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<sup>50</sup> Minow 1998: 4, Minow 2008: 176

<sup>51</sup> Minow 2002: 16, Minow 1998: 10

different options in the way to remember, or “how” to remember.<sup>52</sup> Consequently, the question that theorists and law makers need to be asking themselves is *not* whether or not truth and justice can be pursued through institutions.<sup>53</sup> Rather, they should be concerned with the way that society will respond to the processes of these institutions, and the methodologies of remembrance that they are pursuing.

For Minow, remembrance is the important goal, above truth and justice. Truth and justice are therefore secondary to the need to remember/respond, and are concepts that used to better understand the practical realization of remembrance. In other words, while both truth and justice are required for remembrance,<sup>54</sup> it does not go the other way (that is, neither truth nor justice requires remembrance). Therefore in theory, truth and justice could be pursued and met without remembrance being done. Thus, conceptualizing and evaluating transitional justice through truth and justice can be potentially dangerous. Indeed, as Minow points out, several important goals (such as reconciliation) are not represented in this view. A more proper conceptualization must therefore capture the extremes of remembrance – i.e. vengeance and forgiveness – rather than ideals such as truth and justice (which, as explained earlier, are hard to define to begin with). By beginning with concepts which capture the essence of the act of remembrance (and the motivations for it), any analysis that follows can be understood in a much more encompassing manner. Minow proposes that the essence of remembrance can be captured more accurately through the concepts of vengeance and forgiveness.

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<sup>52</sup> Minow 2002: 16

<sup>53</sup> At least not as the central question. These issues clearly play a role in the greater picture.

<sup>54</sup> Remembrance in the sense described earlier in this chapter. This is not connoting mere memory, for example.

Indeed, she argues that these two concepts are the fundamental moral choices that inform the choice of transitional justice systems.

## **Vengeance**

While “vengeance” might sound pejorative, Minow stresses that her intent is to use it in a non-pejorative manner. Vengeance in Minow’s sense embodies the simple and natural impulse to retaliate against wrongs.<sup>55</sup> Through retaliation, victims can attain basic self-respect and take a moral stance on the offending act. Indeed, according to Minow vengeance is the origin of the morality that motivates justice (justice understood as a demand for accountability).<sup>56</sup> For example, synonyms of vengeance, such as “an eye for an eye”, “giving what’s coming”, “equalizing crime and punishment”, all imply the proportional scales by which justice is measured.<sup>57</sup> Retribution is fueled by the belief that there must be punishment out of fairness to the victim. It denounces previous wrongs, restores moral order, and reestablishes the social standing of the victim.<sup>58</sup> In an ideal retributive situation, retribution would re-establish the equal dignity of all persons, and correct the perpetrator’s false notion that the victim was less worthy.<sup>59</sup> Therefore the concept of justice does not truly capture a need of victims that must be met. Vengeance, however, does. Justice is the mechanism which allows a moderated and reasoned response to the needs for vengeance.

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<sup>55</sup> Minow 1998: 10

<sup>56</sup> Minow 2002: 17, Minow 1998: 10

<sup>57</sup> Minow 1998: 10

<sup>58</sup> Minow 1998: 12

<sup>59</sup> Hampton 1988: 146-147

The danger of course, is that vengeance often leads people to pursue acts that are more than what are necessary to equalize dignity, such that it threatens stability itself. A cycle of revenge and violence may follow. Therefore retribution needs very strict restraints. Minow argues that restraints are required for vengeance to remain consistent with its motives. Thus, the very motivating factor of vengeance seems to suggest that “[i]t is no more right when the victim tries to degrade or falsely diminish the wrongdoer than when the wrongdoer originally degraded or falsely diminished the victim”.<sup>60</sup> In contrast to this ideal, escalating responses are often the norm in vengeful acts. This is because most people do not see themselves as deserving of vengeance, and any acts directed their way are seen as unjust. Therefore the response to vengeance is usually an equal or greater vengeful act, thus starting an endless cycle of violence.

Even if proper limits are established in retributive acts, there are several issues that still remain. For example, psychological studies have shown that people who commit acts of revenge are more prone to suffering severe psychological disturbances compared to those who do not.<sup>61</sup> This is problematic, especially if vengeance is meant to establish a basic self-respect. It is also problematic because it entails that vengeful acts do not help victims heal such that they can move on. Perhaps more importantly, a closer look at the issue shows that it is impossible to commit a retributive response that is equal in magnitude to the original crime. There are no acts that are equal to mass killings,

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<sup>60</sup> Minow 1998: 12

<sup>61</sup> Minow 1998: 13 One could argue that this is merely a correlation and not a causal relation, or that the causal relation is the other way - that those with the most severe disturbances are the ones who are most likely to commit acts of vengeance. However, for Minow’s project, these objections are ultimately not problematic. This is because all that needs to be established is the fact that committing acts of revenge do not help victims to move on, and that seems to be clear regardless of the causal relationship. For more on the actual study however, see Robert S. Laufer, Elizabeth Brett, and M.S.Gallops, “Symptom Patterns Associated With Posttraumatic Stress Disorder Among Vietnam Veterans Exposed to War Trauma,” *American Journal of Psychiatry* (1985), 142, pp.1304-1311.



torturing someone etc, unless one also becomes what one is retaliating against.<sup>62</sup>

Becoming what one is retaliating against of course, fuels another violent and vengeful reaction from the opposite end, resulting in an endless cycle. In short, Minow concludes that some alternative to vengeance is absolutely “urgent to human survival”.<sup>63</sup>

## **Forgiveness**

If one end of the spectrum is vengeance, then the other is forgiveness. Forgiveness renounces resentment and rage, and instead welcomes the perpetrator back into humanity, to reconnect and to reconcile.<sup>64</sup> The concept of truth is merely an instrument used to enable a common dialogue, a common shared history. Truth allows the society to find a way to move forward together, focusing on founding a collective self-government based on new relationships of trust. This approach acknowledges that vengeance can be never ending and excessive. Rather than letting the past preoccupy and debilitate the victims and bystanders, forgiveness promotes a forward look to the future.

Through forgiveness, victims can reassert their power over themselves and their dignity. This is because at the very minimum, forgiveness requires two pre-requisite conditions. First, it requires the victim – and the greater society – to firmly establish a moral stance on the atrocity. That is, the victim and the greater society must condemn the atrocity as a wrong before it can be forgiven, thus re-establishing the moral order and the social standing of the victim. Secondly, forgiveness requires the victims to consciously decide to forgive the perpetrators. This decisional power is held solely by the victims.

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<sup>62</sup> Minow 2002: 17

<sup>63</sup> Minow 1998: 14

<sup>64</sup> Minow 2002: 17

When victims and society recognize this fact, victims are able to re-establish their basic self-respect, correcting the notion that victims are less worthy.

As one can see, many of the benefits that forgiveness offers are similar to those of vengeance. However, forgiveness can also enable a dialogue between the victim and the perpetrator. In other words unlike vengeance, the process of forgiveness opens the door for reconciliatory dialogue, rather than defensive and adversarial discussions. Indeed, in the most ideal realization of forgiveness, both the victims and perpetrators would follow a script that requires both sides to begin a constructive dialogue.<sup>65</sup> Perpetrators would need to come forward and admit their wrongs, and ask for forgiveness. Victims would need to come forward and speak about their suffering, while simultaneously offering forgiveness. Thus, both would be reconciled, and reintegrated into society. The focus is on the future, rather than on equalizing offences committed in the past. Forgiveness is an effort and a commitment by both sides to ensure that atrocities will never happen again.<sup>66</sup> It is a fundamental change in how both sides feel about each other, the past, and the direction of the future. This process of change can also be understood as reconciliation.

Minow uses the colloquial idea of what reconciliation between groups entails: a reconstruction across groups over social divisions.<sup>67</sup> Minow recognizes that under this definition, reconciliation could be pursued minimally “in the most abstract sense”,<sup>68</sup> such as in trials: One could argue that agreeing to sit in the same room with the other group is

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<sup>65</sup> Minow 1998: 19

<sup>66</sup> One might object that individuals can forgive, but groups cannot. However, we can attribute attitudes to groups, since groups can deliberate policies, beliefs and attitudes. Indeed, genocides seem to clearly indicate that groups can hate. If that is the case, groups should also be able to forgive. For more on this, see Govier 2002: 92

<sup>67</sup> Minow 1998: 88

<sup>68</sup> Minow 1998: 26

in and of itself a form of reconciliation.<sup>69</sup> Although Minow recognizes this as an important part of reconciliation, Minow advocates for greater levels of reconciliation, such as the restoration of the dignity of victims, and the reintegration of perpetrators into society.<sup>70</sup> As such, reconciliation can be understood as a process, one that is striving for a change in attitude towards “the other group”. It is for this reason that reconciliation is a vital part of forgiveness.

Unfortunately, forgiveness does not always involve the constructive participation of the perpetrator: technically a form of forgiveness can occur without their participation. A victim may choose to forgive the perpetrator regardless of the perpetrator’s lack of remorse etc. Many of the benefits still remain – the victim reasserts their dignity, restores their own social/moral stance within society, and they are able to let go of the past and focus on the future – but the process by which trust is restored, and a unified commitment to prevent atrocities in the future are not able to occur. It is for this reason that the ideal realization of forgiveness requires constructive perpetrator participation. That being said, there is also a question of appropriateness: Minow asks “how could one even consider reconciling oneself with people such as Hitler ... ?” Sometimes it is not only impossible, but inappropriate to ask the victim to reconcile with the perpetrator. Minow therefore stresses that forgiveness does not necessarily involve a denunciation of vengeance.

In theory, forgiveness does not need to take the place of, or be a substitute for justice/punishment. Forgiveness is a change in how the victim feels about the perpetrator, and not a system of justice.<sup>71</sup> One can still advocate for forms of

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<sup>69</sup> Ibit

<sup>70</sup> Minow 1998: 23

<sup>71</sup> Minow 1998: 15

punishment, such as compensation or incarceration. Therefore, under this framework, the need for truth and justice are not seen as complete dichotomies, but as different instruments that further the needs of vengeance and forgiveness.

However, in practice forgiveness often entails an exemption from punishment. This is particularly true when it is an institutionalized form of forgiveness, as when it takes on the forms of amnesty and pardons. In fact, the term “institutionalized forgiveness” is itself misleading, since true forgiveness cannot be commanded by institutions. It is a power solely held by the victimized, and any expectation for survivors to forgive the oppressors is another burden that victims should not have to bear.<sup>72</sup> The power to forgive is one of the last powers that victims have, no matter what atrocities they have suffered. Usurping that power – even symbolically – further victimizes the victims.<sup>73</sup> Minow further argues that without careful consideration, institutionalized forgiveness has the potential to institutionalize *forgetfulness* as well. As such, a hasty effort to move on through institutionalized forgiveness can sacrifice justice, thus exempting perpetrators from punishment.<sup>74</sup> In such circumstances, the atrocity itself can come to be seen as publicly dealt with or worse, ignored, even though the victims still require healing and proper recognition. In addition, such closure and forgiveness can often imply to a society that new regime is fearful of the previous regime, and of renewed violence.<sup>75</sup> A culture of silence can emerge from this situation, truly calling into question the appropriateness of forgiveness, and in particular, institutionalized forgiveness.

