

Security and Reconciliation in Post-Conflict Society: The Matter of Closing the Books in South Africa and Somalia¹

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They, who brought to birth the [South African] TRC process also ought to be commended for their wisdom... we have seen how unsuccessful prosecutions can lead to bitterness and frustration in the community. Amnesty applicants often confessed to more gruesome crimes than were the subject of [a criminal]...trial, yet their assumptions of responsibility, and the sense that at least people were getting some measure of truth from the process, resulted in much less anger. For the sake of our stability, it is fortunate that the kind of details exposed by the Commission did not come out in a series of criminal trials, which—because of the difficulty of proving cases beyond reasonable doubt in the absence of witnesses other than co-conspirators—most likely, would have ended in acquittals.

Archbishop Desmond Tutu, “Forward,”
Final Report, Volume 6 (2003), Truth at the Crossroads.

Wasn't the TRC supposed to have obtained 'the truth' from perpetrators? Weren't families supposed to have gained full information from perpetrators as a trade-off for giving up their rights to litigation and prosecution? And weren't we all, as a nation, supposed to have reached closure and moved on from these horrors? That was the theory.

Carmel Rickard, *The Sunday Times*, South Africa, May 22, 2005.

I. Introduction

At the more macro and general level, this article is concerned with societal transition towards the rule of law and sustainable democracy in post-conflict societies. It departs from an understanding that sufficient institutional capacity, in particular that needed to root and implement *the rule of law*, is ultimately required if secure, peaceful, and democratically viable post-conflict-ridden society is to be built and maintained over time. It assumes, in other words, that a legitimate and functioning normative order and a culture predisposed to such an order are key to security, reconciliation, and sustainable democracy.² More particularly, the article engages *the time and the methods*, as well as the concerns of transition from societal violence, authoritarianism, and tyranny, towards the rule of law and secure democracy. To use Jon Elster's words, it deals with "the time" of attempting "to close the books" after a cessation of conflict has been agreed to and democracy is introduced.³

Since the end of the Cold War, demands and cries for an end to authoritarian government and tyranny, societal conflict, and injustice, and for peace and security, for reconciliation, and for *a better life for all* have increasingly been globally framed in a *new* paradigm, one of *human rights* and *humanitarian law*. Arguably, world peace and calls for the end to war, authoritarian government, and terrorism have come to be understood via debate that stresses the strengthening of socio-political and socioeconomic institutional centers by way of expanded inclusion and extension, the rule of law, and an unfettered market, but also by a set of policies guaranteeing a *rights culture*. This suggests that the development and reconstruction struggles of recently democratic societies or regions are no longer strategically driven by international policy emanating from notions of control, conquest, and victory in a Superpower-driven binary world. Instead, they are motivated by global human rights and humanitarian concerns. The bringing together and reconciliation of people—and hence the securing of their human rights—has become central to conflict resolution and peace-building projects all around the world.

The contestation of the notion of transitional justice has become pivotal in this regard. On the one hand, there is the argument for the development, extension, and implementation of a universal code of criminal law and justice in order to *close the books* on impunity and to promote democracy via the rule of law. On the other are the calls for

an end to what is regarded by its proponents as essentially retributive justice in favor of reconciliation via truth telling and restorative justice (or forward-looking justice) through truth commissioning.⁴ In the one view, perpetrators and wrongdoers should be brought to justice in terms of identical standards of criminal law, no matter where they find themselves.⁵ The other view is situated within broad parameters that suggest that retributive justice is both doomed to failure and impractical in the struggle for a better life for all. It asserts that the implementation of transitional justice should be composed of some form of truth commissioning (or forward-looking justice) rooted in compromise and negotiated settlement, in which forgiveness and reconciliation, people-centeredness, and truth telling are keys to successful societal transition. These ideal-type strategic options make up the two poles on a continuum that also allows for a range of in-between or hybrid positions. The latter includes one in which internationalized domestic tribunals as well as truth commissions are set up with the cooperation of the United Nations. The two are meant to run alongside one another and function in tandem. This kind of strategy is currently being used in Sierra Leone, East Timor, and Burundi (but not without practical difficulties).

At the institutional level transitional justice—in the form of the promotion of societal reconciliation, national unity, security, the rule of law, and democracy via truth commissioning of some sort—has become the key strategy used to challenge the universal or international criminal justice system position and practice of a kind first set up after the Second World War at Nuremberg. In this sense, it may be suggested that the debates about a global rights paradigm underpins a shift in dominant ideology since the end of the Cold War. Arguably, the latter has brought into clearer focus than ever before the position that conquest and victory alone are too hollow a basis on which to build a lasting democratic peace in broken and conflicted societies and states, perhaps especially in those characterized by deep ethnic and/or racial cleavages. In other words, the *lack or tempering of victor ideology* as a facilitating value holds much promise as a forward-looking strategy in the search for peace. The article attempts to do three things: (1) provide discussion of the notions of the rule of law, institution building, reconciliation, security, and peace building towards democracy in the framework of what is known as transitional justice in the literature; (2) briefly discuss and comment on some of the elements of the South

African case⁶ in this light; and (3) open up a discussion on Somalia in the aforementioned context.

II. Reconciliation

There is little agreement in the growing academic literature as to precisely what reconciliation in the context of truth commissioning means, how to measure it, or how to promote it. The detail of these debates is not central to this article. Rather, some general themes that run through them will serve to frame the discussion.⁷ Four issues are raised.

In the first place, it needs to be stressed that reconciliation is not an event that can be legislated or governed by a law. For example, the extent to which the South African Truth and Reconciliation Commission (SATRC) managed to bring about reconciliation (or national unity) is very limited, notwithstanding a pervasive, almost exclusively international perception of a *miracle-like* success in South Africa. This kind of myth is troubling insofar as it creates greatly overburdened expectations with regard to what truth commissions can bring about in short periods of time. In practice and over time such a myth undermines rather than builds legitimate security and sustainable democracy. It is, therefore, especially destructive and serves to take away from the kinds of very important advantages truth commissioning can bring. Archbishop Tutu and the Commission members were, in fact, and quite soon into the life of SATRC, forced to address the hitherto glorified question of reconciliation. Victims and deponents did not understand what it was supposed to be. Questions such as *with whom should we reconcile* were not uncommon from those who came to tell their stories or the stories of their loved ones to the Human Rights Violations Committee (HRV)⁸ of the Commission.

This question was directly linked to the very deeply entrenched apartheid racial cleavages in South Africa. Overall, very few white South Africans attended the HRV public hearings and it is in this context that the question arose, both at the hearings and in discussions held afterwards. In consequence, the much more sensible goal of promoting and facilitating reconciliation was adopted, at least within the discussions going on inside of the Commission. However, it must be noted that very little headway was made in changing the expectations in the public domain during the life of the Commission around the notion of reconciliation. The question of reconciliation remains a point

of severe criticism among South Africans overall with regard to their understanding of the work and promises of the SATRC.

Secondly, the spirit that underpins any conceptualization or theory of reconciliation attempts to capture and communicate the idea of the bringing together of divergent and opposing views and opinions. It incorporates the (re)uniting of people, of groups, or of society in harmony. This is to be understood, minimally, as tolerance and the forbearance of differences and divergences at the individual as well as the collective and national levels. It means the acceptance that in democratic society it is legitimate and even important to disagree—but not to attempt to overthrow, by means of violence or anarchy, the societal order when there is divergence and opposition among people or groups. In this sense, reconciliation and democracy suggest a set of rules or a legitimate societal “patterning” in which all (or the great majority) of the players agree that such rules are in their common interest and must therefore be abided by.

An overall distinction is made between two forms of reconciliation; that is, between individual reconciliation and national, societal, or so-called political reconciliation.⁹ This is the third matter that needs attention. At one level, the former is both infinitely difficult and complex as well as more probable within the context of an institution like a truth commission. On the other hand, and as Sarkin has persuasively argued, these *magic moments* of individual reconciliation in the life of the South African Commission were few and far between.¹⁰ They have, however, become powerfully symbolic on both the national and international stages.

