

BENDING THE ARC OF THE MORAL UNIVERSE

A Place at the Table on Major Challenges of our Time



Penn Law
UNIVERSITY of PENNSYLVANIA CAREY LAW SCHOOL

PENN LAW INTERNATIONAL PROGRAMS

BENDING THE ARC OF THE MORAL UNIVERSE
THREE ESSAYS ON MORAL LEADERSHIP

"The late Supreme Court Justice Thurgood Marshall, for whom I clerked years ago, said it best: We must dissent from the indifference. We must dissent from the apathy.... We must dissent from the poverty of vision and the absence of moral leadership."

-Crystal Nix Hines at Penn Law on September 23, 2019

25 Years After Apartheid: Looking to the Past; Looking to the Future
Justice Sisi Khampepe

Diaries from the Field: Children Who Were Soldiers
Former UN Under Secretary General Radhika Coomaraswamy

Women's Leadership in Law and Foreign Policy
Ambassador Crystal Nix-Hines

Radhika Coomaraswamy's "*Children Who Were Soldiers: Diaries from the Field*" and Justice Sisi Khampepe's "*25 Years after Apartheid: Looking to the Past; Looking to the Future*" are two separate but interconnected reflections about conflict and the complex narrative of the potential of law and legal institutions to strengthen restorative justice. The third paper by Ambassador Crystal Nix Hines, our former Ambassador to UNESCO, an organization founded on the ashes of the two World Wars to promote international cooperation, examines the role of a disrupter in legal settings:

"How can we do that? With deliberate intention. Even the smallest stones disrupt the surface of water, and if a single stone's disruption is mirrored by more and more stones, the face of the water will, eventually, change."

These profoundly moving meditations by three recent speakers at the law school are reminders to a diverse community of our connective tissues - grounded in the rule of law- and ways to move forward, even when the past wrongs are unalterable.



Apartheid Museum, South Africa

25 Years After Apartheid: Looking to the Past; Looking to the Future

Lessons Learned on Nation Building, Democracy, and Reconciliation

Justice Sisi Khampepe
Acting Chief Justice of the Constitutional Court of South Africa

Foreword

"When I questioned those who were seeking amnesty as to why they committed atrocity crimes, their answers were, 'We did not believe that black people had souls.' This was hard for me to hear. Desmond Tutu, my former boss, wrote in "No Future Without Forgiveness" that 'forgiveness means abandoning your right to pay back the perpetrator in his own coin, but it is a loss that liberates the victim.'"

-Justice Khampepe, at the University of Pennsylvania Law School, October 2019

"By forgiveness, I mean a conscious, deliberate decision to forgo rightful grounds for grievances against those who have committed wrongs or harm.... situations where victims and others consciously decide to set aside otherwise warranted grievances for their own benefit and for the broader good."

-Martha Minow, When Should Law Forgive, 2019

We were honored to welcome Justice Sisi Khampepe to our law school to learn more about how the South African Truth and Reconciliation Commission shaped a nation struggling to heal from apartheid, and what those lessons can offer a nation and the world.

When she graduated from Harvard Law School with an LLM, Sisi Khampepe's advisor, David Smith, wrote in his card to her: "You will go back and build your country." In 1982, she thought it was cruel joke. Born and raised in Soweto, she had no country to build. However, she did frame the card and keep it close to her. She went on to dismantle the apartheid system as one of the first black lawyers practicing labor law and the first to establish her own law firm, which became renowned for defending the rights of workers against unjust laws and unfair employment practices. In 1995, President Mandela appointed her to the Truth and Reconciliation Commission, headed by Desmond Tutu.

The following year she was appointed to the Amnesty Commission. In 2009, Khampepe was appointed to the Constitutional Court that was born out of the country's first democratic constitution and embodies the principles that aimed to dismantle South Africa's horrific history of racial apartheid.

Justice Khampepe has described the role of the Constitutional Court as a historic bridge between the past of a deeply divided society characterized by conflict and untold suffering and injustice and a future founded on the recognition of human rights, democracy and peace. On the Constitutional Court, Sisi Khampepe has defined important civil liberties, including the right of peaceful protest. In 2016, in her lecture at Stellenbosch University, given at a time when South Africa was witnessing a wave of protests by university students challenging the rise in tuition, she spoke on the right to peaceful protest. Her insights have resonance in the context of new forms of protests at educational institutions around the world.

"... Education is a primordial necessity—there is every reason for students to raise their grievances about fees. The Constitution permits this."

"... When seen in the context of our Constitution, education is the lifeblood of a democracy. In my opinion, this means the Department of Higher Education must be prepared to listen to the concerns of students. Equally, students must be willing to take the practical concerns of the Department seriously. What is required is that our Constitution abhors an ethic of obedience and is resistant to a culture of docility. We must work vigorously for a lasting enterprise. Meaningful participation as transformative process demands that we engage with each other."

"... Meaningful participation and transformative process intersect. When students demand a shift in education policy, it can be truly transformative if we allow for meaningful engagement to ensue. If we listened to the plurality of voices and attempt to do justice to them, even if the process is difficult or seemingly insurmountable, we are taking part in transformation... What does transformative process mean? To give voice to the oppressed is to celebrate difference and uniqueness... it is to recognize the complex interplay of culture, experience and memory that defines us. We must do as Derrida encourages to hear, read, interpret... to try to understand. Only, then, do we do justice.... And accept the call to arms against entrenched dominance, to democratically shape our own accepted values, paradigms, and institutions as a society."