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<sup>72</sup> Minow 1998: 17

<sup>73</sup> Minow 2002: 18, Govier 2002: 92-94

<sup>74</sup> Minow 2002: 18

<sup>75</sup> Minow 1998: 16

Yet it is clear that if transitional justice is to pursue more than just the needs of vengeance – which, as argued earlier, is desperately required – then some needs of forgiveness must be met through transitional institutions. At the same time, these needs have to be balanced with the needs of vengeance as well. In order to do this, a better understanding of the needs of forgiveness and vengeance are required, which must then be compared to the capabilities/limitations of transitional institutions. To facilitate this, Minow breaks down the needs of vengeance and forgiveness into twelve detailed goals.

### **New Goals**

Minow argues that given the considerations that have been discussed so far, there are twelve overlapping goals to which a transitional justice system ought to aspire. They are also the basis on which further analysis of transitional justice should be done. A transitional justice system should:

- “1. overcome communal and official denial of the atrocity and gain public acknowledgment;
2. obtain facts in an account as full as possible in order to meet victim’s need to know, to build a record for history, and to ensure minimal accountability and visibility of perpetrators;<sup>76</sup>
3. end and prevent violence; transform human activity from violence – and violent responses to violence – into words and institutional practices of equal respect and dignity;
4. forge the basis for a domestic democratic order that respects and enforces human rights
5. support the legitimacy and stability of the new regime proceeding after the atrocity;
6. promote reconciliation across social divisions; reconstruct the moral and social systems devastated by violence;
7. promote psychological healing for individuals, groups, victims, bystanders, and offenders;

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<sup>76</sup> By this, she means that this is what must be expected at the very minimum. She does not mean that we need to ensure that perpetrators are only to be accountable in the most minimal way.

8. restore dignity to victims
9. punish, exclude, shame, and diminish offenders for their offenses;
10. express and seek to achieve the aspiration that “never again” shall such collective violence occur;
11. build an international order to try to prevent and also to respond to aggression, torture, and atrocities;
12. accomplish each of these goals in ways that are compatible with the other goals.”<sup>77</sup>

The goals that emerge out of vengeance and forgiveness are much more complex than the pursuit of truth and justice. Indeed, there are several new goals that do not exist within the framework of truth and justice, such as reconciliation. Thus, these twelve goals allow the possibility for theorists to evaluate and understand the effectiveness of transitional justice systems, with a complexity that was not possible before. By applying and comparing these goals to the capabilities of TRCs and trials – and in particular, the paradigm case of South Africa – Minow is able to conclude that TRCs are not a second best option to trials.

### **TRCs and Trials According To The New Goals**

Minow argues that TRCs are not a second best option to trials. There are two types of advantages – negative and positive – that TRCs have, which trials do not. First, there are several negative advantages<sup>78</sup> to truth commissions compared to trial courts. According to the twelve goals, the financial and emotional cost of litigations makes trials problematic,<sup>79</sup> since cost limitations make it difficult to meet goals 1, 7, 8.

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<sup>77</sup> Minow 1998: 88

<sup>78</sup> By this, I mean advantages which are advantages by virtue of the TRC *not having* certain disadvantages that trials do. In contrast, positive advantages denote those advantages which are advantages by virtue of the TRC *having* an advantageous ability that trials do not.

<sup>79</sup> Minow 1998: 58

Goal 1 requires acknowledgement of the overall atrocity as well as the individual circumstance, both of which – as explained in the earlier section – cannot be done through trials. This is because if the goal is to gain public acknowledgment, then the trial process becomes a very problematic system.<sup>80</sup> Whereas truth commissions see their central task as an uncovering of history, for judges at trials, history is a *by-product* of particular moments relevant to the case.<sup>81</sup> Truth is only relevant if it exposes the level of responsibility of the defendant.

Goal 7 and 8 – the promotion of healing and the restoration of dignity – is difficult, because trials require victims to undergo cross-examinations and denials by the perpetrators. As explained earlier, victims require a sympathetic audience, one which is inherently not part of the trial process. The chance to tell one's story without interruption or skepticism is crucial for many victims to heal. Therefore trials are almost the exact opposite of what victims need for healing.

Thus, truth commissions do not have certain inherent disadvantages that trials have. Many of these disadvantages have been discussed earlier in this thesis as well, and are accepted by those who argue that TRCs are second best. Indeed, they instead argue that TRCs are only valuable because of the negative advantages that arise from *practical* limitations of courts. After all, with infinite time and resources, trials could provide extensive reports on the greater society, as well as personal counselors and financial compensations to each victim. As a result, although the process of trials itself does not contribute to healing – and instead arguably inherently hampers it – time and resources

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<sup>80</sup> Minow 1998: 58

<sup>81</sup> Minow 1998: 60

could mitigate this disadvantage. However, Minow argues that in order to truly compare TRCs and trials, the affirmative advantages of TRCs must also be considered.

The affirmative/positive case for truth commissions lies in their ability to facilitate the goal of healing. The working hypothesis is that the testimony of perpetrators and victims, offered in an official and public manner, creates opportunities for individuals and society to heal.<sup>82</sup> Victims benefit from the TRC structure in several ways. As mentioned earlier, victims require sympathetic listeners to their testimonies – something that TRCs provide. This is well illustrated by Justice Albie Sachs of the South African Constitutional Court: “Tutu cries. A judge does not cry”.<sup>83</sup> Some psychologists claim that there is a similar process in therapy sessions with individual victims suffering from Post Traumatic Stress Disorder (PTSD).<sup>84</sup> Minow further quotes Judith Herman, who stresses the importance of speaking of atrocities in order to heal.<sup>85</sup> Furthermore, televised statements establish clearly and widely the crimes that were committed, and creates a shared experience for the viewers, which can then work towards reconciliation. For victims, it enables them to understand that their suffering was not solely a private experience, but also one that is part of a bigger picture.<sup>86</sup>

TRCs also promote healing by allocating a constructive role for perpetrators and bystanders.<sup>87</sup> This is done in two ways. First, perpetrators and their factual truths play a vital role in the TRC. Perpetrators and their firsthand accounts often contain information

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<sup>82</sup> Minow 1998: 61

<sup>83</sup> Minow 1998: 73

<sup>84</sup> Minow 1998: 61

<sup>85</sup> Minow 1998: 64

<sup>86</sup> Minow 1998: 67

<sup>87</sup> Minow 1998: 65



that would otherwise remain hidden. Secondly, perpetrators and their narrative truths play a constructive role in TRCs. TRCs can condemn and identify those responsible for atrocities, but also portray the perpetrators as victims of an unjust society at the same time.<sup>88</sup> After all, many perpetrators are educated into accepting and promoting violence, having lived in a society that rewarded them for committing atrocities and harshly punishing them if they refused. TRCs are thus uniquely equipped to condemn atrocities while ensuring that the humanity of the perpetrator is maintained or restored.<sup>89</sup> Consequently, TRCs discourage hatred, and extends the hope for a better future to perpetrators.<sup>90</sup> The more perpetrators express their narratives, the more encompassing the findings are, and the more that society learns about the humanity of the perpetrators and victims. Additionally, if perpetrators choose to express remorse, then TRCs provide the opportunity to make a sympathetic and remorseful gesture. In doing so, perpetrators can engage in an important part of the recovery of victims, themselves, and the greater society.<sup>91</sup> By promoting the acknowledgement of human rights violations on both sides – instead of blaming and punishing one side – perpetrators and their truths and experiences play a vital role in TRCs.<sup>92</sup>

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<sup>88</sup> This is in stark contrast to trials, where perpetrator perspectives are sometimes incorporated to determine the extent to which an act is morally wrong. In other words, the degree of wrongness depends on factors such as the narratives of the perpetrator. For example, in trials, a homicide can be framed/charged as manslaughter (with no intent to kill) or murder (with intent to kill). To determine the original intent, the narrative of the perpetrator is often consulted, but it is merely utilized as a piece of information to determine intent and culpability. Yet according to this procedure, the charges of manslaughter and murder are seen as morally unequal. This limits the ability of trials to separate the considerations of the culpability of individuals and the condemnation of the act itself. In comparison, TRCs can morally condemn the act, but also recognize the perspective of the perpetrator.

<sup>89</sup> Condemning an atrocity here refers to the acknowledgement of the moral wrongs.

<sup>90</sup> Minow 1998: 78

<sup>91</sup> Minow 1998: 73

<sup>92</sup> Minow 1998: 80

As one can see, TRCs can be understood as being valuable and effective. Yet at the same time, Minow recognizes that even under this new framework – based on the twelve new goals – the TRC has certain problems. The most obvious is the use of measures that arguably deter justice, such as the amnesty clause. However, even if one accepts that these measures are a necessity for the greater good (as discussed earlier), other problems remain. In fact, one could argue that the TRC cannot actually find truth or promote reconciliation – the very two goals which make the TRC valuable. This is because any “truth” that comes out of the TRC can never be full enough, or embracing enough to connect extremely divergent perceptions of what happened.<sup>93</sup> In other words, the interpretation of events by perpetrators, bystanders and victims can be profoundly different, such that they contradict each other and cannot accommodate each other. These differences could include everything from minor factual differences, opinions on causes, to flat out denials of the atrocity. Whatever they are, these testifiers and witnesses are more than likely to have a personal stake about what the official, acknowledged version of events will become. This difficulty is compounded when particular individuals might be viewed as victims, perpetrators and bystanders at the same time.<sup>94</sup> For example, a black policeman or informer who worked for the apartheid government in South Africa can be conceived this way – as a perpetrator of crimes, but also a victim of oppression. Given such a situation – one that is not rare – the TRC must ultimately take a clear moral stance on an atrocity. While a TRC might be able to accommodate small contradictions and interpretation of events, the TRC is structured so that victims do not have to go through cross-examinations and are instead afforded

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<sup>93</sup> Minow 1998: 62

<sup>94</sup> Minow 1998: 63

sympathetic witnesses.<sup>95</sup> As such, the proceedings are generally geared towards favouring victims and their truths. Thus, many people may object to the TRC proceedings as a political witch hunt or as watered down truths, resulting in a threat to reconciliation itself.<sup>96</sup> This problem is reflected in South Africa, where the participation levels of the white population were much lower in proportion to the blacks, and invitations to the business communities were ignored.<sup>97</sup>

Even ignoring these problems, treating transitional justice as a therapeutic, healing process can be seen as potentially problematic in principle. One could argue that treating TRCs as therapy seems to “ignore politics, short change justice issues, and treat survivors and their recovery as a means toward a better society rather than as persons with dignity and entitlements to justice”. The first two – ignoring politics and justice – have been discussed earlier. The third – treating survivors as a means – can be argued because in the end, transitional justice is concerned with societal problems, not individual problems. Yet even though the focus is on societal problems, the TRC almost exclusively relies on individuals and their stories to accomplish the goal of societal healing. Therefore the TRC does not seem to treat victims and their stories as anything more than just tools to create a better society. Indeed, because of the structure of the TRC, when a perpetrator is given amnesty he/she immediately walks away free. However, the victims must wait further for decisions about reparations. This seems unfair, and shows how the stories of victims are valued but the victims themselves are arguably not.