Such *magic moments in South Africa* include the willingness of Dawie Ackerman, husband of one of the people killed in the St James’ Church Massacre in July of 1992, to forgive three of his wife’s jailed killers after each had apologized to him at their amnesty hearing. The church was attacked by a group of black men affiliated with the Pan African Congress of South Africa. It was situated in what was then a whites-only suburb of Cape Town and Mrs. Ackerman was white.

The second category of collective or societal reconciliation is the long-term, intricate process of a post-conflict and newly democratic society closing and settling its books, in Jon Elster’s terms. Or, as Sarkin says of a national reconciliation project:

Reconciliation in a nation after conflict has to be a long-term goal. It requires deliberate, measured programmes and processes, including

measures such as conflict resolution and social rehabilitation. For reconciliation to occur, **time is needed**. It is not something that happens overnight. Reconciliation is dependent on a host of other variables, which all need to be assessed and examined collectively.¹¹ (My emphasis)

Finally, and in response to the difficult dilemmas of how to recognize and measure reconciliation, the question of the understanding of the past, more particularly the conflicts of the past, needs to be raised. Two very pressing questions immediately come to mind: whose understanding and whose history are at issue? Clearly, to the extent that there is a common understanding of the conflicts of the past, it will greatly increase the chances of promoting reconciliation in a post-conflict and newly democratic society. Yet as has already been suggested, this is precisely where the problem lies. Societies in conflict are deeply divided entities. Building national reconciliation must open a debate and a dialogue between the competing and hitherto incommensurate views of the various factions towards a unifying grasp of the conflicts of the past. Ariel Dorfmann, the well-known Chilean human rights activist and author of *Death and the Maiden*, held a discussion in the Johannesburg offices of the SATRC during his visit to South Africa in 1996. In response to a question, he argued that the success and sustainability of peace may ultimately lie in finding the “middlepoint” of the competing versions of what in fact happened in the past.¹² The more people share such a “middlepoint” and the less they clot around the extremes of the continuum of understanding (and hence divergence), the better the chances to promote a meaningful reconciliation and a secure and sustainable democracy.

There are at least two very different views of South African history and the conflicts of the past in the minds of the majority of ordinary South Africans: a white or erstwhile ruling group’s viewpoint, and that of the previously disenfranchised black majority. While very few white South Africans will publicly argue that apartheid was morally right in principle or even defensible in the wake of the SATRC (to their credit), this formal acknowledgment should not be taken at face value. Surveys and public opinion as reflected and reported in the mass media in South Africa has produced little persuasive scientific evidence to suggest that the majority of whites view the history of the conflict of the past differently now than before the publication of the Commission’s final reports. In terms of this understanding, it is not possible to argue

that real national reconciliation has taken place in South Africa thus far.

When we consider the Somali case an enormous amount of dissonance arises immediately. Not only do some Somalis wish to secede (the Somaliland option), Somalis overall have become a very deeply divided people. The history of the conflicts of the past has been rewritten in the people's memory and hence in their actions over the past three decades or so. This was promoted and facilitated by the divide-and-rule strategies used by Siyaad Barre and then via the power hungry and acquisitive actions of a cluster of individuals who became warlords, and who appropriated the notion of kinship and reified it as a force *in itself*, and in so doing destroyed the Somali state. In Somalia, kinship has now become clanism and even sub-clanism—a force *for itself*. Until Somalis recognize that they have a history of significant commonality instead of clinging to the primal forces of *clanism* as their main identity marker, their chances of reconciliation and peace building toward the rule of law and democracy will sadly remain dubious. The understanding of the past needs to be thoroughly debated. The notion of clanism as the dominant prism through which the Somali conflict is viewed needs to be revised in the light thereof. Notwithstanding the recent rise to power of the Union of Islamic Courts (UIC), significant stumbling blocks to reconciliation and security under the guise of clanism remain intact. Even the UIC was organizationally structured through an alliance of established groups, each held together by autonomous clan-specific courts. The Ethiopian military sanctioned, but highly fragile, victory of the Transitional Federal Government is no less grounded in a tribalist dispensation. The existence of the clanist mentality can only serve to further exacerbate attempts to unite people in harmony through their common membership in the Islamic religion, their historically shared ancestry and geography, and their implicit national interests.

III. Security

Security is a central condition for action. The basic sense in which we must understand the order of 'the social order' is one of pattern and regularity affording the confidence of being able to function, to go on, to get by, to make sense of our particular segments of activity. While material conditions critically affect ontological, as well as any more conventionally conceived, security, they only do

*so informed by the cognitive dimension of structure—the pattern of meaning or mutual knowledge in relation to which we feel secure or insecure.*¹³

Security is considered to be a highly contested concept. Yet, it is almost instinctively understood by all at the ontological level to, at the very least, refer to survival as the most basic value to be secured or protected. Without survival, no other values have any meaning. We do not deal here with the vast literature on security or the changes to the concept in the post-Cold War era. Suffice it to note that the Cold War military-political definition of security, which privileged the state, has been broadened considerably, allowing for the development of the idea of “human security” — a definition that places people at the center of security, but also allows for the state as a referent object. Security, as Buzan defined it in his seminal work, means “freedom from fear.”¹⁴ It is the condition of not feeling threatened, and the process, according to McSweeney, through which resources are organized to remedy vulnerabilities.¹⁵ The state is instrumental in providing and building security. At the national level (so-called military-political security), the state protects its sovereignty and territorial integrity. At the domestic level (so-called societal security), it is supposed to protect economic and individual security. Domestic or internal security has as its main agents or instruments of security the internal security forces of the state, such as the police, intelligence services, and the legal system. The rule of law is the ultimate guarantor against possible state abuse of its security powers.

In the case of state failure to provide security, citizens turn elsewhere. The affluent buy it in the marketplace (privatized security). The poor go without, or turn to self-help, vigilante groups, or mob justice, thereby making it hugely difficult for the state to reclaim its monopoly over organized violence and its ability to create and maintain social order and to grow strong institutions and a culture of the rule of law. Post-apartheid South Africa provides a good example of this struggle.¹⁶ Somalia will face similar challenges in reasserting the state as not only a referent object of security, but also as a provider of security. During their brief rise, the UIC managed to create a sense of stability and order, not least due to their success in meting out justice. Now that they have been eclipsed, their incorporation into the state as part of its institutional structure and/or the extent to which their success can be reproduced — will depend on the nature of the reconciliation that will be reached, including the extent to which international

actors involved in a Somali peace process will support a continuing role for these Courts. It is to the nature and role of foreign involvement that we now turn.

States aim to reproduce their own survival, often (perceived to be) threatened by external agents or, especially in the case of developing and/or deeply divided countries, by internal forces. In the case of a state being threatened by internal forces, external intervention is not unknown, whether in order to aid the state (as was the case with the support to the regime of Kabila Senior in the Democratic Republic of Congo in the early 2000s by Zimbabwe, Angola, and Namibia) or to aid rebel groups (as was the case with support to the Lord's Resistance Army in northern Uganda by the government of Sudan). The neat distinction between internal security and national security proves to be merely academic in the case of Somalia. Ethiopian military intervention seriously bedevils chances of solving (let alone legitimating) the protracted split in the Transitional Federal Government (TFG). The broader international community's support for the Jowhar group undermined the efforts of (at least some in) the Mogadishu group to demobilize their militias (initially successful and resulting in largely improved security conditions in the capital). The Mogadishu warlords felt threatened by the power and success of the various Islamic Courts in bringing stability and a measure of security to the inhabitants of the city. They formed an alliance, which then declared outright war against the Islamic Courts, claiming that the Courts had terrorist connections. They also succeeded in gaining the support of the United States. The U.S.-backed alliance saw uprisings in Mogadishu, further hampering efforts at creating stability and security. In short, the nature of foreign intervention, especially in the peace process in Somalia, continues to undermine attempts to create national and domestic security, worsening conditions in the country, rather than contributing to the processes of reconciliation and security building.