Justice Khampepe's lecture was followed by engagement with Penn Law students. Lindsay Holcomb wrote to me to say that the Justice's statement, "Reflecting on the time of the TRC, it has become evident to me that the truth is both powerful and dangerous" is an insight that she will carry with her to her work as a lawyer. Justice Khampepe was speaking of the role of

truth and restorative justice when she said, “[h]istorical truth... cannot be ‘bottled’ and administered as contemporary ‘medicine’ of the wounds of the past.” Truth commissions generally face the challenge of having to employ the truth as a means of restoring justice and promoting reconciliation and peace, while at the same time, the truth-telling process has the attendant danger of recounting the divisive and emotive past traumas and atrocities. How does a truth commission balance the subjective and objective forms of truth without trivializing the truths of others, while elevating and prioritizing the truth of some? How do you achieve this without diminishing the legitimacy of the TRC and compromising the mandate of national unity and reconciliation? Justice Khampepe’s insight on the role of truth in reconciliation remains one of the most powerful perspectives to come out of this long and hard journey to build unity and democracy 25 years after apartheid.

Rangita de Silva de Alwis

Associate Dean of International Affairs University of Pennsylvania Carey Law School

**Distinguished Advisor to UN Under Secretary General Phumzile Mlambo Ngckuca,
former Vice President of South Africa**

Introduction

Today, I have been honoured with an invitation to travel across the oceans from South Africa to this prestigious institution, the University of Pennsylvania Law School, to discuss and share my insights as one of the seventeen Commissioners appointed by the late President Nelson Mandela to be part of the South African Truth and Reconciliation Commission (the TRC). The mandate of the TRC was to investigate and record the nature, causes and extent of gross violations of human rights committed under apartheid during the period of 1 March 1960 to the "cut-off date"; to identify the fate and whereabouts of the victims of human right violations of this nature; granting amnesty to perpetrators who made full disclosure of all the relevant facts relating to acts associated with a political objective; and providing the victims of apartheid atrocities with reparations and rehabilitation, along with the restoration of their human and civil dignity. In essence, the TRC was tasked with recognising the atrocities of the victims of apartheid, and clothing them with the dignity that they were once stripped off and systematically denied, while at the same time holding the perpetrators to account for their crimes.

Much has been written about the TRC as the ideal model for restorative and transitional justice. The focus of the TRC on reconciliation and rehabilitation, rather than retribution, has been praised as an effective instrument for nation building and reconstituting a just society. However, there has equally been much criticism advanced by many academics and commentators against the TRC. These criticisms and dissents are crucial and necessary to the continuing conversation in South Africa and the world concerning the impact and effect of the TRC on institutional racism, reconciliation, redistribution both economic and land based, substantive equality and notions of forgiveness. The question persists – did the TRC and its preferred approaches atone for the atrocities committed under apartheid?

My lecture does not intend on focusing on the merits of these arguments or debates. My earnest desire is to contribute to the continuing discourse surrounding the TRC and its

functions. My lecture will be divided into three parts. Part A will delve into and discuss the birth of the TRC process and its functions; Part B will take a look at the general attitudes surrounding the TRC process in present-day South Africa; and in Part C, I will attempt to discuss the value of TRC in the future. I use the word attempt very deliberately because this issue is so complex and intricate that one cannot truly do justice to any analysis about its impact in the future. Lastly, I will discuss the lessons to be learnt from the TRC process.

* I want to proffer my gratitude and thanks to my law researcher at the Constitutional Court, Sfiso Nxumalo for his assistance with researching and preparing this paper.

PART A: The Birth of the TRC and its Functions

In order to properly understand and appreciate the impact and the role of the TRC, one must have regard to its identity and genesis. It is common cause that the TRC was the result of the negotiated settlement between the white apartheid government and the predominately black liberation movements. However, European domination in South Africa can be traced back to the latter part of the fifteenth century. This perennial domination and oppression endured Dutch and English colonialism from the seventeenth century to the beginning of the twentieth century. It persisted through generations of institutionalised and legislated racism and culminated in a racial segregation that spanned for decades.

The negotiated settlement, as we know, was the apotheosis of the racial tensions in South Africa, which had the primary objective to counterpoise the pending, and boiling civil war. South Africa was feared to implode. This feared civil war threatened the promise of a nation that was yet to be born and hence the importance of successful negotiations. Apartheid was dead and those who wielded power, could no longer imprison, silence and cull the oppressed without impunity. Change was necessary. Change was inevitable. Change could be attained through bloodshed or a negotiated settlement. On 20 December 1991, the formal negotiations commenced at the Convention for a Democratic South Africa (CODESA), with its first plenary meeting in the World Trade Centre in Kempton Park. CODESA is scarcely free of criticism and was confronted with numerous difficulties both internally and externally. During this political transition, which South Africa was negotiating its way through, it was perspicuous that a constitution, which set out a reasonable framework that all negotiating parties would pledge their fidelity to, was of the essence.

After numerous failures and collapse of the constitutional negotiations, the interim Constitution was adopted.² The Interim Constitution was committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. It was wisely appreciated by those involved in the preceding negotiations that the task of building this new democratic order was a very arduous task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could

² Act 200 of 1993.

not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past, without forgetting the atrocities that had been committed in the past.