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<sup>95</sup> Minow 1998: 71

<sup>96</sup> Minow 1998: 79

<sup>97</sup> Minow 1998: 76

It is also not clear whether truth telling in a formal commission can create a trusting relationship between groups/individuals.<sup>98</sup> It remains to be seen whether people will merely sympathize with the stories that most resemble their own, or if they will empathize at all with the other side.<sup>99</sup>

Nonetheless, Minow recognizes that TRCs are still not a second best option to trial courts.<sup>100</sup> This is especially true when the goals of reconciliation and healing are prioritized over others, notably justice.<sup>101</sup> In fact, to achieve the goal of reconciliation (and to appease many of the criticisms), TRCs would have to diverge even further away from prosecutions. For example, more extensive therapeutic assistance to victims, as well as offering more forms of amnesty to perpetrators would further the goal of reconciliation.<sup>102</sup> While the pros of prosecutions – such as the need to seek accountability regardless of circumstance – are important, Minow ultimately argues that the primary concern should be about how institutional responses affect the people they are meant to protect. When the concepts used in analyzing transitional justice reflects a pursuit of an abstract ideal rather than real human situations, TRCs might seem like a secondary option. By changing the discussion from justice and truth to vengeance and forgiveness, these new concepts capture the reality of specific and real human beings, rather than an abstract ideal.<sup>103</sup> Using the concepts of vengeance and forgiveness, TRCs

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<sup>98</sup> Minow 1998: 65

<sup>99</sup> Minow 1998: 75

<sup>100</sup> Minow 2008: 179

<sup>101</sup> Minow 1998: 88

<sup>102</sup> Ibid

<sup>103</sup> Minow 2008: 181

seem to emerge as a viable alternative to courts, because the strengths of TRCs are equally as important as the strengths of courts.

## Chapter 2

### Minow and the Acceptance of Reconciliation as a Goal for Transitional Justice

Minow sees her work as the first step towards developing analytic tools for evaluating transitional justice, and then matching it with the needs of communities. By conceptualizing the response as the need to balance vengeance and forgiveness rather than truth and justice, she is able to offer a better explanation of the underlying motivations behind different responses. As discussed in chapter one, she lists twelve different goals for transitional justice that come out of these motivations. One of her important contributions in this field is her inclusion of reconciliation as a goal that is equal to the goal of finding justice. This is why she is able to argue that TRCs are not just a second best option due to practical constraints of trial courts, but an equally worthy option in their own right.

Since her work and that of others who have argued similar lines, it has become commonplace that TRCs are better suited at reconciliation than trial courts. Writers such as Trudy Govier,<sup>104</sup> Susan Dwyer,<sup>105</sup> Wilhelm Verwoerd,<sup>106</sup> and Carlos Sluzki,<sup>107</sup> have since focused on the meaning and the process towards reconciliation in post conflict societies. Centered on the analysis of the goal of reconciliation, these writers have

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<sup>104</sup> See Trudy Govier, *Taking Wrongs Seriously: Acknowledgement, Reconciliation, and the Politics of Sustainable Peace*, (New York: Humanity Books, 2006)

<sup>105</sup> See Susan Dwyer, "Reconciliation for Realists," *Dilemmas of Reconciliation: Cases and Concept*, Carol A.L. Prager & Trudy Govier, Eds. (Waterloo: Wilfred University Press 2003), pp.91-110.

<sup>106</sup> See Wilhelm Verwoerd, "Toward a Response to Criticisms of the South African Truth and Reconciliation Commission," *Dilemmas of Reconciliation: Cases and Concept*, Carol A.L. Prager & Trudy Govier, Eds. (Waterloo: Wilfred University Press 2003), pp.245-278.

<sup>107</sup> See Carlos E. Sluzki, "The Process Toward Reconciliation," Antonia Chayes & Martha Minow, Eds. *Imagine Coexistence: Restoring Humanity After Violent Ethnic Conflict*, (San Francisco: Jossey-Bass 2003), pp.21-31.

developed varying theories about the steps towards reconciliation, and the obstacles that exist. Elsewhere, the psychology, political science, and sociology communities have developed studies of the goal of “forgiveness” and “reconciliation” specifically as these pertain to transitional justice. Kaminer et al,<sup>108</sup> Catherine Byrne,<sup>109</sup> Ervin Staub<sup>110</sup> and Audrey Chapman<sup>111</sup> have undertaken studies that either indicate the extent to which the TRC was successful at reconciling, or suggest new ways of reconciling, both at the individual and group levels.<sup>112</sup> Reconciliation – in the context of transitional justice – is no longer seen as a failure of justice, but a goal that should be understood and pursued for its own merits. Martha Minow is one of the prime movers of this change in the literature.

Reconciliation can mean several things, depending on the literature and the theorist. Indeed, there is no consensus as to what the term means. Audrey Chapman notes that the South African TRC commissioners “often equated reconciliation with interpersonal forgiveness.”<sup>113</sup> Ervin Staub uses a definition that is based solely on the psychological attitudes of victims and perpetrators: “Reconciliation means that victims and perpetrators, or members of hostile groups, do not see the past as defining the future,

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<sup>108</sup> See Debra Kaminer, Dan J. Stein, Irene Mbanga & Nompumelelo Zungu-Dirwayi, “The Truth and Reconciliation Commission in South Africa: relation to psychiatric status and forgiveness among survivors of human rights abuses,” *British Journal of Psychiatry* (2001), 178, pp.373-377.

<sup>109</sup> See Catherine C. Byrne, “Benefit or Burden: Victim’s Reflections on TRC Participation” *Peace and Conflict: Journal of Peace Psychology*, 2004, 10(3), pp.237-256.

<sup>110</sup> See Ervin Staub, “Reconciliation after Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps toward a General Theory,” *Political Psychology* (2006) 27(3), pp.867-894.

<sup>111</sup> See Audrey Chapman, “Truth Commissions and Intergroup Forgiveness: The Case of The South African Truth and Reconciliation Commission,” *Peace and Conflict: Journal of Peace Psychology*, (2007) 13(1), pp.51-69.

<sup>112</sup> It should be noted that by and large, these psychological studies complicate the philosophical literature in this area, in that they indicate that the TRC does not seem to be as successful in either healing, or reconciling victims as one would hope. While there are many reasons that are suggested for this (i.e. continued community struggles, poverty etc), it is clear that this issue is a complicated one. These discussions however are beyond the scope of this particular paper.

<sup>113</sup> Chapman 2007: 60

as simply a continuation of the past.”<sup>114</sup> Carlos Sluzki defines reconciliation as a process, with specific steps from coexistence to integration.<sup>115</sup> Susan Dwyer thinks that reconciliation is about “bringing apparently incompatible descriptions of events into narrative equilibrium”, and that divisions are primarily across narratives.<sup>116</sup> In Trudy Govier’s analysis of the concept, she notes that reconciliation can also have religious connotations, or can be based on the restoration of trust. While these definitions are helpful, as mentioned earlier, Minow uses the colloquial idea of reconciliation: a reconstructive process across groups over social divisions.<sup>117</sup>

Compared to the detailed analysis that other theorists have given, Minow’s definition of reconciliation may seem too broad and simplistic. Without an explicit – and perhaps even measurable – definition of reconciliation, one could argue that it becomes difficult to know how to pursue it. Yet the fact that she uses the colloquial idea gives her the benefit of being able to incorporate all of the other views within her analysis. Since Minow’s project is to establish a language by which to analyze and understand transitional justice systems – namely, her concepts of vengeance and forgiveness – her colloquial idea is sufficient to make it clear that reconciliation is a part of forgiveness. Thus, her work is easily used as a stepping stone for other theorists who want to focus on reconciliation itself – regardless of their individual definitions of reconciliation. It is this robustness that enables theorists such as Carlos Sluzki to begin their analysis of

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<sup>114</sup> Staub 2006: 868

<sup>115</sup> Sluzki 2003: 23

<sup>116</sup> Dwyer 2003: 100

<sup>117</sup> Minow 1998: 88



reconciliation with a quote from Minow, claiming that reconciliation is an important goal.<sup>118</sup>

For the purposes of this paper, I will adopt Minow's broad definition of reconciliation. This is because my project is not to criticize any specific definition of reconciliation, but to suggest the need for further research into areas that are vital to reconciliation, *regardless of definition*. Put differently, I do not require that theorists adopt a specific view of reconciliation in order for my arguments to stand. Instead, all I require is the acceptance of a view that is within the scope of her definition – which Minow offers as one that encompasses all of the definitions in the literature.

From this definition, I will argue that Minow and others have not fully developed the implications that come from accepting reconciliation as a goal. Those who are attempting to design and evaluate transitional justice systems – with the inclusion of reconciliation as an explicit goal – must be equipped with knowledge of the preconditions for reconciliation. Reconciliation – no matter what definition you use – necessarily involves two or more parties, and all the parties must be willing to participate constructively for it to succeed. The current theories understand that it is difficult for victims to come to the table, and that victims require certain things – such as sympathetic witnesses<sup>119</sup> – to make it easier to participate. This knowledge – of victims and their requirements – comes from an interdisciplinary amalgamation of knowledge, from political science, philosophy, anthropology and psychology. Yet if one is to accept that reconciliation requires all participants to be constructive, then a similar understanding of

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<sup>118</sup> Sluzki 2003: 23

<sup>119</sup> Sympathetic witnesses are also a need for victims in and of itself, but in this case I refer to the fact that an institutional process which forces victims to confront denials can be a barrier to participation. For example, the prospect of facing cross examination can be a barrier to participation for victims.

perpetrator requirements is also necessary. That is, one also requires knowledge of the barriers to perpetrators coming to the table and what perpetrators need from the process. Nonetheless, there is currently a lack of knowledge about the requirements of perpetrators.<sup>120</sup> In order to motivate this argument about the need to take account of the experiences of perpetrators, I first describe how Minow and others work within a theoretical framework that does not adequately take into account perpetrator requirements. This framework, which I refer to as “The Old Framework” is based upon a view of justice that justifies ignoring perpetrator requirements on grounds of their moral irrelevance. I then argue for the importance of taking perpetrator requirements into account, beginning with an overview of the type of needs and priorities I am referring to. Thirdly, I explain the different ways in which the current literature simplifies perpetrators and their requirements. Finally, I give illustrations of how perpetrators and their PRs are homogenized in the current literature, and explain why the diversity of perpetrators is important to recognize in the transitional justice context.