Yet one also needs to look at the present Somali situation against the background of the South African experience. A number of aspects of the context with which truth and reconciliation were pursued in South Africa should be mentioned:

- The truth and reconciliation process started after the transition process in the country had been well under way: negotiations took place between 1990 and early 1994 with an interim constitution adopted in 1993, democratic elections based on universal franchise followed in April 1994, and the SATRC was set up in December 1995.

- Internal security had been stabilised: the negotiations of 1990 to early 1994 were predicated on the principle that all parties agreed to renounce violence.¹⁷
- The restructuring of the security forces was also already in full swing by the time the SATRC started its operations. Investigators were drawn from the 'old' forces, the 'new' forces, and the former liberation movements, making this an inclusive process and contributing to a perception that (a) there was unity within the security establishment and (b) that all aspects of the country's past would be investigated, no matter within which sector/group of society abuses had taken place.
- Aspects of the rule of law as well as the spirit thereof had existed throughout the era of apartheid in South Africa. The legal system claimed to be committed to it. It was readopted during the negotiations and had been established, functioning and generally respected, with the interim constitution providing both symbolic and practical guidelines for the conduct of the security apparatus.
- Throughout the process of negotiation (prior to the most visible act of transition—the 1994 national elections), the international community played a positive and supportive role, putting pressure on parties and leaders when the 'going got tough,' but ultimately respecting the right of the negotiating parties, and, by implication, the people of South Africa, to decide the terms of their agreement.

In other words, to the extent that one can view the truth and reconciliation process in South Africa as successful, it would seem that the establishment of the rule of law, the agreement to negotiate on the basis of a renouncement of violence, the general stability of the security situation, a measure of integration among various security forces (whether official, paramilitary, or militias), and positive reinforcement of these processes by the international community were crucial to the success of attempts at reconciliation.

As far as international involvement in Somalia is concerned, one salient difference between South Africa at the start of its negotiation process in 1990 and that of present day Somalia should be noted. South Africa negotiated a peaceful settlement in the wake of (and to some extent because of) the end of the Cold War. Somalia is attempting to negotiate a settlement at the height of a new international war, the "War against Terror," which has polarized the world anew along ideo-

logical lines. In 1990, the Superpowers, major powers, and regional states in southern Africa were all willing to work together and to support and respect the outcome of South Africa's negotiations. Today there are deep international cleavages that impact the way in which the international community perceives and intervenes in Somalia. The war against terror now pits the U.S. against the UIC and its legacy and, it would seem, therefore against a large segment of Somalia's citizenry, thereby inhibiting attempts to end the violence, stabilize the security situation, embark on security sector reform, and negotiate an inclusive settlement for the country.

IV. Transitional Justice

*Transitional justice refers to formal and informal procedures implemented by a group or institution of accepted legitimacy around the time of a transition out of an oppressive or violent social order, for rendering justice to perpetrators and their collaborators, as well as to their victims.*¹⁸

Teitel defines transitional justice as, "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."¹⁹ As has been suggested, the idea of transitional justice is a matter of some moral, socio-political, and legal controversy. The brief discussion that follows looks at the important problems and insights it brings to the discussions around societal transition. We discuss some lessons from the past and the history of the concept by looking at some of Jon Elster's work. We address the question as to whether or not transitional justice is needed at all in the wake of an agreement to end violence and tyranny in order to build a secure democracy. Finally, there is a short commentary on the relationship between *truth* and *justice*.

A. Lessons from the Past: The Forces of History

In what is surely a defining work on the history of transitional justice, Jon Elster's *Closing the Books: Transitional Justice in Historical Perspective* raises questions and analytical arguments around the empirical *conduct* of transitional justice from a historical angle.²⁰ By making use of richly textured arguments and by refreshingly avoiding the somewhat jargonized and "politically correct" language common to much of the contemporary debate in the field, he states the purpose of his book:

"I mainly try to describe and explain variations in how societies close their open accounts from the past after regime transitions."²¹

More particularly, this book is concerned with debunking false conceptions. Through research and the development of appropriate analytical frameworks, Elster shows that the application of transitional justice is by no means a new or exceptional 20th-century or post-Second World War method of attempting to close the books after an authoritarian or tyrannical regime falls, societal violence is ended, and democracy is introduced. By systematically engaging the questions of how the victims and perpetrators of societal conflict have been dealt with over time and of how reconciliation was promoted (or not), Elster suggests that societies can grow by learning from the past. He looks at both "backward-looking" issues, or how societies respond to wrongdoing and suffering, as well as "forward-looking" issues such as economic reconstruction and Constitution making in as far as they interact with the former.²² What follows is a short (but hopefully not a reductionist) summary of his discussion of the overthrow of Athenian democracy in the 5th-century B.C. In the quest to appreciate how best to understand and promote reconciliation and sustainable democracy, and to learn what *not* to do, lessons from the past must always be the starting point, else we are surely doomed merely to repeat history *ad infinitum*.

Elster begins by looking at early Athenian democracy. One may justifiably enquire as to why Africans should be interested in events that occurred almost 2,500 years ago in Europe. What, if anything, could Somali society learn from these long past events that were situated in another continent and a radically different context? The Greek city-states were the home of democracy as we know it today. The beginning of Athenian democracy is to be found around 594 B.C., when Solon was asked to reform the city-state laws. Broadly speaking, democracy meant the direct rule of the citizens (the *demos*) as opposed to the rule of tyrants. Because the question of democracy remains at the center of the search for international peace, security, and human dignity for all at the start of the 21st century, and because Somalia has been ruled by tyrants over these past three decades, the struggles of early Athenian democracy resonate strongly.

In light of this article's aims, no attempt will be made to enter into the detailed arguments offered by Elster in support of his compelling analysis in the field of aggravated socio-historical contestation. Suffice it to note that Athenian democracy was overthrown early in its life on

two occasions and was re-established both times. Furthermore, Greek democracy survives today, notwithstanding a 2,500-year history that included periods of non-democratic, tyrannical, and totalitarian rule. For example, Greece was ruled by the Ottomans and was part of their Empire for close to 400 years, gaining independence from them in 1832. Its last experiment with totalitarian rule was the military junta that was overthrown in 1974. Viewed from this perspective, the surviving Greek democracy is an encouraging lesson to us all.

Secondly, in doing an analysis of these “two episodes...that followed closely upon each other in Athens during the 5th century B.C.,” Elster finds that “transitional justice is almost as old as democracy itself.”²³ Athenian democracy was overthrown in 411 B.C. and then again in 404–403 B.C. by oligarchs.²⁴ After the breakdown of the first oligarchy, reinstated Athenian democrats carried out severe retribution (executions) and introduced laws to deter similar events from reoccurring. After the second, the pre-oligarchic democrats introduced a range of constitutional changes attempting to deal with the origin of, and reasons for, the problems that led to the overthrow of their democracy initially. They enacted what Elster refers to as a “forward-looking” goal this time, one meant to promote reconciliation. Extensive amnesty from prosecution and the option of exile to those not covered by the amnesty were offered to members and supporters of the oligarchy this time. Much less retribution took place. Clearly the democrats had learned from their first experience and wanted to avoid reoccurring violence and challenges to their state. As to the reasons for this relatively temperate exercise of retribution, Elster offers three possibilities. They are remarkably familiar to any observer of history and of contemporary events dealing with societal transition away from conflict and authoritarianism. They leave one with the feeling that little seems to have really changed over 2,500 years.²⁵ Elster suggests that one reason for the reconciliatory actions could have been “imposed by Sparta” (e.g., the international community). A second potential reason is that the action could have come about as “a condition stipulated by the oligarchs in exchange for giving up power” (e.g., Pinochet in Chile). Finally, the restraint used, which in this view is conciliatory, could have resulted from being “freely chosen by the Athenian democrats” (e.g., Spain after Franco in 1976).²⁶ In concluding his analysis of the overthrow of the Athenian democracy and its lessons, Elster suggests that the reasoning behind this action in 404 B.C. may have contained all of the above elements and that this played a role in promoting peace

and sustaining democracy. Furthermore, by drawing on this very early example at the inception of Western democracy, Elster is able to identify what he refers to as the “cast of characters in transitional justice: wrongdoers (perpetrators), victims, resisters, neutrals, and beneficiaries from wrongdoing.”²⁷