The epilogue of the interim Constitution perspicuously captures the essence of the mandate of the TRC and the transition generally. It powerfully provides:

"National Unity and Reconciliation

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

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

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

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

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

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

Evinced by this epilogue is the fact that the TRC was one of the envisaged bricks and mortar, which would form part of the historic bridge between a deeply divided past to a South Africa founded on human rights and national unity. Its purpose needs to be understood in the context of a number of other instruments aimed at the promotion of democracy like the Land Claims Court, the Constitutional Court and the Human Rights and Gender and Youth Commissions – all institutional tools in the transformation of the South African society. Staying true to the epilogue and the interim Constitution's aspirations, Parliament enacted the Promotion of National Unity and Reconciliation Act,³ which led to the establishment of the TRC in 1995. A key object of the TRC was to promote national unity and reconciliation and its period which was the subject of its focus was between 1 March 1960 (this was the month in which the Sharpeville Massacre took place) and the cut-off date of May 1994 when Mr. Nelson Mandela was elected the first democratic president of South Africa.⁴

The Promotion of National Unity and Reconciliation Act made provision for three committees within the TRC, which I now briefly turn to. First, the Committee on Human Rights Violation, was primarily tasked with leading an investigation into human rights violations. Its primary mandate was to uncover as much as possible of the truth about the past gross violations of human rights – an often-difficult task. The TRC was however founded on the belief that this task was necessary for the promotion of reconciliation and national unity. It facilitated the official public acknowledgement of gross violations suffered by the victims. In so doing, the committee sought to restore the dignity of those who had suffered. It gave the victims a voice to unburden their suffering. This committee devoted much of its time and resources to acknowledging the painful experiences of victims.

Second, the Committee on Amnesty, of which I was a part, had the mandate of facilitating and granting amnesty to perpetrators who committed gross human rights violations associated with political objectives. Although there was a set criterion for the granting of amnesty, a fundamental *sine qua non* for the granting of amnesty was that the applicant had to make full disclosure of all the relevant facts. No apology from the perpetrator was required.

³ Act 34 of 1995.

⁴ The TRC comprised 17 commissioners. The commissioners were Archbishop Desmond Tutu (Chairperson), Dr Alex Boraine (Vice-Chairperson), Ms Mary Burton, Adv Chris de Jager, the Revd Bongani Finca, Ms Sisi Khampepe, Mr Richard Lyster, Mr Wynand Malan, the Revd Dr Khoza Mgojo, Ms Hlengiwe Mkhize, Mr Dumisa Ntsebeza, Dr Wendy Orr, Adv Denzil Potgieter, Dr Mapule F Ramashala, Dr Fazel Rander, Ms Yasmin Sooka and Ms Glenda Wildschut. Interestingly, of the 17 commissioners, 10 were male, 7 female, 6 white, and 11 black.

On a personal note, the crude and horrendous testimonies I heard during my time in the TRC have haunted me for years, there were nights where I struggled to sleep as my mind kept on replaying the hearings. I can only imagine the trauma the actual victims went through. The third, Committee was on Reparation and Rehabilitation. It had to consider the plight of victims referred to it by the other two committees and gathered evidence relating to the identity, fate and whereabouts of victims as well as the nature and extent of the harm suffered by them. Any person of the opinion that he or she suffered harm as a result of a gross violation of human rights could apply to the Committee for reparation. Each claim was investigated, and this committee was empowered to make recommendations on appropriate reparation for victims.

In addition to these committees, there was the Investigative Unit, which was tasked with investigating any matter falling within the scope of the TRC's ambit. This included verifying evidence by victims and people applying for amnesty before testimony was heard, identifying and investigating dominant themes of human rights violations, like attacks on trains, buses and on liberation movements.

The TRC in comparison to other truth commissions or equivalent bodies

Numerous truth commissions have been held across the world. However, none of these commissions have been as ambitious as the South Africa's TRC. For instance, unlike other truth commissions, the TRC was not established to prosecute and punish perpetrators, but it was tasked with identifying and recording the truth leading to human rights abuses. A unique feature of the TRC was that it was empowered to grant amnesty to individual perpetrators who duly applied and made full disclosure. To my knowledge, no other investigate body, like a truth commission, has been given this important quasi-judicial power with the investigative task of truth recovery. This feature had the advantage that it elicited detailed accounts of gross violations of human rights, from the perpetrators themselves. The Commission was empowered to grant amnesty without the involvement of anyone, including the President of the Republic.

Another significant feature laid in the TRC's powers of subpoena, search and seizure. This led to questioning of witnesses including those who were implicated in violations but did not apply for amnesty. None of the Latin American Commissions, for instance, had the power to compel witnesses to come forward with evidence.

Another distinctive feature of the TRC was its openness to public participation. This enabled it to reach out on a daily basis to a large number of people both inside and outside South Africa with vivid images on their television and newspapers. For example, the public saw a security policeman demonstrating various torture techniques used on victims and others saw weeping victims recounting their untold stories of suffering. This enabled the nation to focus on values central to a healthy democracy: transparency, public debate and public participation.

Other countries, like Uganda held a few public hearings through its truth commission, but these were drastically lower than those of the TRC. Similarly, the Latin American truth commissions heard testimonies in private, away from the public eye. This was not something we did – we publicised all the hearings and invited members from the public to actively participate in these hearings and the work we were doing. This level of transparency inspired confidence and increased public interest, both locally and internationally.