### **The Old Framework, Perpetrators and Reconciliation**

As mentioned in chapter one, Minow’s arguments are a response to those who claim that justice and truth are competing priorities. This claim – that they are competing priorities – depends upon certain assumptions about justice and the relationship of perpetrators to justice. These assumptions are for the most part inherited by Minow from antecedent discussions, and they are detrimental to reconciliation as a valuable goal of truth commissions. This section will explain these underlying assumptions about justice,

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<sup>120</sup> The amnesty clause is arguably a form of perpetrator requirement. However, the flaws with how the amnesty clause is understood will be discussed in detail later in this thesis.

and the (ultimately problematic) framework that emerges from it – what I call “the old framework”.

One way to look at justice is to see it as a social goal. The classic example would be Mill’s definition of justice in Utilitarianism: “...I account the justice which is grounded on utility to be the chief part, and incomparably the most sacred and binding part, of all morality.”<sup>121</sup> In this conception of justice, justice is about serving the greater good for the society. Individuals and their crimes are punished because it makes the society better (perhaps as a deterrent, or because the perpetrator would commit more crimes if they were free etc.). Alternatively, justice can be conceived as a rendering to individuals what they are due. The classic example of this is Aristotle’s definition of justice: “This, then, is what the just is – the proportional; the unjust is what violates the proportion.”<sup>122</sup> In this case, perpetrators are punished because their actions need to be rectified, and the perpetrator must be held accountable. Combinations of the two conceptions of justice also exist, and the classic example of this is Kant. For Kant, justice is about social forms and institutions that are tasked with rendering individuals what they are due: “The right of administering punishment is the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime committed by him.”<sup>123</sup> Current liberal views such as those of Rawls and Pogge claim that justice is a *property* of social institutions, and that this property has to do with how these institutions

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<sup>121</sup> Mill: 205

<sup>122</sup> Aristotle: *Nicomachean Ethics*. 1131b.14, trans. W.D.Ross 1908

<sup>123</sup> Kant: *The Science of Right*. 4.1.6 E, trans. W.Hastie 1887

respond to individuals: “Our focus is almost entirely on the basic structure as the subject of political and social justice.”<sup>124</sup>

The transitional justice literature adopts a combination of these conceptions of justice. Justice is conceived as a deterrent against future offenders, with the immediate benefit of preventing further violence by the perpetrator. As discussed in the first chapter, it is a form of punitive justice, based upon just deserts. It is because of this conception of justice that Minow uses “justice” and “accountability” interchangeably. Under this conception, justice is served if and only if the perpetrator is held accountable.

Yet as most transitional justice theorists recognize, perpetrators do not usually have a desire for justice. Perpetrators are often disproportionately wealthy due to their exploitation of victims (in monetary measures, education levels, land, political power – everything.) and justice could force the perpetrators to give up a tremendous amount, from political and economic power to their dignity and freedom, to their sense of group superiority and pride. Perpetrators are usually not willing to give up their gains, or to accept the losses that justice may entail.<sup>125</sup>

In contrast, one would be hard pressed to find victims who refuse justice (unless it is in the context of a debate about what kind of justice they are due, such as whether justice should be rendered restorative, retributive, or some other form.). For example, some victims have refused reparations, not because they refuse justice, but because reparations are perceived as an alternative, or a substitute for justice. In fact, in the South African case, there seem to have been very few victims who actively spoke against

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<sup>124</sup> Rawls 2001: 4.2, and see Thomas W. Pogge, *Global Justice*. (Oxford: Blackwell Publisher, 2001)

<sup>125</sup> Bystanders are even more difficult, for often (as is the case in apartheid) those who did nothing actually gained a tremendous amount through ingrained injustices over several generations. Their position of privilege was gained through unjust means, yet bystanders technically did nothing.

justice. There were those (such as the families of Steve Biko) who spoke against the TRC as an abandonment of justice, but the TRC justified its own actions as a form of justice, rather than as an abandonment of it. In short, in post conflict societies victims need and demand justice, but perpetrators generally try to avoid it.

This dichotomy of desires can also be seen with the demand for truth, or more specifically, acknowledgement. Truth, for the most part, is something that the perpetrator would rather hide due to the consequences that it might have for their reputation and legal status etc. Victims on the other hand (as argued previously) have a need to understand the violence that they faced, and understanding the truth is seen as vital to moving on. The demand for acknowledgement is even more difficult to accept than truth. This is because accepting official, government acknowledgment, or – even less likely – offering a personal acknowledgment of their own, involves an admission of moral ineptitude. For perpetrators, acknowledgement involves an admission of having made serious moral errors, and an acceptance of culpability and responsibility.<sup>126</sup> This is extremely humbling, even humiliating, to the perpetrators.<sup>127</sup> Perpetrators may feel that these acknowledgements are a denial of their identity and their interpretation of history. Thus, like justice, while survivors demand truth, perpetrators often avoid it.

The combination of these realities creates a framework of understanding within which, transitional justice is justified in focusing almost exclusively on the needs of victims when a transitional institution's only goals are truth and justice. The realization and pursuit of truth and justice involves a tradeoff of political and socio-economic factors

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<sup>126</sup> This is not to imply any internal state of the perpetrator, such as remorse. As discussed earlier acknowledgement is an admission of an action that is official, which condemns the action. Whether this acknowledgement is accompanied by any feelings of remorse is not what I am addressing.

<sup>127</sup> Govier 2006: 61

between perpetrators and victims (or at least an attempt to): The perpetrator must give up the advantages that were gained, and be prepared to accept the losses in recognition of the wrongs that have been done to the victims. Given that perpetrators are not usually willing to give up their gains, transitional institutions must be prepared and able to force or coerce perpetrators into exposing truths and accepting justice. If the very *raison d'être* of a transitional institution is to pursue justice and truth, this is entirely justified under this framework.<sup>128</sup> In fact, it is not only justified, but required of the institution.<sup>129</sup>

This framework of understanding – that transitional institutions are tasked with meeting the needs of victims, with force and coercion if necessary – works well if we accept that such institutions are primarily about the pursuit of truth and justice. However, if we are to agree with Minow and include reconciliation as an equally valuable goal, this framework becomes problematic. To the extent that TRCs have reconciliation as a goal, they must find a non-adversarial, or at the very least a non-coercive way to overcome perpetrators' *prima facie* disposition against exposing themselves to justice and revealing truth. It is this practical problem to which I now turn. Because even if there is no moral

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<sup>128</sup> There is also a very strong argument that claims that transitional justice should be solely concerned with the victims needs. However, since that view is easily incorporated within “the old framework” without contradiction – and the moral argument is beyond the scope of this paper – I will not spend time on that argument.

<sup>129</sup> Furthermore, transitional justice theorists often refer to a long theoretical tradition wherein perpetrators are also said to gain something from justice. In fact, many argue that perpetrators ought to want justice, and that their interests are ill-served by escaping it. For example, one could contend that justice also deters future violence against perpetrators as well as the general population, or that justice makes perpetrators more virtuous, or that justice ensures the continued incorporation of the perpetrator within society, or that justice establishes human rights norms which also respect perpetrators etc. While these conceptions and their arguments differ depending on the conception of justice that theorists have, the view that justice is beneficial for perpetrators is a long tradition within moral and political philosophy. These same arguments are also utilized by Minow and others in the transitional justice literature. For example – as mentioned in chapter one – Minow claims that TRCs heal perpetrators by allocating constructive roles to them. Indeed, the more that perpetrators participate, the more that the rest of society can understand their circumstances, and the more that the humanity of perpetrators is restored. Yet the claim that justice is beneficial for perpetrators is rarely enough to convince perpetrators to want justice. For perpetrators, the threat of losing the aforementioned socio-economic and political gains is much greater and closer to reality than the benefits of justice – most of which are based upon abstract ideals.

imperative to address the needs of perpetrators (a topic which, although important, is beyond the scope of this thesis<sup>130</sup>), the practical necessity of having perpetrators first participate, and second, participate constructively, in reconciliation processes, forces the question of what perpetrators require from TRC institutions for these to be effective.

### **Perpetrator Requirements**

The process towards reconciliation – even if one views the need for reconciliation as a need for victims and not perpetrators – requires constructive participation by the perpetrator and the victim. Yet the process of reconciliation is not an easy one for either victims or perpetrators, requiring both to follow through with difficult tasks. Victims must be reconciled to a past in which their society either failed to protect or actively abused them, and a present in which some of their fellow citizens are perpetrators of that abuse. This requires them to be willing to give up personal control over how perpetrators are socially designated or treated: to accept that their personal desire for vengeance or their personal decision to forgive does not govern how society will respond to those who have abused them. Not only that, they are called upon to share their painful stories, to relive memories, and to even face their perpetrators. This type of trust and constructive participation cannot be achieved merely by forcing someone to attend the proceedings of a transitional institution. It is for this reason that – as shown in chapter one – theorists and lawmakers have drawn from a variety of disciplines to understand these difficulties. For example, they have been able to incorporate knowledge from therapy sessions, treatments of psychological disorders (such as PTSD), and socio-cultural factors into their analysis. Likewise, theorists have also been able to draw from different disciplines

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<sup>130</sup> It is also a very strong and controversial thing to accept.

to suggest ways to improve transitional institutions, to better address the needs of victims.<sup>131</sup> In other words, theorists have utilized interdisciplinary methods in two ways: to understand the needs of victims in a post-conflict society (so that the transitional institution can try to meet them), and to understand the circumstantial and structural conditions that enable victims to participate more comfortably and more willingly in transitional institutions.

The process of reconciliation for perpetrators is difficult as well. Perpetrators must face their crimes, their victims and the rest of society. Like victims, they must also participate willingly and constructively, and give up personal and group control over how their crimes are interpreted and how they will be personally designated and treated. Furthermore, they must be ready to transfer moral authority to the victim, and to accept forgiveness or non-forgiveness. Letting go of that type of control involves a tremendous amount of trust in the transitional institution. Like victims, this type of trust and constructive participation cannot be achieved by forced participation. This seems obvious: if a perpetrator participates in reconciliation processes but spends his/her time ignoring the proceedings, or promoting prejudices, it cannot be argued that the process is working towards reconciliation.<sup>132</sup> Instead, reconciliation requires the perpetrator to listen to victims sympathetically, to cease spreading hate, and to humanize the victims, themselves, and their own crimes.

Reconciliation is therefore inherently a process which requires constructive and willing participation by perpetrators. Yet the aversion towards constructive participation

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<sup>131</sup> It is for this reason that there is a lot of research about what would enable a victim to forgive a perpetrator, and what support they would require, what other needs would need to be met before they could participate in a reconciliation process with a perpetrator (both at the group level and the individual level), etc.