Can Elster’s analysis of the development and conduct of transitional justice help us grapple with the enormous challenges of the Somali conflict and the attempts being made to establish a democratic state? What can we learn from it? The existing Greek democracy provides not only an example of the persistence of the ideals of democracy over time, but also evidence of its imprint on the social order. In other words, once established, democratic culture tends to be preserved in societal memory. Ahmed I. Samatar argues persuasively that, for example, such a key democratic moment stands out in Somali history particularly over the period 1964–1967, under the leadership of President Aden A. Osman and Premier Abdirazak H. Hussein.²⁸ There is, in the era of the postcolonial state, a history of *the people* ruling Somalia.²⁹ Samatar also argues that the era of the pre-colonial order included “a cultural pattern, informed by a sense of the divine, which portrayed a moral code and common sense; and a loose political practice marked by local legitimacy and accountability.” What has happened to these memories and this culture? Can they be mobilized as a forward-looking act toward building reconciliation and sustainable democracy? Are there examples of reconciliatory actions in Somali history that can be drawn upon? Has amnesty been granted after periods of conflict or have the actions of post-conflict regimes and governments in Somalia always implemented retributive justice? In other words, what has the history of one or another form of transitional justice been?

We would answer affirmatively the question of whether Somalis (as we all) can learn from Elster’s exposition of Athenian democracy’s conduct of transitional justice. The perspective of time and place brings with it a promise that ultimately facilitates and motivates action.

B. Do We Need Transitional Justice at All?

Why should there be transitional justice when there is a new democratic regime? This is the first question that needs attention, according to Elster.³⁰ In other words, why should the wrongdoings of past authoritarian regimes be addressed or unpacked at all in the face of a brand new democracy that has been agreed upon by the relevant par-

ties? How strong is the demand for justice in the wake of negotiations that ultimately lead to agreements to enter into a democratic order? In the case of a civil war, are all or any of the participants in a position to demand justice? If so, what kind of transitional justice? Don't demands for justice *spoil* or undercut the agreed-upon peace? These are some of the questions that need to be addressed before engaging in the perilous processes of implementing any form of transitional justice, argues Elster.

When looking at Somalia in light of the above, a number of points need consideration. Somalis have been unable to agree satisfactorily with one another at a dozen or so different gatherings during the period since the fall of Barre's regime. They are so deeply divided that they have not been able to reconcile sufficiently in order to resurrect the Somali state. Recently, there have been two powerful bodies vying for the right to recreate the state. Another group wants to secede (Somaliland). One, Puntland State, has declared itself an autonomous region. The TFG, with its particular history of division, and the UIC have been unable to agree to meet regularly or to strategize together. The upshot has been a full Ethiopian military invasion to install Colonel Abdullahi Yusuf's TFG. Consequently, violent instability has returned to Mogadishu and other southern parts of the country. Still it is important to note that there was no evidence that the warring factions in South Africa would enter into a formal four-year dialogue when F.W. De Klerk announced the "unbanning" of the South African liberation movements and freed Nelson Mandela from prison in 1990. No serious observers or scholars working on South Africa expected it to happen at the time.

In order to illustrate his point further, Elster goes on to argue, by looking at available evidence, that transitions to democracy have been made without opening up the past.³¹ We refer briefly to two of the examples he notes: the Spanish transition to democracy in 1976–78 after the death of General Franco (long-time dictator, following the bloody civil war that took place from 1936–1939) and the collapse of the Soviet Union. According to Elster, the first rested on an internal consensus and the second resulted from the lack of any organized demand for either justice or truth. Neither of these two countries decided to officially confront their respective pasts by engaging questions of truth or justice or accountability. Transitional justice as a facilitator and promoter of democracy was not incorporated into their respective pro-

cesses of peace and nation building. This begs a range of questions, the most pressing being, why open up the past again?

In South Africa this question was often asked, both before and during the life of the South African Truth and Reconciliation Commission, and not only by members of one of the main protagonists in the struggle. It was well known at the time that there were many senior African Nationalist Congress (ANC) members who felt that opening up the past further would lead to little or no good. Some believed that the racially driven socio-political and economic power divides (that were the *raison d'être* of the apartheid state) had been sufficiently bridged over the period of four years of formal negotiations (1990–1994), and that the building of a *new* democratic South Africa should take precedence. “The page should be turned” and the “reopening of patients so soon after they had been operated on” was asking for trouble and tribulation. These two metaphors became common coinage at the time. On the other hand, it was equally well known that some senior National Party (NP) members, as well as the majority of white Afrikaners, felt that a truth commission in South Africa was merely an excuse to formalize a witch hunt against them by the ANC. Any perusal of the Afrikaans language press over the period 1995 to 1998 will show that commentators saw the Commission as an attempt by the ANC to put white Afrikaners on trial, even though it should have become clear very early that under the leadership of Desmond Tutu, their fears would remain hollow. Any reasonable reading of the South African Commission’s work shows unequivocally that one of its key findings was that individual members of all the main political forces in South Africa during the struggle had been guilty of gross human rights violations.³²

C. Truth and Justice

As this article hopes to have shown, no simple or straightforward answers exist in response to the many questions about how to establish a lasting peace in the wake of conflict-ridden, authoritarian, and oppressive regimes. Neither are there uncontested or universally held positions determining how societies in periods of transition toward peace and democracy should deal with the crimes of the past or accountability for these crimes. The range of technical procedures that exist to close the books include the following: trials and tribunals; “amnesia”; negotiated restitution and compensation; amnesty; lustra-

tion and purges; and justice via truth commissioning³³ (or a combination of these).

Drawing on Elster's useful distinction between *backward-* and *forward-looking* transitional justice, the former would include trials and tribunals. The latter would encompass negotiated restitution and compensation, amnesty, and truth commissioning. That would arguably leave amnesia, lustration, and purges somewhere between the two.

In the case of South Africa, forward-looking transitional justice strategies were implemented. The perpetrators were facilitated (that is, the apartheid state and its agents) when backward-looking punitive or retributive legalistic "*justice was put up for trade,*" in Priscilla Hayner's words.³⁴ Truth commissioning as a process to promote reconciliation and national unity was selected. Individual freedom from prosecution, as well as amnesty, was offered to the perpetrators in exchange for the full truth about politically motivated crimes. Human Rights Violations Public Hearings inside of the Commission were set up to deal with "*rectifying the damage to human dignity.*"³⁵ Hence, the South African Commission can rightly claim a degree of victim centeredness. Finally, a committee was set up to make recommendations to the State President with regard to the rehabilitation of, and reparations to, those found to have been victims of gross human rights violations by the apartheid state. It was argued that the truth told at the Commission was a form of justice that would promote reconciliation and hence a democratic society.