Even the appointment of the 17 Commissioners was public and transparent. This included the appointment of the Chairperson of the TRC the emeritus Archbishop Desmond Tutu. The President could not merely appoint anyone he so wished to appoint. He had to appoint persons in consultation with cabinet and the process had to be transparent to the public. He further could not remove a Commissioner arbitrarily as the grounds of removal from the TRC were stringent and he could not remove any Commissioner on any other grounds except those listed in the Promotion of National Unity and Reconciliation Act.

The functions of the TRC

The first hearing of the TRC was held on 15 April 1996, when it sat in East London, Eastern Cape. Approximately five years were spent by the TRC in investigating, examining and recording the atrocities committed in the 34-year period. The hearings and the evidence unearthed by the TRC told a grim and harrowing story of how people were systematically abducted, tortured and killed. For instance, in one of the amnesty hearings, we were told of the ANC activist who was tied up to a tree with his feet, hanging upside down from the tree. A fire was lit underneath his head in order to burn his hair and scalp whilst the police sat nearby enjoying a barbeque and beers. The hearings evinced a blatant disregard and denial of fundamental human rights to those considered non-Europeans. Some of the most atrocious, inhumane murders were documented. The testimonies of those who lost loved ones at the hands of apartheid left one ashamed of being South African.

The atrocities that were unraveled left no doubt in anyone's sound mind that apartheid was indeed a crime against humanity. The TRC officially came to an end in July 1998, although its mandate was extended to 2002 to enable the Amnesty committee to complete its work.

Although there was pain caused by the TRC process, in the end it gave the victims of apartheid names and dignity, it gave them a voice which had been systemically silenced for decades. It brought the perpetrators to the front, held them publicly accountable for their evil deeds and enabled those affected by their violations to have closure. In the end, the TRC recorded the testimonies of approximately 21 000 victims, 2 000 of these testimonies took place in public hearings. Approximately, 7 112 amnesty applications were received but only 849 applications were granted amnesty while 5 392 amnesty applications were refused, and the rest were withdrawn. The reason why many applications for amnesty were refused is because amnesty was not freely given. The applicant had to satisfy the stringent requirements set out in section 20 of the TRC Act, which included full disclosure.

In the case of reparations, while it is trite that millions of South Africans suffered the brunt of apartheid; were the victims of many human right abuses, less than 22 000 people qualified for reparations under the TRC's reparation policy.⁵ This was one of the unintended results of the narrow construction of "victims of gross human rights violations". This meant that for a considerable number of South Africans, there has unfortunately and regrettably, been little or no formal recognition of the suffering they endured outside of government's lip service.

Having set out the background of the TRC, I interpose at this juncture to make a few salient points. Reflecting on the time of the TRC, it has become evident to me that the truth is both powerful and dangerous. This is because "[h]istorical truth... cannot be 'bottled' and administered as contemporary 'medicine' of the wounds of the past."⁶ Truth Commission generally face the challenge of having to employ the truth as a means of restoring justice and promoting reconciliation and peace, while at the same time, the truth-telling process has the attendant danger of recounting the divisive and emotive past traumas and atrocities. How does a truth commission balance the subjective and objective forms of truth without trivialising the truths of others, while elevating and prioritising the truth of some? How do you achieve this

⁵ Fernandez 'Reparations Policy in South Africa for the Victims of Apartheid' (1999) 3 *Law Democracy and Development* 209

⁶ Truth and Reconciliation Commission of South Africa Report volume 1 at 22.

without diminishing the legitimacy of the TRC and compromising the mandate of national unity and reconciliation?

We were alive to this danger as the TRC. Albeit our Report was an objective and authoritative account of the past atrocities, we were cognizant that it was possible and indeed probable that there were other accounts of the atrocities as our narrative consisted of personal testimonies of those who elected to come forward and share their stories of suffering. This created the idea of multiple truths. These multiple truths are told by different victims in their own words, some told with trembling and pain-stricken voices. However, this was acceptable because at the end of the day, the TRC aimed to put a "human face on all those who suffered and continue to suffer."⁷ It was meant to facilitate the process of reconciliation and peace, establish the truth through a dialogue between people who held different perspectives.

With that being said, it must be remembered that when the TRC was established, a choice had to be made between two models of justice which had been adopted by other jurisdictions when confronted with historical human rights violations and abuses in their transitional, post-conflict periods. These are the Justice Model and the Reconciliation Model. The former is primarily concerned with addressing questions of prosecution and punishment, predominantly characterised by retributive justice and criminal accountability. The latter is principally concerned with restorative justice, with its associated elements like truth-telling, and seeking reconciliation – this model is also known as the Truth Model.

As history has shown us, both these models of justice have their own inherent flaws. Should a country, on the one hand, adopt the Justice Model, then the citizens of that country must bear the consequences of living with hatred and vengeance, and perpetually recreating victims of injustices. While on the other hand, the adoption of Reconciliation Model will result in the oppressor and oppressed, the abuser and the abused to live together and peacefully co-exist while the government tries to press the refresh button. In essence, in this model, truth takes precedence over punishment and retribution. In order to achieve this truth-telling, an amnesty carrot had to be dangled before the perpetrators who committed the impugned atrocities. We chose this model, the Reconciliation model.

⁷ C Scott, "Combating myth and building reality", C Villa-Vicencio & W Verwoerd, Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission of South Africa (Cape Town, University of Cape Town Press, 2000) at 108.