<sup>132</sup> This is in stark contrast to justice and truth. Justice can be served with the mere presence of the perpetrator, while truth can arguably be forced (although depending on the degree of force, moral problems arise).



is particularly high in the case of perpetrators, for reasons that have already been discussed. This creates a practical problem for theorists of transitional justice institutions. If force and coercion cannot be used, then theorists must find alternative ways to ensure constructive participation by perpetrators. In order to do so, the first step would be to understand in better detail the aversions, barriers, needs, and requirements that perpetrators have, so that theorists can address them in ways that are not morally problematic. In short, theorists must research perpetrators in the same depth and breadth as victims, and utilize interdisciplinary methods to understand the needs of perpetrators, as well as understand the circumstantial/structural conditions that enable perpetrators to participate more comfortably and willingly in transitional institutions. I will refer to these conditions and needs as “perpetrator requirements” (PR).

### **Clarifications**

By suggesting that we take seriously PRs, I do not mean to suggest that we should take seriously threats, ultimatums or preconditions that a perpetrator or group of perpetrators may demand. The requirements that need to be taken seriously are the needs that must be met for perpetrators to be willing and wanting, to participate in a genuine truth commission process – one that may genuinely be expected to identify and acknowledge truths.<sup>133</sup> Demands to avoid or mitigate the extent to which the process will do this – while perhaps indicative and informative of PRs – do not in themselves

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<sup>133</sup> “Wanting” would be the ultimate goal, but in practice a willingness to cooperate would probably be the case.

constitute the kind of PRs that are of interest.<sup>134</sup> This distinction can be illustrated further using Minow's work on victims.

Recall that Minow accepts that justice and truth are demands that come from victims.<sup>135</sup> Yet Minow argues that neither justice nor truth captures the true requirements of victims, *even though* that is what is often demanded by them. Instead, a deeper analysis of victims, and an understanding of the need for remembrance, reveals that perhaps the true requirements are vengeance and forgiveness. From this stepping stone, Minow is able to argue that reconciliation is also a need for victims.<sup>136</sup> Victims' demands are therefore not taken at face value by Minow, but taken seriously and considered carefully to understand what the requirements behind it could be. These requirements are then used to better address the underlying issues, and to shape transitional justice systems accordingly.<sup>137</sup> A similar transformation must occur with perpetrator demands, through a deeper analysis and a serious consideration of perpetrators.<sup>138</sup> From there, a better understanding of perpetrators emerges, which is crucial for overcoming the practical

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<sup>134</sup> It may turn out that there is no way to meet PRs without undermining the ability of TRCs to actually deliver truth, and in that case, the prospect of reconciliation through transitional justice institutions may need to be rethought. However, it is too soon to go to that pessimistic conclusion. I believe that it is possible to identify PRs that are not antithetical to the goals of a transitional institution.

<sup>135</sup> Perpetrators on the other hand "demand" their avoidance.

<sup>136</sup> At the same time, Minow recognizes that there are conflicts within these different goals, and different victims. There is an understanding of the diversity of victims.

<sup>137</sup> For example, with the understanding of victims came the transformation of "truth" into "acknowledgement", which is vital in considering the process of TRCs: since truth is not what victims require, but acknowledgement is. In other words, victims would not be gaining what they require if truth was served without acknowledgement by TRCs and trials. One could fathom that they would soon lose faith and willingness to participate in the process, if acknowledgement was never given. It is for this reason that understanding the importance of acknowledgement, and what it entails, is important in order to understand the requirements for victims to play their "role".

<sup>138</sup> Demands alone are not the only source of information by which one can better understand perpetrator requirements, but this paragraph is specifically addressing the concerns of taking seriously the demands of perpetrators.

problem that this thesis is addressing. Thus, accepting ultimatums or threats is not what is being advocated in this thesis, but the need to understand PRs is.<sup>139</sup>

The reason for pursuing an understanding of perpetrators is not because perpetrators have equal standing as the victims, in the sense of having an equal priority in the design and functioning of transitional institutions. The fundamental idea that transitional justice is centered on and ultimately for victims does not necessarily have to change. The need for understanding PRs comes from the need for reconciliation, and not from an argument about the moral status of perpetrators.<sup>140</sup> Without PRs, a theory of transitional institutions would not take into account important facts, and the practical implications could be potentially problematic. Minow gestures at this problem when she writes:

“Hoping that the process of forgiveness can itself transform the wrongdoer depends upon a script that must be shared by the forgiven and the forgiver. ... Yet many people do not share this script. Pardon does not transform all perpetrators.”<sup>141</sup>

This quote brings out the fact that perpetrators must react a specific way to the process and have a specific attitude towards the victims (“the script”) in order for their participation to serve the goal of reconciliation. Yet merely gesturing at this problem is

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<sup>139</sup> One might argue that this whole method of analysis, in which the demands of victims and perpetrators are not always taken at face value, is paternalistic. Indeed, with the fact that most of these conflicts occur in non-Western countries, this methodology may seem like a vestige of colonialism. Moreover, theorists are most likely to be foreigners to the country, and one could argue that they are unable to truly understand the relevant social facts of other cultures. However, those who advocate these critical positions should not be opposed to my proposal, since these types of criticisms are critical of the methodology of finding PRs, and not against the idea that PRs are important to consider. I am not advocating a top-down approach – that we can dictate what perpetrators and victims need – but instead I am advocating the need to better understand perpetrators by recognizing their own value systems and experiences. The best practices of arriving at reliable, relevant PRs is a matter of further research.

<sup>140</sup> Although one could arguably make the case for a moral need to understand perpetrators. However, that issue is beyond the scope of this paper.

<sup>141</sup> Minow 1998: 18

not enough: Transitional institutions and theories about them must attempt a process in which both sides are likely to take up their roles.

A further point of clarification may be useful: The argument presented here is not advocating a blanket incorporation of PRs into theories of transitional institutions. In fact, if one chooses to not support the requirements of perpetrators at all, then – in principle – there would be no problem. Rather, I am advocating that given the goal of reconciliation, and the practical difficulties surrounding it, PRs are important to *understand*. As Minow has outlined, there are twelve overlapping goals that transitional justice should try to meet. Reconciliation is one of them, as is the fulfillment of each of the twelve goals in ways that are compatible with the fulfillment of the others. Therefore reconciliation isn't the only goal to be considered, and if the requirements of perpetrators threaten the achievement of other goals, then it would be up to the theorists and those who design transitional institutions to decide how to balance the different goals, and to prioritize different goals.<sup>142</sup> Theorists and designers of institutions can therefore choose to ignore PRs if they see fit, but only if they justify it in terms of other goals that must be met. In order to do so, however, a detailed understanding of PRs, and the effects that they have on the other eleven goals must be in place.

Unfortunately, the old framework did not require a detailed understanding of perpetrators. This is because if truth and justice could be pursued through force and coercion – and compromises were seen as morally inferior<sup>143</sup> – there was never a need to understand PRs in great depth. As such, there is a clear lack of research on PRs. Indeed,

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<sup>142</sup> It may turn out to be the case that the other goals will also need closer consideration of the experiences/requirements of perpetrators, but for this thesis the considerations are limited to reconciliation for reasons of space.

<sup>143</sup> Which is why, as explained in chapter one, the TRC was seen as morally inferior to trials.

because of this legacy, perpetrators are understood as those who must respond to the victim's demands. The problem is that the *responses* of perpetrators to victim demands are often understood as perpetrator *requirements* (PR) by these theorists. While perpetrators may respond to justice and truth with material and legal concessions, this does not indicate that those responses are PRs. For example, in her 1998 analysis of TRCs, Minow discusses the idea of healing and reconciliation.<sup>144</sup> The sub-headings of her analysis are as follows: "The Restorative Power of Truth-Telling", "The Presence of Sympathetic Witnesses", and "Tasks for Perpetrators and Bystanders". The first section deals with the notion that truth telling can restore the dignity of survivors. The second section then goes on to point out that this restorative power requires sympathetic witnesses to be present in the process. In the last section, she lists the tasks that perpetrators and bystanders must do in order to fulfill the needs that are discussed in the other two sections. In this pattern of argument, perpetrators are discussed only in relation to the needs of victims. In doing so, PRs are understood as the reactionary aversions against these tasks. PRs are thus not treated as a subject that should be discussed separately from the requirement of victims. In other words, when structuring an argument in this way, there is a tendency to simplify perpetrators and their requirements. Instead, PRs need to be understood on their own terms, separate from the needs of victims. To better understand this trend, the simplification of perpetrator PRs, and the homogenized portrayal of perpetrators will now be discussed.

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<sup>144</sup> Minow 1998: 61-87

## **The Simplification of Perpetrator Requirements in the Current Literature**

The current literature has a tendency to simplify perpetrator requirements in two ways. First, the perpetrator is simplified to the point that their needs and requirements are merely understood as material or legal concessions. This generally takes the form of amnesties, or monetary concessions. For example, many theorists claim that an amnesty program is meant to promote the active and constructive participation by perpetrators: “Trading truth for amnesty, and amnesty for truth, the commission was intended to promote the gathering of facts...”<sup>145</sup> This is because theorists recognize that perpetrators can be motivated by the need to get away as unscathed as possible by the transition. Perhaps this is true for some perpetrators, but as the amnesty process in the South African case revealed, this did not truly promote active, and more importantly, constructive, participation by the majority of the perpetrators.<sup>146</sup> The number of abuses reported in the South African TRC – 40,000 – is clearly disproportionate to the number of amnesty applications – over 7000 – clearly showing a failure in convincing perpetrators to come forward, let alone come forward constructively. When one considers that over 5000 of those applications came from those who were already tried and incarcerated, and had nothing to lose by testifying, the problem of participation seems even worse.<sup>147</sup> Material concessions are no better. This is because material concessions fail to account for the fact that many perpetrators already have economic clout in the country.

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<sup>145</sup> Minow 1998: 57, and also see Govier 2006: 288

<sup>146</sup> Of course, theorists know that the amnesty clause did not truly promote perpetrator participation. The problem is that theorists currently think the majority of the perpetrators can be understood as having legal and material concessions as PRs.

<sup>147</sup> Foster 2005: 13

Consider the English perpetrators in South Africa, who were in control of business and the economy of South Africa. Through their economic might and historical legacy, they had enormous clout in politics as well. For the most part, they had no need for a transitional institution to allocate material or legal concessions to them. Therefore conceptualizing perpetrator needs solely through monetary or political concessions fails to capture the PRs of the English. Although they may have legal and material needs – as all people do – one can easily see that these concessions do not promote, encourage, or enable desires in perpetrators for constructive participation. Indeed, material and legal concessions – at least in the way that they are currently utilized – can be better understood as a form of coercion, rather than as a way to address PRs. This is because they seem to mostly have significance as an alternative to real force – for example, in South Africa if one did not accept amnesty, then they were agreeing to the possibility of prosecution. Yet as mentioned earlier, force and coercion are no longer an option, if one is to pursue reconciliation seriously. In short, monetary and political concessions clearly simplify the perpetrators, such that the complexity of their circumstance is not reflected through this understanding of PRs.