D. South African Truth Commissioning: Any Lessons for Somalia?

The South African Commission has become a model for all upcoming commissions. Any perusal of the ever-growing literature on questions of transitional justice makes the point forcefully. Moreover, there is seldom, if ever, a discussion in the international public domain dealing with conflict-ridden societies, authoritarian regimes, and the search for solutions that facilitate democracy that does not refer to the South African case and its "*small miracle.*" In the introductory chapter to a volume dealing with truth commissions, Robert Rotberg claims that the South African commission has set the standard in this regard.³⁶ Priscilla Hayner makes much the same point.³⁷ She notes that the "*South African Truth and Reconciliation Commission succeeded in bringing this subject to the center of international attention, especially through*

its public hearings of both victims and perpetrators outlining horrific details.”³⁸

As has already been suggested, however, it is extremely important to remember that the kinds of expectations and promise captured by the somewhat over-idealized views of the South African commission need careful deliberation each time a truth commission is debated or set up. Whilst there is an enormous amount to learn from the South African case, it is crucial to keep in mind that any choice about transitional justice (and the institutional process that accompanies it) is always rooted in a particular context and a unique history. There are always parallels to be drawn and very important lessons to be learned from what has come before, but the attempt to replicate a model in the belief that the process that follows will bring the same outcome is a dangerous assumption. Similarities cannot be overgeneralized. Each case needs to be carefully reviewed so as to be cognizant of its empirical uniqueness. It should be kept in mind that truth commissions are not without problems, and that they are not quick and easy events to be organized, as we have suggested earlier on. As Priscilla Hayner has noted:

Truth commissions are virtually never smooth, pleasant, well-managed, well-funded, politically uncomplicated bodies. On the contrary, most struggle daily with a barrage of methodological, operational, and political problems, and operate under extreme pressures of time, under the heavy moral and emotional weight of their task and the risk of damaging error in their conclusion.³⁹

The South African case is dissimilar from the Somali one in a range of important areas, the most glaring of which was the existence of a functioning South African state, albeit one that had been weakening over quite some time before 1990. The fact of its existence was the basis of the South African negotiated settlement and the creation of the SATRC. In Somalia there has not been a state or any functioning state institutions in existence since 1991, with the overthrow of Siyaad Barre. What does this mean for truth commissioning as the transitional justice choice in Somalia?

Bruce Baker argues, in an article dealing with the Mozambique case, “that democracy demands the rule of law as the guarantor of political and civil rights,” but that they (political and civil rights) are “ultimately worthless unless the rule of law is first made to prevail.”⁴⁰ For him, the

sequencing of building democracy is very important. Put crudely, he argues for first the rule of law and then democracy. In institutional terms as well as in those of everyday culture, the rule of law survived the apartheid state. It had been implemented institutionally in a kind of warped and skewed fashion from 1948–1994. It was therefore possible for the negotiators of the South African democracy to draw on these institutions and the capacity they provided during the period of the negotiations. This, at the very least, helped legitimate the ideas of democracy and transitional justice.

A powerful—sometimes very tenuous and conflicted but nevertheless *inclusive*—process of elite negotiations and trade-offs toward transition and democracy took place over the four years in South Africa. The process throughout was able to draw on the capacity of functioning state institutions. Moreover, the practice and conduct of democratic principles were not unfamiliar to most sections of the South African population. For example, the broad liberation movement, under the auspices of the United Democratic Front, had since 1982 not only facilitated the development of a network of democratic dialogue and open debate on the ground and in the public domain in South Africa, it had also been crucial in encouraging the creation of a very powerful and activist range of civil society organizations. Democracy in decision making was a key goal of all these organizations. By 1990, there were literally thousands of non-governmental and community-based organizations making use of legitimate laws in order to fight exploitation, inequality, and oppression in South African courts. A further example of democratic practice and culture existed among the whites-only citizens of South Africa. Those that negotiated and ultimately traded themselves out of power and into the South African democracy, namely, mainly white Afrikaners, had a strong legacy of *internal* democracy, rule of law, and democratic decision making. Afrikaner nationalism, it may be argued, had throughout its history been characterized by a strong republican spirit and democratic leadership processes. Hence, there existed a relatively free press and a relatively independent judiciary throughout the life of the apartheid state.

Sustainable democratic states are conditional upon the existence of functioning institutions. While the South African apartheid state was by no means strong or democratic in the conventional sense in 1990, at the start of the Kempton Park negotiations—or in December 1995, at the setting up of the SATRC—it was nonetheless possible to draw on its capacity and begin to rebuild and reform its still functioning institu-

tions, especially those underpinning the rule of law. The lack of a functioning state makes matters considerably more complex and difficult in the Somali case. In other words, the Somali case requires the parties to pay serious attention to how such institutional gaps will influence the choices that need to be made about transitional justice mechanisms, such as truth commissioning, in order to make a worthwhile and positive contribution to reconciliation, security, and democracy.

E. Background Notes to South Africa's Post-Colonial Past

Faced with strategic choices around the issues of accountability and justice, the negotiators in South Africa were required to debate and trade to find a suitable method of transitional justice. This was formally prompted by the apartheid government's demand for a general amnesty for, minimally, the security forces and politicians.

The origins of the South African racial order can be traced back most fruitfully to mid-18th-century society in the Cape.⁴¹ By the turn of the 20th century, privilege and power had come to be identified with those who were white, while political exclusion and poverty had increasingly become the destiny of those who were black. In this sense, South Africa's history is much like that of many colonies in that race and class converged over time and brought untold hardships to the original inhabitants of the various colonial territories of the world. The apartheid state was set up in 1948 by the *whites-only* Nationalist Party of South Africa, when they won the whites-only general election. The Party's policy was outspokenly segregationist, flying in the face of Harold Macmillan's now famous "winds of change in Africa" speech. Race as a marker of human worth, life chances, and political power (as was the norm) was not neutered in the wake of the Second World War. Instead, it was reinvigorated via the institution of further legal entrenchment.

On November 30, 1973, the General Assembly of the United Nations adopted Resolution 3068. It was the culmination of a series of expressions of censure declaring the system of apartheid in South Africa to be a *crime against humanity* and a violation of the United Nations Charter. For the white minority regime, it was no longer possible to use euphemisms to obfuscate the highly reified and inhuman racial ordering of South African society. It had to confront the fact that the economic and social costs of sustaining its racial ordering policies had escalated enor-

mously. (It should be noted that South Africa's main trading partners were in Europe.)

Act No. 200 of 1993, the Interim Constitution of South Africa, formally ended the racial ordering that was the essential characteristic of the apartheid state. This Constitution was the product of a series of formal agreements reached between the two primary parties involved in the struggle for South Africa. It was the upshot of extensive negotiations that had been going on since 1990, primarily between the National Party-led whites-only minority regime and the non-racial African National Congress (ANC). This Act led directly to the creation of the South African TRC via The Promotion of National Unity and Reconciliation Act, No. 34, of 1995.

There was no clear victor or vanquished group by 1990 in South Africa. At the end of the previous decade, it was becoming obvious to significant parts of the ruling white minority regime that it was unable to continue to suppress the mass opposition to its existence. At best, it was able to coercively maintain an unstable and very costly equilibrium in South Africa. In addition, international economic boycott pressures were wreaking havoc with the South African economy and the mainly whites-only business classes were fast losing interest in maintaining the more and more counterproductive racial order that had served them so well in the past. On the other hand, it was equally clear to the opposition liberation forces that they were going to be unable to seize power from below or militarily in the foreseeable future. The logic of this stalemate had a much stronger impact than was recognized at the time.

F. The South African *Small Miracle*: A Compromise

The essentials of the South African compromise are well known. Colin Bundy, the eminent South African revisionist historian, captures its core element as follows: "the ANC first sought the political kingdom" and the National Party succeeded in getting the former to back off "from redistribution and state regulation" of the economy.⁴² In so doing, the ongoing low-level civil war was ultimately contained and the existing infrastructure and economy survived largely intact—together with its deeply unequal distribution of wealth. A trade-off had been made between the two main parties, with international corporate capital playing the midwife.⁴³

The Kempton Park negotiations went on for four years. They included an agreement on a series of sunset clauses that were incorporated into the Interim Constitution. These clauses committed the first post-1994 election democratic government to power sharing and secured the jobs of white civil servants for five years. The Parties also agreed in principle to indemnify soldiers, security agents, and politicians from civil or criminal prosecution in return for revealing their past actions and crimes. In other words, it was agreed that a form of individual amnesty be made available that coincided with the character of the negotiated and traded transition that was being made overall. The ANC refused to countenance the NP demand for a blanket amnesty.