In any event, the interim Constitution demanded reconciliation and national unity over retribution and retaliation. This is in accordance with the principle of *Ubuntu*, an African principle which guided and directed the manner in which post-apartheid South Africa would be founded. The late Chief Justice Pius Langa in his concurring judgment in *S v Makwanyane*⁸ (a landmark case that declared the death penalty unconstitutional and unlawful) defined *Ubuntu* as "emphasising communality and interdependence where the life of another is considered as valuable as one's own."⁹ Although the judgment does not make express mention of the elements of restorative justice, it did however contrast the principles of dignity and *Ubuntu* to the concept of retributive justice, which points to an indirect recognition of restorative justice.

The case of *AZAPO v President of the Republic of South Africa*¹⁰ explicitly deals with the TRC and its preferred model of justice. In this case, AZAPO, which was one of the liberation movements at that time, and the families of a number of prominent victims of apartheid approached the Constitutional Court and challenged the constitutionality of the TRC's amnesty provisions. This was because, as a result of the grant of amnesty, the perpetrator cannot be criminally or civilly liable in respect of that act. Equally, the state or any other body, organisation or person that would ordinarily have been vicariously liable for such act, cannot be liable in law.

The Constitutional Court in a judgment penned by the late Mohamed DP found that the sections were not unconstitutional and were indeed envisaged and demanded by the epilogue of the interim Constitution. In making this finding, the Constitutional Court supported the Reconciliation Model kind of justice to the predominantly western retributive or punitive criminal trial-based version. To this end, Mohamed DP rightly articulated:

"If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those

⁸ *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

⁹ Makwanyane judgment at paras 224-225.

¹⁰ *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672.

*who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimization.*⁴¹

Undoubtedly, this case affirmed the importance of restorative justice in the TRC process. Retaliation and vengeance had no room in the TRC. The TRC was there to heal the deep division and wounds that existed in South Africa, in order to create a dialogue and bring awareness to the untold stories of suffering and atrocities committed by police officers in the name of law and order under the apartheid government.

Part B: How is the TRC viewed today?

Did the TRC fully reconcile a once deeply divided society? Did it completely heal the wounds of the past? The answer is simply no. The TRC neither fully reconciled a deeply divided society nor completely heal the wounds of the past. So is the natural denouement that the TRC was a failure. Again, the answer is no. In my view, the TRC's mandate was never to suddenly reconcile and immediately heal but it was an event that formed part of a larger project. It was part of a larger conversation that the new South Africa was meant to engage in. The TRC was tasked, in essence, with facilitating the process of reconciliation and healing, through truth-telling, restorative justice and amnesty. However, it was never envisaged to be the ends in itself. No one can plausibly argue that the TRC was meant to heal and resolve the issues created by over 300 years of colonisation and over 50 years of apartheid.

A look at South Africa today shows that there is much healing and reconciliation to be done. Admittedly millions of South Africans, primarily black South Africans, are still dispossessed of land, experience abject poverty and do not enjoy quality basic healthcare and are thus subjected to avoidable diseases. For many, the promise of a bright future has been denuded and is at best illusory. Social ills like racism, dispossession, violence and corruption unfortunately still remain somehow engrained in South Africa. Even with a constitution that is hailed throughout the world, millions of South Africans feel marginalised and excluded. To them, the TRC process and the negotiated settlement meant nothing, except a political compromise by those in power.

⁴¹ *AZAPO* judgment at para 19.

However, this should not overshadow and trivialise the requisite work of the TRC. To my mind, without the establishment and interventions of the TRC, South Africa would be poorer and there would plausibly be greater animosity, racial tension and even a bloodbath. The TRC process was not perfect. However, with that being said the TRC was not a lost cause and it undoubtedly achieved tremendous objectives. I caution that in our quest of interrogating the TRC, we should be slow to ignore and downplay its contribution in providing a narrative of what transpired during apartheid and ultimately, playing a crucial role in ensuring a relatively peaceful transition.

I now turn to the criticisms advanced against the TRC.

Valji¹² argues that the TRC adopted a narrow construction of its mandate to investigate “gross violations of human rights”. The TRC, so the argument goes, acceded to and accepted certain definitions of what constitutes gross violations of human rights. These definitions were limited to killing, torture or severe ill treatment. The glaring issue with these definitions is that the TRC restricted its interpretation of its mandate as requiring it to deal with solely with individual acts of violence which occurred in the course of political conflict. As a result, this preferred interpretation of the mandate excluded the everyday administrative horrors of a system legally defined as a crime against humanity. The crux of this argument is that focusing on individual actions of violence does not accurately portray the experiences of the majority and ignores the institutional violence of the apartheid system itself, which manifested itself in forced removals, for instance.

Wilson¹³ asserts that the TRC’s adoption of restorative justice is a fallacy. He perceives restorative justice as a political myth that does not take into account the value and importance of retribution in healing the wounds of the past, and it also fails to consider the multiple variants of reconciliation and forgiveness. More poignantly, he argues that that elements of retribution were “sacrificed” at the altar of truth and reconciliation. Thus, for Wilson, a form of retributive justice that would promote the punishment of perpetrators; while encouraging redress for victims should be preferred.

¹² Valji “Race and reconciliation in a post-TRC South Africa” (2014) available at <http://www.csvr.org.za/wits/papers/papnv3.htm>.

¹³ Wilson “The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty” 2001 *SAJHR*531.