The second way in which the literature oversimplifies PRs is by portraying PRs with overtly idealistic theories. For example, some theorists have noted that perpetrators should want to be honest with themselves, others, and the chance to speak cooperatively with their former enemies.<sup>148</sup> Others claim that acknowledgement is also something that is required by perpetrators.<sup>149</sup> Some others argue that people who have committed atrocities are bound to feel guilty, and that even if they deny it, perpetrators want to

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<sup>148</sup> Govier 2006: 61

<sup>149</sup> Minow 1998: 121

relieve their feelings of guilt deep inside (and that the TRC can provide it).<sup>150</sup> While such claims may be true, the practical reality is that those ideas clearly do not capture the real requirements of most perpetrators. As discussed earlier, in reality perpetrators generally avoid justice and truth, and the transitional institutions which attempt to realize them. Interestingly, the theorists who propose these ideas also generally recognize participation to be a problem, and that the current understanding of PRs is not sufficient to tackle this problem.<sup>151</sup> Yet what is problematic is that they do not offer alternative PRs which might solve these issues, or see the need to focus on PRs in the way that I have argued. Again, this lack of research on perpetrators seems to be justified by the old framework, and its victim centric research.

In striking contrast, the transitional justice literature is rife with criticisms against idealistic philosophical portrayals of victims and their requirements. Indeed, many theorists argue that the South African TRC failed to connect the ideal of “healing through testimony” with a concrete understanding of victims and their requirements. In their critiques, these theorists incorporate findings from therapeutic and psychological literature, creating a complex portrayal of victims, their needs, and their requirements.<sup>152</sup> In doing so, they argue that the TRC proceedings have also produced pain for victims who participated, or that many have failed to move on in their lives. Therefore they challenge the notion of the idealistic healing effects that TRCs are purported to have, and to better understand the needs of victims.

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<sup>150</sup> Govier 2006: 61

<sup>151</sup> Govier 2006: 61

<sup>152</sup> Martha Minow and her move towards the concepts of vengeance and forgiveness is part of this advancement in understanding of victim’s needs – truth and justice do not truly capture the complexities of victims.



Similarly, theorists have also argued that material concessions fail to truly understand and address the needs of victims. This was particularly the case when they argued that reparations to the victims – on their own – were problematic. In the South African proceedings, the amnesty clause granted immediate amnesty to perpetrators once the TRC proceedings concluded – yet the material/monetary reparations that were distributed by the government typically took months, if not years, to make it to the victim. Theorists argued that regardless of the monetary value of the reparation, the fact that the perpetrator walks away immediately and the victims must wait a long time was problematic. This is because although the victim's need for reparations was being met, they had to be distributed in a way that did not seem like the victims were merely needed for testimonies. Reparations are only meaningful if they contribute to achieving the need for acknowledgement. Thus, theorists argue that not only does the monetary amount matter, but the form, and timing as well. As one can see, this type of multi-layered understanding has not been mirrored in the understanding of perpetrators.<sup>153</sup>

### **The Homogenization of Perpetrators**

Not only do the current theories simplify PRs, they also homogenize perpetrators as a group. Perpetrators are all seen as a single group of people, with mostly similar concerns, needs, and requirements. Yet there are many differences among perpetrators that could drastically shape PRs, such that one set of PRs do not correspond to all perpetrators. Again, when it comes to victims, theorists recognize and incorporate differences into their analysis. Victims are recognized as having different needs,

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<sup>153</sup> Perhaps it need not be similar in depth to victims. However, it seems clear that there needs to be more depth.

depending on their culture, gender, and the type of atrocity that they suffered. For example, as mentioned earlier, victims of torture place a special importance on the intrinsic value of truth. Gender is also recognized as a significant difference as well. Rape is most commonly suffered by females, and female rape is the only one that can result in a child with the perpetrator.<sup>154</sup> These are realities that clearly shape and change the needs that these women have, compared to men. Furthermore, culture also plays a role in how gender affects their needs/requirements: some culture shun women who have been raped, or are no longer virgins. Once again, culture therefore shapes the needs and requirements of victims. In comparison to this multi-layered analysis, theorists do not have a conception of PRs that is shaped by culture, gender, and circumstance. At the most, they recognize that some perpetrators are bystanders and victims at the same time, or that fighting for and against oppression are significantly different.<sup>155</sup>

To illustrate how cultural and political groups can entail relevant differences among perpetrators – relevant in the sense that they lead to substantial differences in PRs – I will use the South African political landscape at the time of the TRC as an example. A common misperception exists concerning the creation of the TRC and the end of

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<sup>154</sup> There is a wide range of problems in the South African TRC and its definition of human rights violations, when it comes to excluding gender specific atrocities. For more on this, see the Melanie Walker & Elaine Unterhalter, “Knowledge, Narrative and National Reconciliation: Storied Reflections on the South African Truth and Reconciliation Commission,” *Discourse: Studies in the Cultural Politics of Education* (2004) 25(2), pp.279-297.

<sup>155</sup> The South African TRC also homogenized perpetrators in their proceedings, although arguably not in their sentencing. The case of the Amy Biehl murder, in contrast to the Chris Hani murder shows this. Both were presented as racially motivated murders that were influenced by the society at the time, yet one was granted amnesty and one was not. One involved a white woman murdered by a group of black people, and the other a black man murdered by a group of white people. Whether the differences in sentences were justified is beyond the scope of this paper, but it perhaps shows that perpetrators from different backgrounds were given different sentences for similar crimes, reflecting an understanding that there are differences between perpetrators because of their social background. On the other hand, it has been argued that the difference in sentences comes from a lack of standard rules/procedures across the commission. For more on this, see Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, (Cambridge: Univ. Press, 2001) pp.81-93

apartheid. It is commonly thought that the transition to a democracy and the TRC was a negotiated settlement between the major parties. Even Minow's work reflects this view.<sup>156</sup> Yet a closer look at the historical record indicates that this was hardly a negotiation between major parties, or even between the African National Congress (ANC – Mandela's party) and the National Party (NP – De Klerk's party). In fact, the negotiations were largely between ANC moderates and NP nonracials (those who were less concerned with racial segregation and entrenched superiority). Therefore the negotiations essentially excluded other parties, as well as many within their own ranks.<sup>157</sup> Other parties had originally participated in these talks, but many simply refused compliance, or walked out entirely. Yet these groups were not idle. When one looks at the political maneuvers by all the different groups at the time, it becomes obvious that each group could arguably have had a different set of PRs. While going over all the possible groups and political parties would be beyond the scope of this paper, some key groups will be highlighted here.

The National Party was largely an Afrikaner party. The English did not see themselves as part of the National Party, even though they benefitted from apartheid. In fact, neither the Afrikaners nor the English saw themselves as belonging to the other group, other than in skin colour terms.<sup>158</sup> It is for this reason that the English did not by and large *directly* associate themselves with apartheid policies, since many of them saw it as an Afrikaner nationalist policy that was not theirs. Therefore the English may have believed that they should have been treated differently from the Afrikaners, because they

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<sup>156</sup> Minow 1998: 53

<sup>157</sup> Louw 2004: 167

<sup>158</sup> This is due to historical contexts. The Afrikaners see themselves as a colonized people who over came English rule.

were less guilty than the Afrikaners.<sup>159</sup> Thus, this type of difference in narrative could impact PRs in a significant way. This type of impact also exists for those peripherally involved in violence through mob violence, or bystanders to violence: they may not see themselves fully as perpetrators, but they are not fully innocent either.<sup>160</sup> Theorists do not currently incorporate such relevant facts about perpetrators.

COSAG is also another group worth considering. Some of those who refused the NP-ANC alliance came to be loosely organized as COSAG (Concerned South Africans Group). These were not just the right wing white groups such as the Conservative Party which wanted to sustain apartheid. It also consisted of the Inkatha, the Bophuthatswana and Ciskei governments, all of which were opposed to the form of the transition taking place, for various reasons.<sup>161</sup> In other words, there was a surprising political alliance between the conservative pro-apartheid party, and some of the black groups. In particular, it is interesting to note that the Inkatha were actively engaged in violent atrocities against other blacks. This was because they were more concerned with the potential to be culturally dominated by the ANC, which was largely comprised of a

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<sup>159</sup> These are examples that, although generally true, may or may not have actually played a role in their TRC participation levels in South Africa. However, it seems feasible that these factors could play such a role, and I am only arguing that such a possibility is worth exploring. Combined with the fact that the English were guaranteed political clout through their economic might, the PRs of an English perpetrator could be significantly different from the relatively poorer, politically threatened Afrikaner perpetrator.

<sup>160</sup> Of course, morally whether one sees themselves as guilty or not is irrelevant to how they should be treated. However, as mentioned earlier, theorists must still recognize and understand these differences. For a further discussion on this, please refer to the clarifications section.

<sup>161</sup> Both the Bophuthatswana and Ciskei governments wanted to maintain the independence that they “gained” through the apartheid government in 1981 (although no foreign governments recognized this, since their independence was a ploy by the apartheid government to deny citizenship to the blacks). Furthermore, the Pan African Congress (which was the major resistance group while the ANC was in exile) rejected the negotiations because they saw the ANC as failing the blacks by agreeing to too many concessions to the whites. Resistance by these groups continued until it was broken through sheer force (ordering police into Kwazulu, the Inkatha homeland for example), or economic pressures (vetoing development loans to these areas). For more information, see Louw 2004 – p.171-172

different cultural group than the Inkatha.<sup>162</sup> Furthermore, at the time of transition, the Inkatha had been violently fighting the ANC for over a decade, making them a perpetrator who benefitted and maintained apartheid on the one hand, but also victims of racial oppression on the other. As such, it seems clear that the PRs of the Inkatha group would be considerably different from those of ANC supporters – in fact, it might even be detrimental to lump them together as if they were the same, since that is partially what the Inkatha were afraid of.

As one can see, at the time of the creation of the South African TRC there were many groups that held substantive differences in their views regarding the TRC, the government, and the future of South Africa in general. These groups were split along cultural, racial, and political lines, demanding different things for different reasons. It is therefore a good indication that there were most likely different PRs between these different groups. While one cannot conclusively say that there were different PRs, it seems clear that there was a potential for that to be the case. If there is potential, then theorists have an academic responsibility to consider them, similar to the way they have considered victims and their differences. Yet once more, theorists currently do not incorporate such considerations in their understanding of PRs, and perpetrators are instead homogenized.