This would be an incomplete account if one were to situate these events and their outcomes purely in objective structural terms. There were some remarkable individual personalities involved. Much has been written about the bearing that the social bonding among the key political negotiators had in the final outcome. The history of, and no doubt the ultimately determining nature of social relationships, in South Africa were characterized by increasingly deep racial cleavages, growing economic power imbalance, and the exploitation and brutalization of black people by white people over time. However, even as the relationships between prison warder and prisoner seem to create bonds of a sort, there existed in South Africa some covert social fabric, some knowledge about one another, that somehow enabled the Kempton Park elites to work with one another at times.⁴⁴ In this regard, two very influential forces significantly impacted the negotiated transitional processes. First, South Africa had not had a full-scale, long-term bloody civil war raging between the main protagonists. In the second place, an important segment of the liberation movement leadership had been in exile from South Africa or in jail on Robben Island for a prolonged period of time.

Any reading of the unfolding of this negotiated democracy will show that while there were many crises and many moments when serious breakdown occurred, Kempton Park somehow held together and a realization of the structural interdependence between black and white in South Africa seemed to grow. Nelson Mandela's role in all of this should not be overly glorified. Yet it would be extremely short-sighted not to acknowledge that it was his enormously gifted leadership ability and great humanity that provided the glue that held the many factions of the liberation movement as well as those of the overwhelmingly

white negotiators together at crucial moments. Further, and in retrospect, it was his understanding of, and approach to, legitimating a negotiated transition and translating it that captured the commitment to reconciliation and nation building that was to be the driving force of post-1994 democratic South Africa. This became the *leitmotif* of his historic five-year Presidency. There is little doubt that F.W. de Klerk did not fully understand the consequences of what he was doing on “Red Friday” of February 1990, when he announced the “unbanning” of the liberation movements and the freeing of political prisoners. It is to his credit and that of the think tanks around him, nevertheless, that he stayed with the negotiation process and accepted its outcomes, thereby lending inestimable legitimacy to the South African transition to democracy in its initial years.

G. Truth Commissioning’s Moment had Come

Truth commissioning as a mode of promoting transitional justice and democracy in post-repressive and conflict-ridden societies had gained considerable stature and exposure over the fifteen to twenty years preceding the establishment of the South African Commission. “Forward-looking justice,” as Jon Elster would have it, was an agenda item on the international stage. It had been used repeatedly in South America and elsewhere in Africa, and seemed to have achieved some successes, especially in the former. At least fifteen truth commissions had been established by the mid-1990s. There were also a range of actors who had taken an interest in this form of *closing the books* and the questions of accountability that arose with it in South Africa. They included the ANC’s Kader Asmal⁴⁵ as well as the Institute for a Democratic South African (IDASA). The latter was a respected and well-known NGO think tank in South Africa, led by Alex Boraine, who was to become the vice-chairperson of the SATRC.

The Cold War in Europe had only just ended by early 1990. International political arrangements, relations, and alignments were in a process of large-scale flux and transition. This meant at least two things for Southern Africa. The apartheid state’s long fear of the communist threat subsided considerably and the liberation movements, especially the ANC, lost the support and patronage it had received over many years from the Union of Soviet Socialist Republics.

In 1994, South Africa held its first-ever democratic election, and political power was transferred to the majority. The ANC gained over

60% of the popular vote. Under the presidency of Nelson Mandela, they set about constructing a power-sharing government (or government of national unity). On the agenda was the matter of building a viable democracy, together with the promotion of reconciliation, national unity, security, and amnesty, as captured by the 1993 Interim Constitution. The Kempton Park settlement provided a powerful and legitimate platform for the trade-offs dealing with South Africa's conflict-ridden, authoritarian, and oppressive racialized past, framed by truth commissioning as a method of transitional justice.

H. The SATRC: Matters of Organization and Function

Before looking at the structures and functions of the commission in a bit more detail, let us summarize its formal task. The SATRC was specifically mandated to engage, investigate, and document the gross human rights violations that took place in South Africa from 1960 to 1994. It was to compile as complete a picture as possible of them. In so doing, the SATRC was obligated to look at the reasons for, and the antecedents of, these events. Hypothetically, this process of finding the truth so as to promote justice and forward-looking reconciliation was meant to do the following:

- provide a description of, and explanation for, the gross human rights violations that took place
- serve as a basis from which to launch and facilitate the amnesty process
- serve as a starting point for setting up a reparations policy
- promote truth telling, reconciliation, and national unity (revealing is healing)

The Postamble "compromise" to the 1993 Interim Constitution captured two important codes. Amnesty would be granted to individual applicants⁴⁶ in return for the full and truthful revelation of "omissions and offences associated with political objectives and committed in the context of the conflicts of the past." Secondly, justice would be sought in South Africa in line with the political compromise that had been reached.

In essence, The Promotion of National Unity and Reconciliation Act of 1995 asserted that reconciliation between the South African people

was possible through truth telling and truth gathering. This position contained a further matrix of assumptions:

- such a process would reveal the details of the truth about the apartheid state's repression of, and atrocities against, the great majority of its population on the basis of their skin colour;
- the truth of the past events would be found and acknowledged through this course of action and that this was a form of transitional justice;
- the commission rested on the notion that *revealing is healing*, built on the theory that a decent society in South Africa could be established and made human even in the face of the atrocities of the past;
- if this were to occur, victims would be able to forgive their pain and suffering, even if they could not forget;
- perpetrators, even though they were not required to show remorse or ask for forgiveness, would commit themselves to never allowing a recurrence of such atrocities;
- the bulk of white South Africans would be forced to face the past and, as a result, the continued denial of it would be eradicated;
- this theory of truth would lead to reconciliation, and that national unity would come about as a result;
- the space for a viable and enduring peace would be established so that the democratic reconstruction of the country could take place;
- the victims would be able to gain relief and closure; and
- the knowledge of the details of atrocities committed against them would compensate victims for the (retributive) justice that they would forgo, in that it would alleviate their pain.

In summary, the South African TRC was mandated to accomplish a wide range of complex and gruelling tasks including finding the truth about the past through a process of victim-centered narrative and storytelling; formally acknowledging past abuses; promoting reconciliation; providing the perpetrators with the opportunity to obtain amnesty; providing victims with the opportunity and tools to heal; preventing the atrocities of the past from being repeated; and providing the state with a policy document for a program of reparations and in so doing, promoting reconciliation, security, national unity, and sustainable democracy.

Overall, The Promotion of National Unity and Reconciliation Act, No. 34 of 1995 is a document broad in both scope and principle. It is also an idealistic piece of visioning. In spirit, the Act captures a promise and a hope that the future will enable the ultimate humanity of people to overcome the past.

The South African Commission “dwarfed previous truth commissions in its size and reach.”⁴⁷ Organizationally, it operated with three committees and via four regional offices.⁴⁸ The Human Rights Violations Committee had the duty of collecting statements from victims and deponents reporting on gross human rights violations, holding public hearings, and making victim findings after carrying out a form of low-level corroboration (the legal measure being the balance of probabilities). The Amnesty Committee received and processed amnesty applications from individuals, either in a public hearing or in committee, depending upon the form and subject of the application. The Reparations and Rehabilitation Committee was tasked with identifying individuals who came to the commission to tell their stories and who were in need of urgent interim relief, as well as making recommendations to government through parliament for a policy on reparations. This committee had no chequebook and was conceived of both as a support committee for the victims and an advisory body to the commission and parliament. This structure had never been used in truth commissioning before. It made the South African body the most ambitious commission ever to be established at that time. It was also the first commission that had the power to grant amnesty.