Nxumalo¹⁴ argues that the 1994 negotiations between the government of the time and black liberation movements were actually negotiations to reconfigure and reconstruct white supremacy and to dilute the suffering of blacks. He asserts that during these negotiations, the parties involved had to make a choice between two contending paradigms, i.e. democratisation and decolonisation. This supports the criticism that the TRC failed to address the historical legacy of racism in that it created a delusion in the South African community that “we can now move on” and that we have been able to develop a cohesive non-racial national identity in South Africa. The TRC has been criticised for failing to adequately acknowledge the role of race and politics and accordingly, it failed to fully delve into the “truth” surrounding racial privilege. Thus, while the anatomy of past racial privilege remains whole, the very rhetoric of reconciliation itself is now invoked to consolidate these privileges against encroachments, which seek redistributive justice or redress.¹⁵

Although these criticisms certainly have some merit and are pivotal to the achievement of a common goal, which is the betterment of South Africa and its citizens, they tend to ignore the significance of the TRC.

Reconciliation is a costly and risky process. Unearthing the truth about past violations and ill-treatment, either from an individual or a group of persons, is one of the crucial components of restorative justice as it provides closure to victims and commences the process of healing and reconciliation. We should not be blind to the fact that the TRC was about fostering unity between a deeply divided nation. It was about humanising and adding a name and face to those who were subjected to gross human rights violations. It was not merely about creating a national unity but it had, at its core, the interests of the people who made up that nation. We simply could not address the systemic oppression and inequality that black people in general experienced, without first creating a personal narrative of the horrors that people experienced.

It must also be borne in mind that the TRC was part of many other establishments and institutions that were created to provide redress and heal the wounds of the past. It was not

¹⁴ Nxumalo “The Fallacy behind the Previously Disadvantaged Category” (2015) accessed at <http://www.mediaforjustice.net/the-fallacy-of-the-term-the-previously-disadvantaged/>.

¹⁵ Valji “Race and reconciliation in a post-TRC South Africa” (2014) available at <http://www.csvr.org.za/wits/papers/papnv3.htm>.

necessary for the TRC to employ a broad interpretation of its mandate to include forced removals because the Land Commission for instance was set up for that purpose.

As to Valji's criticism, sight must not be lost that the definition of what constitutes gross violations of human rights is an acute reminder that the responsibility for building the bridge between dehumanising past and a just and democratic future did not just belong to the TRC alone. The TRC had to walk the tightrope between too wide and too narrow interpretation of gross violations of human rights. Moreover, the TRC had neither the lifespan nor the resources to implement a broadly constituted interpretation. A too narrow interpretation on the other hand would have added insult to the untold injuries and injustices experienced by many victims.

It is of course so that the apartheid system itself was evil, inhumane and degrading to many people who suffered under its existence. The focus of the TRC was neither on the effects of the laws by the apartheid government nor on the general policies of that government, no matter how morally offensive these may have been and indeed no matter how apartheid was a crime against humanity. This underlines the vitality of comprehending the TRC as but one of several institutions responsible for our transformation and nation building in post-apartheid South Africa.

The recognition and finding by the international community that apartheid was a crime against humanity has important consequences for the victims of apartheid themselves. Their right to reparation is acknowledged and can be enforced in terms of international law. The classification of apartheid as a crime against humanity emphasises the scale and depth of victimisation under apartheid and, to that extent, adds further weight and urgency to the need to provide adequate and timely responses to the recommendations already made by the Commission. It also enhances the legitimacy of the TRC's recommendations in respect of reparations, which now require urgent implementation.

This significance of the classification of apartheid as a crime against humanity has recently gained the attention in South African courts in the case of *Rodrigues v NDPP and Others*. Rodrigues, a former apartheid police officer who is indicted for the murder of a political activist, Ahmed Timol and for obstruction of justice, applied for a permanent stay of proceedings based on what he argues as an unfair trial based on the fact that the prosecution was delayed for 47 years.

The crime committed under apartheid has never been prosecuted before after the Commission filed its report. Therefore, this case will set precedent for the prosecution of the atrocious crimes that were committed under apartheid. The TRC, for instance, recommended more than 300 cases for further investigation or prosecution twenty years ago. To date, none of those investigations or prosecutions has begun. Since most of those crimes occurred in the 1980s, 1970s or earlier, there is an element of urgency to finally prosecute those cases due to the advanced ages of the perpetrators.

A finding that this crime is still prosecutable will remind the nation that the perpetrators of these grave crimes are not beyond the law and that justice has no expiry date.

However, I can confirm at this point, that the High Court that heard this case held that that while the delay in prosecution has caused some measure of prejudice, it cannot be said to taint the fairness of the proposed trial.

As South Africans we were aware that our history was saturated with horrendous occurrences: the Sharpeville and Langa killings; the Soweto student uprising; the Church Street bombings; the St James shootings; and others. We also knew about the deaths in detention of political prisoners, such as the likes of Stephen Bantu Biko. Our country was soaked in the blood of its people, most of whom were black. The TRC was given a mandate to deal with this history and to bring it alive in a way that would promote national unity and reconciliation. The cardinal question that confronted the TRC was how it was to deal with this mandate. There was no framework for the TRC and no one knew if the TRC's work would sow the seed of reconciliation at all, let alone achieve national unity. Moreover, the TRC had to consider the issue of granting amnesty to applicants, which had never been done before in other commissions elsewhere. Thus, the TRC achieved greatly, despite this uncertainty.