Gender differences within groups of perpetrators could also entail significant PR differences between perpetrators – something that is again, not considered by the current literature. Although the TRC devoted a chapter on women (see volume 4), and theorists such as Walker & Unterhalter have focused on this area, by and large the concerns have

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<sup>162</sup> Louw 2004: 170-171

been on women as victims.<sup>163</sup> While it can be conclusively said that almost all atrocities in the world are committed by men,<sup>164</sup> there are exceptions, and it is important to consider how gender roles impact PRs. For example, it is known that all sides of the conflict in South Africa drew upon gender stereotypes, and that masculinity was an important theme.<sup>165</sup> Therefore women perpetrators might – after being exposed publicly – suffer through greater cultural stigmas and other difficulties that male perpetrators do not have to face, as participants of “manly” actions. Indeed, in Liberia, women combatants seemed to be “unwilling to talk about their experiences, except among fellow combatants, because of the feeling of shame.”<sup>166</sup> This is because women were perceived as being soft, loving, and caring, while perpetrating violence was deemed unwomanly and shameful.<sup>167</sup> Men, on the other hand, were expected to fight, and becoming a combatant is often seen as a sign of courage and manliness. In other words, women perpetrators not only had to deal with the consequences of perpetrating violence – and the various stigmas that it carries – but they also had to face the stigmatization that labeled them as a failed woman, as a disgrace to their family and themselves. Therefore, the support that they would require in order to be willing to participate in transitional institutions – and the public exposure that it entails – seems to be different from men. These are all speculations however, because there is not enough research on female perpetrators participating in transitional justice proceedings. Yet even without extensive

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<sup>163</sup> A notable exception is the book by Jacklyn Cock. See Jacklyn Cock, *Women and War in South Africa*, (Cleveland: Pilgrim Press, 1993)

<sup>164</sup> Foster 2005: 74

<sup>165</sup> Foster 2005: 74

<sup>166</sup> Bennet 1995: 6

<sup>167</sup> Ibid

research, it seems correct in assuming that there are significant and relevant PR differences between the genders.

### **The Case of South African Perpetrators, and the Differences in PRs**

As one can see, there is a wide range of diversity among perpetrators. To illustrate how these differences – and the PRs that follow from them – affect participation levels in the TRC, a study by Foster, Haupt and de Beer will be utilized. Foster *et al.* conducted qualitative interviews with perpetrators from South Africa. The perpetrators included those from the liberation and apartheid sides, as well as those in command and those who were lower ranking, and across genders. Their study was concerned with the narratives of perpetrators and the future prevention of atrocities, but they also devoted a small section to reconciliation. They sought to identify similarities in perpetrator's narrative patterns and concerns.<sup>168</sup>

One of Foster *et al.*'s findings showed a difference amongst liberation and apartheid perpetrators and their degree of perceived responsibility. Liberation perpetrators were quick to admit that they had committed a crime. Furthermore, they emphasized the idea that they were right in committing the crime because apartheid was unjust.<sup>169</sup> Liberation perpetrators were proud of the violence they committed, as well as the organizations that they belonged to. They also showed a sense of collective

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<sup>168</sup> All of the participants were volunteers who understood the aim of the study, and some were listed under pseudonyms to protect their identity. Since this study was done years later, legal issues had been resolved for most participants. Although self-selection might play a role, but the fact that there was a clear difference between liberation and apartheid perpetrators – as will be discussed further in this section – is still significant, and indicative of the potential for relevant differences between perpetrators. In short, it seems safe to assume that their responses were more or less a reflection of their views (even if it were not, it is still indicative of the narratives they were willing to share in public, which is equally as valuable in determining what perpetrators are comfortable talking about).

<sup>169</sup> Foster 2005: 306

entitlement, as part of a greater struggle.<sup>170</sup> Apartheid perpetrators showed very different patterns of response. Perpetrators from the apartheid side tended to evade responsibility. They were less likely to directly speak of the crimes they committed. Rather than taking responsibility, they deflected responsibility in different directions.<sup>171</sup> They claimed that those responsible were their superiors, colleagues who were rogues/hotheads, and the liberation perpetrators – but not themselves.<sup>172</sup> As was the case with the liberation perpetrators, apartheid perpetrators also felt entitled to commit their crimes. However, unlike the liberation perpetrators who saw it as a collective, moral entitlement, the entitlement came from the professional position that they held (in other words they were entitled because it was their job, not because it was morally correct). Therefore there were clear differences in how the liberation and apartheid perpetrators saw their crimes, their level of responsibility, as well as their willingness to talk directly about their crimes.

When one compares these results with the structure of the South African TRC, it seems to indicate a correlation that is worth considering. The amnesty clause of the TRC required perpetrators to expose everything to the commission. This included all of their crimes, and their roles and how they were responsible. A successful application further depended upon clearly showing that the crimes were politically motivated. If the Foster findings are correct, then the liberation perpetrators and their narratives are clearly better suited for the requirements of the TRC. Liberation perpetrators easily admit responsibility (in fact they show pride), are willing to expose their crimes, and they already view their struggle as politically motivated (as a collective struggle against an

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<sup>170</sup> Ibid

<sup>171</sup> Foster 2005: 306

<sup>172</sup> Ibid



unjust state). Thus their narratives closely resemble the structure required by the TRC to administer amnesties. Compared to this, the apartheid perpetrators seem to be an ill fit towards this system. Apartheid perpetrators were less likely to speak of their crimes as their own, and deflected responsibility to superiors, to colleagues and to the victims. Finally, although they felt entitled to commit these atrocities, it was not due to political reasons but due to their professional designation. Therefore the narratives of the apartheid perpetrator do not resemble the structure required by the TRC. Consequently, it seems that apartheid perpetrators would be much less likely to apply for amnesty than those on the liberation side because of the procedures of the system. Again, there are moral arguments that may justify these difficulties, but if these difficulties influence the level and quality of participation by certain perpetrators, it is an important issue to consider. At the very least, it shows that the diversity amongst perpetrators is important to consider, since one type of proceedings may not promote constructive participation by all perpetrators.

These differences have an even greater effect when it comes to the goal of reconciliation. This is because – as mentioned in chapter one – reconciliation and forgiveness require victims and perpetrators to play specific roles. One of the most important roles of a perpetrator – ideally – is to show remorse for their crimes. Many theorists have stressed the importance of the expression of remorse by the perpetrator in order for victims to be willing to forgive them.<sup>173</sup> Alternatively, if a perpetrator clearly shows no remorse, this could be extremely damaging to the victims.<sup>174</sup> This additional factor may have played a role in shaping the disapproval of the amnesty clause among the

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<sup>173</sup> See Minow 1998: 17, 70-79, Phakathi: 129

<sup>174</sup> For more on this, see chapter one.

whites. A study done in 2001 indicated that 72 percent of blacks approved of the amnesty clause, but only 39 percent of whites did.<sup>175</sup> In other words, a large majority of blacks supported the amnesty clause, while only a minority of whites supported it. This seems counter intuitive, since the amnesty clause was included at the behest of the old apartheid government, and was meant to protect the whites – who were the majority of the perpetrators.<sup>176</sup> Therefore it seems more intuitive that blacks would be disapproving of the amnesty clause, while most whites would be supportive of it.<sup>177</sup>

This counter-intuitive phenomenon can perhaps be explained in conjunction with Foster *et al.*'s findings. Since perpetrators of liberation groups consistently held a certain sense of pride in their crimes, victims of their crimes – most of which in this case would be white – may not have had the necessary show of remorse from the perpetrator. Although in other studies it has been suggested that up to 65 percent of all applicants had not shown any signs of remorse,<sup>178</sup> the victims of liberation perpetrators may have been forced to see an unremorseful, proud perpetrator as well. This is not conducive to reconciliation, and it is also potentially damaging to the victim.<sup>179</sup> While there are obviously many exceptions on both sides (there is the appalling case of Dirk Coetzee's perpetrator testimony, in which his son's girlfriend was painting her nails during the

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<sup>175</sup> Pigou 2008: 204

<sup>176</sup> This is all the more surprising, because as mentioned earlier, there were no proper translations for "amnesty" in many of the South African languages.

<sup>177</sup> Pigou attributes this to the fact that blacks approve of the TRC in general, where as whites do not. This is indeed the case, but the suggestion made here can be integrated with that view as well.

<sup>178</sup> Phakathi 2008: 137

<sup>179</sup> I agree that morally, the perpetrator side is perhaps justified in their pride. However, for reconciliation purposes, and from a more practical viewpoint, the argument from morality does not change the fact that "pride" was not conducive to reconciliation.

proceedings<sup>180</sup>), if the Foster findings are correct, then by and large most liberation perpetrators maintained a sense of pride in their crimes. As such, the white community may have been partially influenced by this aspect in disapproving the amnesty clause. This reveals how the heterogeneity of perpetrators is a particularly important factor to consider in the pursuit of reconciliation.

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<sup>180</sup> Foster 2005: 50

## Chapter 3

### Implications

In this thesis I have argued that if reconciliation is to be accepted as a valuable goal – one that is equally as valuable as justice and truth – then the project cannot succeed unless PRs are taken into account. In this section, I will discuss the implications beyond Minow's project, and how an incorporation of PRs will have several consequences for the larger literature on transitional justice. First, theorists must spend more time on explaining how exactly their model of transitional justice will promote reconciliation, and how it is morally justified. This is because an incorporation of PRs raises new moral issues that theorists must deal with, such as the extent to which the practical concern of perpetrator participation should outweigh justice issues. Secondly, the need to understand PRs should lead theorists to collaborate further with other disciplines. While Minow and other theorists often refer to psychology, political science, and other behavioural sciences to better understand the needs of victims, a similar move must be made to understand perpetrators as well. I conclude that by incorporating other disciplines, theorists will be better equipped to evaluate, and create, transitional justice institutions.

### Implications for Minow and related literature: New Questions

The first implication is that theorists must spend more time explaining the mechanism by which constructive perpetrator participation is encouraged by their model, and whether their model is morally justified. They must explain – just as they do with victims – how their model promotes constructive participation by perpetrators. As we

better understand the consequences of institutional responses in addressing perpetrator needs – and the limitations surrounding it – our understanding of the capability and potential of TRCs to promote constructive, reconciliatory participation by perpetrators must be articulated. Yet this practical concern with perpetrator participation must still be balanced with the twelve other goals. As the literature becomes more familiar with PRs, it may turn out that responding to PRs conflicts with these other aspects. This raises new types of questions that are currently not part of the transitional justice literature.

More specifically, if the recommendations in this thesis are adopted, then there are several new questions that theorists must deal with. The argument for PR incorporation is based upon practical arguments; and so theorists who incorporate PRs must have some expectation of – and an explanation of how to reach – a tangible, practical result. Yet some PRs – and the practical results that they are meant to produce – might be found to be morally problematic. Thus, this raises new questions: what constitutes an ethically permissible sacrifice of moral imperatives, given that the pursuit of reconciliation is important? For example, one may need to balance moral imperatives against the number of perpetrator participants: by sacrificing moral imperative  $x$ , one might gain a few thousand more participants. One must then at some point decide what number of constructive participants justifies a sacrifice of a certain moral imperative. Furthermore, this may not just be a numbers issue: if all the top leaders of a perpetrator group were to participate, from a practical point of view, their participation is much more significant than the lower ranked perpetrators. Again, if these leaders were to participate constructively, would a moral trade-off be permissible? As I have shown in this thesis, a blanket “no” answer – no matter what – would lead us back to the problematic old

framework, where reconciliation cannot realistically be pursued. Alternatively, it is also conceivable that different perpetrators have different PRs. If there were to be a conflict between PRs, then theorists would need to consider that balance as well, in addition to the balance with victims. Even if one were to only incorporate the PRs which do not come into moral conflict with victims and their needs, an incorporation of PRs is still going to cost time and resources. In a post-conflict society, time and resources are not in abundance. Anything that is allocated to the incorporation of PRs entails a loss elsewhere. In short, even in this scenario, theorists must explain in practical terms their choice of PRs, the extent to which they will be incorporated, and whether they are morally justified.