There were seventeen commissioners. The South African Nobel Peace Prize laureate, Archbishop Desmond Tutu, was appointed as chairperson. President Mandela made the appointments from a list he was given after a public nomination and selection process. In other words, a fair degree of transparency was built into the process of appointing commissioners. Some attention was also paid to diversifying the panel of commissioners. For example, a member of the white right wing, who had been a sitting member of the apartheid parliament, was appointed to the Amnesty Committee. Around 300 persons worked for the commission in its four regional offices over the first two, and key, information-gathering years of its life. (The commission was only meant to exist for a maximum of two years.) On the whole, these people came from the ranks of civil society organizations that had opposed the apartheid government. The commission appointed a relatively small team of investigators to help with the corroboration of

amnesty applications and in making victim findings. People from the range of different security forces were appointed to this team, including a number of former and then-serving members of the South African police force.

The Human Rights Violations Committee collected about 20,000 statements, while the Amnesty Committee received around 7,000 applications for amnesty. A relatively small percentage of the latter applications came from people who were members of the apartheid state's security forces; that is, those who had served in the South African police force rather than the Defence Force.

The Human Rights Violations Committee held public hearings that were shown on television and broadcast on radio. While a small number of public hearings were to act as windows into the SATRC, these hearings seemed to take on a life of their own, once the first two had been held (in the Eastern Cape and Johannesburg). The televised human-rights atrocities public hearings went on to dominate, to the exclusion of almost everything else, the organizational life of the commission during the two-year period it had to complete its work. In the end, the formal period of the commission's work lasted from December 1995 to March 2003, a totally unanticipated seven years and three months. In terms of the founding act, Act No. 34, the TRC's organizational life was meant to span 18 months, with the possibility of a further six-month extension in the event that more time should be required. The Human Rights Violations Committee also held a series of so-called special hearings over the period of the first two years. These focused on a number of key sectors, such as business, the media, and the health sector. They were an attempt to engage these sectors with a view to considering their response to, or participation in, the events of the past.

The Amnesty Committee's work was very slow to get off the ground. In fact, it did most of its work after the first two years of the commission's information-gathering organizational life. Applicants applied to the committee as individuals. They were not required to ask for forgiveness or to show any sign of remorse. Decisions by the committee were meant to be made in terms of a number of factors: whether the act was politically motivated; whether there was proportionality between the act and the political objective pursued by the applicant; and whether the full truth of the action was revealed. A small number of these hearings were also televised. They were all open to the public.

There is significant evidence to support the argument that, overall, a fair degree of openness and transparency characterized the commission's work. The commission attempted to build an organizational structure that included representation as broad as possible of the diversity of South African political opinion and people. It did, in fact, succeed in doing significant and worthwhile work.

V. Strengths and Weaknesses: The SATRC

A. Weaknesses

The enormous potency of symbolic power in the mass media should not be confused with wholesale healing, or large-scale societal repentance, or national reconciliation. The latter was not achieved in South Africa and is unlikely to be easily achieved, no matter the context or the country in which truth commissioning is carried out.

In the case of South Africa, the basic material needs of all have not (yet) been adequately met. Extensive and structural socioeconomic inequality and poverty are neither easily nor quickly remedied in any society, despite the promises of politicians to the contrary. It takes time and courage to deal with material questions. After authoritarian and conflict-ridden societies commit themselves to democratic arrangements, the demand for palpable and visible material change to the benefit of all is always massive. In South Africa, around 30% of people are unemployed in 2006, as they were ten years ago, at the height of the Commission's work. The great majority of them are black, as they have been throughout post-colonial history. In this stark context, national reconciliation can ultimately be a barren notion, generally speaking.

Secondly, little new truth was told or 'discovered' by the South African TRC. No new or pluralist interpretation of South African history emerged from the Commission's work. On the whole, "truth" remains divided and differentiated. The facts of the apartheid regime's atrocities were, and are, on the whole, well known and documented. After all, the press had remained relatively free throughout the years of struggle, South Africa enjoyed a vigorous and progressive civil society, and there existed an active, critical, and prolific body of researchers at the country's universities who were not silenced. A reading of the commission's 1998 five-volume "Final Report" shows quite clearly that the historical explanations it presents do not provide us with a new understanding of South Africa's past. Rather, it draws upon and from

the large body of existing work. Whilst some individual victims and/or their families and friends learned the details of *why*, *when*, and *where*, most people, unfortunately, did not.

In point of fact, few perpetrators came to the SATRC and even fewer “confessed.”⁴⁹ Generally speaking, those that did appear came because evidence against them had been collected by the authorities before the advent of the Commission, and prosecution was probable after the Commission’s window of opportunity closed. Moreover, the investigative and research capacity of the SATRC was limited, relatively speaking. It should be remembered that it was not meant to be a prosecutorial body. As is the nature of truth commissioning, legal justice was traded for restorative or forward-looking justice. The rule of law was not applied to deal with the atrocities and crimes of the apartheid regime or its agents. The question of accountability remains open insofar as a *punishment to fit the crime* was not sought by the SATRC. The TRC Act, however, held out the promise that prosecution would and could follow the work of the Commission for those who had not applied to it. The South African state has recently announced that it will prosecute some individuals who did not come to the Commission when existing evidence warrants it, although there is still much debate within the ruling party as to its value.

Finally, it was assumed that in the context of the South African *small miracle* it would be possible to bring about a paradigm shift at the level of the collective consciousness of the people, and that truth would heal when it came to dealing with the atrocities of the past regime. However, reconciliation and national unity are both complex and illusive phenomena. Few perpetrators who qualified for amnesty actually came to the Commission. One of the most telling refrains of the work in the TRC became the question asked so often by black South Africans: “Where are the white people?” Whites did not come in any numbers either to listen, to learn, to say they were sorry, or even just to talk about the past.

B. Strengths

Notwithstanding the range of real weaknesses and problems, the choice for and process of closing of the books in South Africa’s search for security, national unity, and sustainable democracy (that is, truth commissioning) has brought with it a number of significant and worthwhile benefits.

There is little doubt that the Commission served one overall and exceedingly important function at a very crucial moment in South Africa's modern history. Soon after the negotiated democratic dispensation was implemented in 1994, there followed a period when the great mass of ordinary South Africans, both black and white, needed desperately to be *held*, sociologically and emotionally. Over this time, the ideals of truth commissioning served a majority of South Africans, although not all of them all of the time, and not all in the same way. The basis upon which to rebuild key institutions was created during the Kempton Park negotiations. The work of the TRC was to give South Africans time and space to consider what their respective leaderships had done at Kempton Park and to ponder the notion of a "rainbow" nation and if a viable democracy was possible to move South Africa forward. Together with the person and Presidency of Nelson Mandela and under the chairpersonship of Desmond Tutu, the SATRC provided a time for "holding" when it was desperately needed.

Paradoxically, the accounts of violence and abuse, of the terrible brutalization primarily of the disenfranchised black people, and of the public exposure of the dynamics and processes of stripping away collective and individual dignity ultimately brought with them the promise of a better life. This promise and the hope it engendered were embedded in the enormously powerful emotional discourse that played itself out in the public media. It symbolized a long-withheld rite of passage to citizenship in the lives of black South Africans.

The great majority of South Africans were for the first time in their lives affirmed. They were accorded full citizenship rights both in concrete terms and symbolically. The past was acknowledged primarily via the legitimacy that was gained by the public and cumulative *telling* of individual *stories*. It became clear that the past had in fact happened, and moreover that it was *wrong*. Black South Africans who were criminalized at birth by the color of their skin were freed. Their trauma at having lived in a society that did not structurally or legally recognize their humanity was acknowledged. The role that ongoing live television broadcasts played over a period of about fifteen months (mainly the HRV Committee's public hearings of victims and deponents telling stories of atrocities) cannot be overestimated.