I can confidently state that the TRC indeed sowed the seeds of reconciliation and national unity. Outside of the truths that were unearthed by TRC, it made practical recommendations that went beyond its broad commitment to reconciliation, healing and unity. These recommendations include:

- Developing a strong human rights culture that would prevent future gross violations of human rights. Central to this is the recognition of socio-economic rights;
- The government should close the intolerable gap between the advantaged and the disadvantaged by giving urgent attention to transformation of education, the provision of shelter, access to clean water and health services and the creation of job opportunities;
- The private sector should consider establishing a fund for training, empowerment and opportunities for the disadvantaged;
- The government should explore possible resources to combat poverty;
- Government to take a ruthless stand against inefficiency and corruption; and
- Attorneys-generals should pay rigorous attention to prosecuting members of the SAPS "found to have assaulted, tortured and/or killed persons in their care".

Part C: Looking to the future

Value of Memory

Although the truth does not necessarily lead to healing and reconciliation, it is often the first step. You cannot expect too much too soon when one speaks of reconciliation. As I have stated before in 2017, reconciliation is like a tree that needs to be watered continuously, until it grows, and takes firmly to root, and then you enjoy the benefits of the shade the tree will provide.

The TRC has planted the necessary seeds for this tree of reconciliation. However, at the pith of this seed is memory. The TRC binds our conscious to never forget our past. This notion of memory is of particular import in relation to the legacy of the TRC. Countries are built by buildings and borders, using bricks and mortar. They consist of schools, hospitals, roads, houses, and other magnificent infrastructure. In contrast, societies consist of a different fabric.

As Ngcukaitobi¹⁶ rightly states:

"The link from one generation to the next is passed by word of mouth. In the modern world those linkages are passed down in the written form. So, books of history, books of science and books of language are instruments to connect us to a world we never inhabited. They connect us to people we never met; places we have never seen; and a culture we can only imagine. But, the path to creating a society lives and survives only

¹⁶ Ngcukaitobi in his inaugural Inaugural Lecture given in commemoration of the Boipatong Massacre, of 17 June 1992, at the Vaal University of Technology on 5 July 2019, available at <https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ausc%3A6ec56ce8-ca32-4919-a320-cb7c52e9af7a>.

through memory. Memory is not confined to a generation, experiences to personal, and to a single lived reality. Memory is cross-generational; it is interpersonal; and it is the ability to transport and transpose one reality to the next. Stories of the past help us not only to know how our predecessors lived, but how they shaped our own living. Memory teaches us how to be. Without memory we might have a country, but no society."

With that in mind, it is particularly interesting that the interim Constitution and the statute that establishes the TRC refers to a "society" and not a country. Thus, one of the objectives of the TRC was to create a shared memory for South Africa. A shared memory is a meta-narrative of the truth about the country's past. Once a shared memory and experience is in place, it then becomes arduous for anyone to deny the occurrence of gross human rights violations and abuses by the state. The TRC's multifaceted truth is not necessarily an officially sanctioned truth but is instead an amalgamation of ideas about the past with which all South Africans must at least contend.

Should we forget the memory of apartheid as recorded and documented by the TRC, we risk forgetting ourselves. An inclusive remembrance of the painful past is essential to the creation of national unity, transcending the divisions of the past. Notably, it is out of the memory of apartheid, the negotiated settlement and the TRC that the Constitution was born.

In addition to the physical archive of memories created by the TRC, it also serves as a treasure trove of lessons for societies that are going through a transitional phase. While the TRC provides a window from which to see the injustices of the past, it simultaneously is a door to a future of reconciliation, healing and peaceful co-existence.

Lessons from the TRC

With that being said, the first lesson to be gleaned from the TRC process is that truth commissions should be vehicles and tools for accounting for past atrocities and injustices as well as vehicles to build a future. They better serve transitional countries and societies if they perform this dual role. A truth commission that is primarily focused on the past and punishing perpetrators may find itself creating a hostile environment for any reconciliation. In fact, they may only be creating a society founded on hatred and vengeance. This requires a delicate balance between holding onto the past in order to unearth gross human rights violations and looking forward into the future to facilitate reconciliation and healing. In my view, the TRC achieved this.

In the same vein, it must be understood that reconciliation is multi-faceted and must occur at various levels. The TRC was not concerned with surface-level reconciliation; but was concerned with deeper, meaningful reconciliation between the affected races, the communities and the nation. This is why it was important to invite both the victims and the perpetrators to the table, to allow everyone to tell their truth. Reconciliation cannot be truly achieved by silencing either the victim or perpetrator and preferring one voice.

Furthermore, I cannot emphasize this enough: A truth commission cannot achieve its objectives without the assistance and backing of a democratic institutional infrastructure. And a truth commission cannot operate and do its work in a vacuum, without having regard to the material conditions and social injustices that permeate that society. It cannot be divorced from the realities of the community and the nation it is trying to reconcile. If it is, then it is highly plausible that the commission will lose legitimacy and be rendered ineffective.

The process of reconciliation should go hand in glove with economic redress to the disadvantaged members of society. The latter should not be permitted to lag behind. In its report, the TRC made it perspicuous that the government should close the gap between the advantaged and the disadvantaged members by giving urgent attention to the transformation of the education system, provision of shelter and the creation of job opportunities. Regrettably this has not been fully realised.