### **Methodological Implications: Researching Perpetrator Requirements**

A second implication affects methodology. As mentioned in chapter one, Minow refers to literature from psychology, political science and other behavioural sciences to better understand victims and their needs. For example, research on post-traumatic stress disorder has been extremely informative in determining what mechanisms need to be in place for victims to be willing to testify.<sup>181</sup> While there may be legitimate debate about how research from the behavioural sciences should be integrated into the area of transitional justice, there seems to be some findings that can be used in constructive and meaningful ways.<sup>182</sup> This thesis has argued that PRs must also be understood in similar

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<sup>181</sup> Minow 1998: 61

<sup>182</sup> For example, most research in these fields is based on Western societies (and often university undergraduates as the sole sampling pool) and so they should be used with the understanding that they are potentially limited in their social and cultural scope. Furthermore, by its very nature, behavioural sciences are based on controlled environments and conditions. In the real world, countless other factors can play a role in determining how an individual – let alone a society – will react to an institution. Therefore applying findings from these disciplines can be problematic if it is not done carefully. It is for this reason that these

depth. Therefore, an interdisciplinary approach is required. Research done by Ervin Staub – and his methodologies in considering, testing, and implementing findings from psychology in a transitional justice context – may serve as a model for future researchers.

Ervin Staub conducted experiments in Rwanda, to find out the best methods in promoting reconciliation.<sup>183</sup> He trained locals to lead experimental interventions in small groups, using different methodologies, in different communities. By controlling and creating different iterations based on the methodologies, topics, group compositions and the training, the researchers were able to set up control groups to compare different methodologies and their effectiveness in promoting reconciliation. For example, some of these groups were composed of both Tutsi and Hutus, while some wholly consisted of one ethnicity, while some groups were asked to discuss the genocide without the trained facilitators etc. All of the participants were interviewed prior to and immediately following their participation, to find out how the workshops changed the way they felt about the genocide, themselves, and the other group. Furthermore, another follow up interview was conducted two months after the workshops, to see if any changes had long term effects. Thus, Staub was able to identify methodologies that were most effective in establishing a disposition towards reconciliation and individual healing.

Through this study, Staub found that one of the most effective ways to promote reconciliation was to educate the participants about *other* atrocities that had nothing to do with the one they personally experienced. This was based upon findings involving perpetrators of violent crimes in the United States. The original U.S. findings indicated

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studies should be used as a basis to understand contexts, and to explore possibilities that may not have been considered without this knowledge, rather than as a concrete assumption that theorists should adhere to. For a further discussion of this subject, see Alan Nelson, "Social Science and the Mental," *Readings in the Philosophy of Science*, M.Martin & L.Mcintyre, Eds. (Massachusetts: MIT Press 1994), pp.515-528

<sup>183</sup> Staub 2006: 877

that these perpetrators were more willing to admit responsibility and begin healing and reintegrating with victims and society, if they were exposed to stories by survivors who were unrelated to the act that they committed.<sup>184</sup> In other words, instead of exposing the perpetrators directly to the consequences of their crimes, and the human face behind it, a similar, but unrelated survivor's story was presented to them. These findings showed that perpetrators of violent crimes were more likely to listen to and fully grasp the consequences of his/her actions, if they could do so without having to face the victim and the associated guilt and demands for justice.

As one of his methodological iterations, Staub created a similar situation to the U.S. study in his workshops, by presenting knowledge of other genocides. Participants were informed of factors that led to atrocities in other countries, such as difficult life conditions and historical animosity. They were further informed of the numerous consequences that have followed violent conflicts and wars, such as poverty. Participants were then told of how these conditions led to increased group identification, a tendency to blame the other group for all the problems, and finally, a vision of a future where the only positive outcome involved a destruction of the other group. Violence was presented as a psychological and social process by which frustrated needs for basic human security, control, and positive identity were met.

Once these participants learned of the origins and consequences of other genocides, the entire group was then asked to think about Rwanda together. As mentioned earlier, since group compositions were controlled, Staub was able to conclude that the groups which included both Hutus and Tutsis showed the most promising results.

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<sup>184</sup> Staub 2006: 876



It is significant to note that the groups composed of both ethnic groups were the most successful. Not only does this show that both perpetrators and victims are a vital part in any successful reconciliation process, but that constructive participation of perpetrators and victims can be achieved through institutional mechanisms. What emerged out of these Hutu/Tutsi groups were substantive emotional discussions, combined with intellectual understandings, with interwoven personal experiences of genocide. Staub notes that by letting the applicability to Rwanda unfold through a joint discussion – rather than making them face it directly from the beginning – something more was achieved: The participants came to have an experiential understanding of the genocide. In other words, the participants had an understanding not only at the intellectual level about the origins/consequences of genocide, but an internalization of this understanding through application and their personal experience. This enabled them to have the capability to articulate the viewpoint of the other group, and understand the motivations behind the violence in a way that was not removed from their own experience.

Furthermore, out of all the groups, these participants were most likely to report feelings of re-humanization. In other words, these participants recognized that they were not solely victims of violence (a regained sense of agency), but that they were capable of preventing future violence.<sup>185</sup> These effects seemed to be long term as well, with the follow up interviews two months later showing lasting effects – something Staub found was lacking in other groups. Two months later, these participants continued to show a

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<sup>185</sup> Staub 2006: 878

significant reduction in trauma symptoms, while maintaining a willingness to reconcile with the other group.<sup>186</sup>

As one can see, Staub based part of his research on a different U.S. study. Looking at the U.S. findings, Staub applied them into an institutional form in Rwanda. By doing so, he was able to see if the U.S. findings could be applied to reconciliation processes in Rwanda. Staub was then able to see that perpetrators have a harder time participating constructively, if they are forced to speak of their own crimes from the very beginning. Instead, by first letting the perpetrators and victims understand atrocities that are unrelated, and then follow that with their own context, they were able to work constructively together when they began to discuss their own experiences. Thus, under the definition of PRs that I have advocated in this thesis, one could say that this format of interaction seems to indicate a PR (or a series of PRs): that facing victims from the very beginning – with the demands for justice and truth that it comes with – is a type of barrier for perpetrators, one that makes it more difficult for them to constructively participate. By removing this barrier, perpetrators are more likely to participate constructively, as Staub's research has shown.

The methodology that Ervin Staub followed is a research model that may be useful for transitional justice theorists. First, he looked at the results of the original study, and theorized the type of institutional form that is suggested by the study. Taking into account the patterns of perpetration and victimization in a particular setting – in this case Rwanda – he was able to create an experiment which would test the effectiveness of the application of the original study's findings in a wider context. Through this test, he was

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<sup>186</sup> Staub 2006: 876

able to determine whether the theorized institutional procedure would produce desirable procedures and outcomes in the Rwandan context – which it did.

One might argue that since the participants were all volunteers, Staub's findings were based on self-selected individuals who were willing to participate. However, given that the group compositions and methodologies were controlled, it is clear that certain methodologies and group compositions were more likely to promote reconciliation in general. Furthermore, if one looks at the way the behavioural sciences have informed the requirements of victims, the same criticisms can be made. By and large the studies on PTSD – or any other topic – were done with volunteers who were willing to deal with their symptoms etc, and were self-selected in the same way. Yet as I have mentioned in chapter one, these studies have contributed to the understanding of victims in a fruitful way. Thus, it seems that even if the studies are not completely void of confounding factors, there are useful ways of doing research.

However, as mentioned in the beginning of this chapter, determining PRs is the first step in a long line of difficult issues that theorists must deal with. For example, if one were to utilize Staub's findings as a basis for transitional justice institutions, there would be several problems that could arise. The most obvious is the problem of balancing victim's needs against PRs. According to Staub, perpetrators are more prone to constructive participation by not facing their victims, yet if one were to integrate that PR completely, it would deny the ability for victims to meet their perpetrators. This could potentially pose problems in meeting several requirements of victims, such as acknowledgement. As discussed in the previous two chapters, the most effective acknowledgement must come from perpetrators themselves. It seems then, that it could

be problematic if victims cannot actually face the perpetrator. Although acknowledgement is perhaps not conditional or reliant upon face to face interaction, it seems that some form of interaction should still take place. After all, the acknowledgement must be made to the victims, as well as the public. Therefore some balance must be made between the PRs and the needs of victims.

## Conclusion

*“South Africa is endowed with generosity among those who suffered. What it lacks is the wisdom of privileged classes fully to acknowledge the shamefulness of our past and their part in it.”<sup>187</sup>*

Minow and her colleagues are part of the recent literature and research on transitional justice. Their work has transformed the way that post-conflict societies are understood, from the acceptance of reconciliation as a goal, to the complex moral and practical needs that victims have. Truth and justice are no longer the only two goals that post-conflict societies must address, but also vengeance, forgiveness, and reconciliation. Not only that, there is an increased awareness of the practical realities and limitations that these post-conflict societies must deal with. Yet Minow recognizes that it would be extremely misleading – and dangerous – to simplify or gloss over these limitations, for there are too many lives at stake.

In this thesis, I have argued that the development of reconciliation as a goal entails the practical need for an understanding of PRs. In effect, I am arguing the need for another set of practical realities and limitations that must be considered within the literature. Indeed, if my arguments are correct, then I have made the work of transitional justice even more daunting than it was before.

Yet at the same time, I am motivated by the belief that there are effective methodologies/models that have not yet been considered. When the research on PRs has increased, and depending on how PRs are incorporated into transitional justice systems, new types of transitional institutions can be created. I believe that some of these might drastically improve the success of transitional justice systems. In other words, I am

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<sup>187</sup> Govier 2002: 74. A quote from Ntsiki Biko, Steve Biko’s son.

optimistic about the possibilities that can emerge from future research. This is because fundamentally, an increased awareness of a new practical reality also entails an increase in the possibilities for improvement as well.

As Minow says, “Genocide, mass murders, torture, and rapes defy comprehension and escape human conventions for making sense and meaning of life.”<sup>188</sup> Mass atrocities may defy comprehension, but it is precisely because they defy comprehension that we must attempt to understand it from the perpetrator’s eyes as well. Only then do we have the knowledge that is necessary to bring together victims and perpetrators into a new society.

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<sup>188</sup> Minow 1998: 147

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