The beneficiaries of the apartheid regime, who were for the most part in denial about the harsh and repressive reality of life for black South Africans and who saw the systematic atrocities of the past as exceptions or occasional mistakes, were left with little behind which to

hide. Some began to wonder how they had let it happen. Considerably fewer continued to argue that it hadn't happened. Hannah Arendt's notion of the "terrifying normality of the people" who committed the Holocaust—who were part of both letting it happen as well as committing the atrocities—came alive in South Africa over this time, revealing, for those who wanted to see, the very powerful lessons of *lest we forget*. The SATRC was not only evidence of formal state acknowledgment of the atrocities of the apartheid regime. It also brought that acknowledgment into the broad public South African domain, and that should not be underestimated.

VI. Conclusion

It is too soon to tell how South Africans or South Africa will view the Commission or how it will be taken up into collective memory over time. Clearly, the many over-idealized and overly ambitious hopes and expectations for the SATRC overburdened it. In retrospect, it could not hope to have done what was required of it by its founding legislation or what was expected of it by the people of South Africa. The iconic international status accorded the acts of contrition by a small number of perpetrators should not be seen to be more than they were—or less than they were. They were significant and important events that will stand as examples of what is humanly possible. Archbishop Desmond Tutu is a truly special and great person. This does not mean, however, that the SATRC was able to transform South Africa in his image. Nor does it detract from the enormously important role he played and continues to play in trying to remake and secure South Africa. The mythmaking that seems to be characteristic of the international view of the South African Commission's work does not serve the transitional justice truth commissioning project well, or for that matter, the building of sustainable democracy in post-conflict authoritarian societies.

Instead, and on the basis of the evidence of the South African Commission, sober and serious consideration is needed if this tool of transitional justice is to play a role as more than a very necessary, even vital, but short-term mode of dealing with *closing the books* on the crimes of the past. If one lesson is to be learned from the South African experience, it is "that the expectations for truth commissions are almost always greater than what these bodies can ever reasonably hope to achieve."⁵⁰ In consequence, they need to be resolutely reviewed so as to find more viable and realistic ways of holding on to the possible lon-

ger-term societal benefits of forward-looking truth commissioning and its role in promoting societal transition to democracy. This is the main lesson a fledgling Somalia can learn from the South African case.

Notes

1. This paper benefited significantly from Maxi Schoeman's reading. We would like to thank her for her suggestions and additions. Of course, we are solely responsible for the errors that may remain, both in terms of conceptualization and fact.
2. See, for example, Jack Snyder and Leslie Vinjamuri (2003/04) for a useful discussion about the argument of institutions as the basis of stable democracy.
3. Jon Elster 2004, p. ix.
4. At the time of the appointment of the South African Truth and Reconciliation Commission in December of 1995, at least 15 truth commissions had been set up (Priscilla B. Hayner, 1994). By 2002, there were or had been 25 of these bodies, according to Hayner (2002). Since then, truth commissioning as a strategy has become even more evident in attempts to build peace and democracy in the wake of civil war, societal conflict, and authoritarian regimes. The latest commission established in Africa is in Burundi. It was set up as a result of the United Nations Security Council Resolution No. 1606, of June 2005. The resolution stipulated the setting up of a mixed truth commission and a special court to prosecute war crimes and the human-rights violations during the decades of civil war in Burundi.
5. The setting up of the International Criminal Court that followed the Rome Statutes of 1998 is a key development in support of this position.
6. Janis Grobbelaar occupied an insider status in the South African Truth and Reconciliation Commission for the key period of its evidence-gathering and statement-taking working life. She acted as (what was designated in the organizational chart of the SATRC) an information manager in the Johannesburg regional office from April 1996 to January of 1998. In everyday life, she is a professional academic sociologist. This article needs to be read in this light. Insider status and dynamics bring both strengths and weaknesses.
7. See Priscilla Hayner 2002, pp. 154–169, and Jeremy Sarkin 2004, pp. 211–227, for insightful and useful discussion of the problems around various conceptualisations and theories of reconciliation.
8. The SATRC consisted of three Committees: a Human Rights Violations Committee, an Amnesty Committee, and a Reparations and Rehabilitation Committee. Each of the committees functioned "independently." The latter proved to be a serious organizational problem. The only opportunity for "integrated" discussion of the work being done by each was full commission meetings.
9. We are not suggesting that national, collective, societal, or political reconciliation are necessarily synonyms, but that for our purposes they share enough common ground to be grouped as one category.
10. Sarkin 2004, p. 226.
11. *Ibid.*, p. 219.
12. Personal experience. Janis Grobbelaar was present at the discussion in 1996.

13. Bill McSweeney 1999, p. 156.
14. Buzan 1991.
15. McSweeney 1999, p. 156.
16. See Simpson 2004 and Van der Spuy 2004.
17. This is not to imply that there was no violence during this period. On the contrary, see Mattes 1994. Yet the principle did provide a measure of confidence for a range of political actors. In violence-torn KwaZulu-Natal, strong political leadership from the top assisted in preventing the violence from turning into full-blown civil war, and contained it largely within the confines of the province.
18. Kaminski, Nalepa, and O'Neill 2006, p. 295.
19. Teitel 2002, p. 70.
20. Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, 2004.
21. *Ibid.*, p. ix.
22. *Ibid.*
23. *Ibid.*, p. 3.
24. *Ibid.*, pp. 3–23.
25. It should be noted that Elster is at pains to make sure that the reader is under no illusion as to the great many dissimilarities in context, process, and solution, depending on the empirical case in question. He also makes it clear that he is not trying to suggest that one model fits all.
26. *Ibid.*, p. 21.
27. *Ibid.*, p. 22.
28. Ahmed I. Samatar 2006, pp. 101–114.
29. In this paper, Samatar divides Somali history into three periods: that of the pre-colonial order, the colonial order, and the postcolonial state.
30. *Ibid.*, pp. 116–122.
31. *Ibid.*, pp. 47–76.
32. See the *Final Report*, Volume 6 (2003).
33. See, for example, Adam and Adam in James and Van De Vijver 2000; and John Elster 2004.
34. Priscilla Hayner 2002, p. 86.
35. Minow 2000, p. 236.
36. Robert Rotberg, *Truth and Justice: The Morality of Truth Commissions*, 2000.
37. Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2002.
38. *Ibid.*, p. 5.
39. *Ibid.*, p. 213.
40. Bruce Baker 2003, p. 141.
41. See Elphick 1977 for the best analysis of the making of race in South Africa over the period of the initial colonization of the Cape from 1652.
42. Bundy in James and Van De Vijver 2000, p. 12.

43. See, for example, Terreblanche 2002; Adam, Slabbert, and Moodley 1997; James and Lever 2001; Alexander 2002; and Bozzoli 2004 for good discussions on various aspects of post-apartheid analyses of South Africa.

44. See Ndebele 2000 and Bundy 2000 on some of the reasoning and the trading that underpinned the establishment of SATRC.

45. Kader Asmal had been a Professor of Law at Trinity College in Dublin while exiled in Ireland for 27 years. He became a Cabinet Minister in Nelson Mandela's first government. He was also a Cabinet Minister in Thabo Mbeki's first term of office as President of South Africa.

46. While entrenched racial ordering was the defining character of apartheid, determining both the lifestyle and the life chances of all South Africans, the Interim Constitution formally turned this around. It systematically set out to reconstruct South Africa as a non-racial, non-sexist, and non-discriminatory society. According to its stipulations, in post-apartheid South Africa, people's lives would not be determined structurally, in terms of legally defined group membership, but as individuals and full citizens.

47. Hayner 2002, p. 41.

48. The Cape Town office consisted of both a regional and the national office. The other three regional offices were in Johannesburg, Durban, and East London. A small satellite office existed in Bloemfontein. The latter fell under the management of the Durban office.

49. According to Sarkin 2005, pp. 105–127, while 7,116 people applied for amnesty, the majority (around 4,500) had been convicted of ordinary or common law offences and thus sought amnesty while incarcerated for offences with no political objective. Only about 2,500 people applied for amnesty who had committed a political offence. Overall, 1,167 people were granted amnesty for the offences for which they applied. In 145 cases, partial amnesty was given.

50. Hayner 2002, p. 8.

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