An often-ignored lesson from the TRC is how it opened the eyes of many apartheid beneficiaries to the atrocities committed by the apartheid government. The candid public hearings from both victims and perpetrators forced many of those who were oblivious of the harshness of apartheid to interrogate their own complicity. Many white people were ignorant of what was going on throughout the country and merely thought that some of the "alleged" atrocities were merely exaggerations. The public hearings played a huge role in disabusing them of this belief, especially when the perpetrators themselves confessed to their crimes. Perhaps, this also caused many other white people to actively fight against any forms of injustice and racism because they now started to understand the violence of bigotry. With that being said, we do not remember and revisit the past in order to pass moral judgments, we remember in order to do better.

Truth commissions by their very nature are there to facilitate and ensure the emergence of a responsible society committed to the affirmation of human rights.

There can be no healing without the truth. The granting of amnesty therefore plays a crucial role in this regard. The idea of inviting a perpetrator to the TRC and giving them the platform to confess their crimes, without the fear of punishment, was a significant factor that incentivised numerous perpetrators to come forward and provide much needed closure to the victims. In the South African context, amnesty was the only viable option given the delicate balance of political and military forces at that time. Of import, the TRC did not require the perpetrators to apologise in order to get amnesty, however, many of them did apologise and ask for forgiveness. This was good because there can be no meaningful reconciliation without forgiveness.

On the notion of forgiveness, the question has rightly been raised as to whether or not the TRC paved the road for reconciliation. First, what constitutes forgiveness? Forgiveness is a choice, not a duty or an obligation. It is the conscious decision to intentionally let go of the wrongs and harm that one has endured as result of someone else's actions and not holding on to the feelings of resentment and hurt, even though you have legitimate cause to hold on to those feelings. Thus, it goes beyond the need and ability to punish a perpetrator which falls squarely into the domain of amnesty. The TRC did not require the victims to forgive the perpetrators because you can never coerce forgiveness from a person in the same way that you cannot force reconciliation. It must be organic, and it must result in the victim feeling a sense of empowerment and autonomy.

The role of the TRC was to provide a platform for the perpetrators to tell the truth and in so doing, give closure to the victims. In certain cases, the perpetrators would reveal the location of the shallow graves in which some of the deceased were buried – this gave the victim's family the opportunity to bury their loved ones in a manner that restored their dignity. In essence, our role was to foster an environment that would lead to forgiveness and reconciliation. The TRC courageously and energetically endorsed the process of finding out the truth and made forgiveness possible. The TRC in many ways used legal instruments to foster forgiveness and reconciliation.

In the quest of forgiveness and reconciliation, there must be full disclosure of the truth. One of the legal tools used to get the truth and foster forgiveness was the granting of amnesty. Another tool was the awarding of reparations and compensation to victims. Accordingly, the TRC as a legal institution had an effect on human relationships and interactions. To my mind, forgiveness plays a pivotal role in reconciliation and transitional justice.

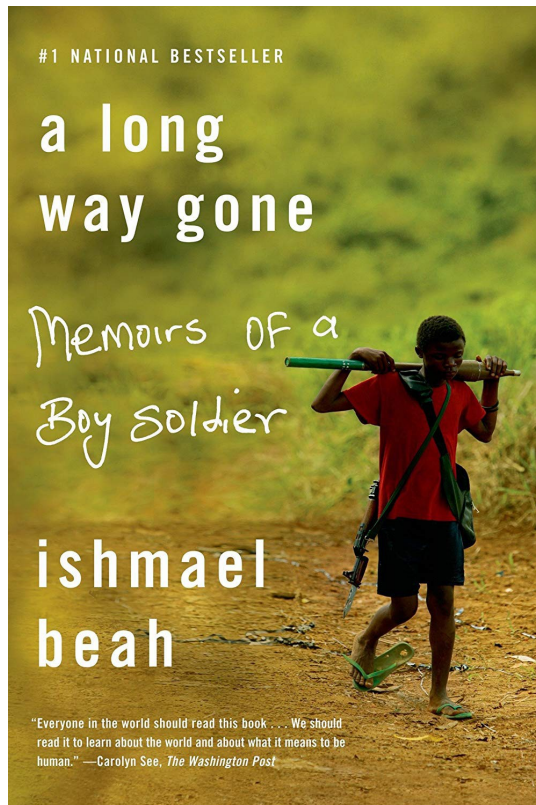
In South Africa, the amnesty provisions were made to prevent members of the security establishment from scuppering the negotiated settlement. As I have stated before, without that negotiated settlement, South Africa would have been a bloodbath.

Amnesty also brings to the fore most of the perpetrators of gross human rights violations. For instance, by focusing on the individual and popular perpetrators – as the Nuremberg Trials and Tokyo War Tribunals did – many perpetrators to date remained in obscurity.

We should never lose sight at the fact that truth commissions are not another government apparatus that have been established to protect certain political interests and mete out vengeance on certain people. Truth commissions, through their truth-telling, create and provide a space for victims of human rights abuses; and give them public recognition of the trauma they have endured and restore their dignity.

On a more practical level, due consideration must be given to the lifespan of a truth commission. In South Africa, the TRC's lifespan had to be extended because it had to investigate for a long period (about 30 years) given the extent of the violations and the mandate period. This work could not be done in less than 5 years. Thus, the longer the period of human rights violations, the longer the duration of the commission should be in order for the commission to properly conduct its work and complete its task.

In conclusion, has the TRC achieved its objective of reconciliation and national unity? I believe it has. It did achieve many successes including uncovering the truth about many atrocities. It began the process of dialogue and facilitated the process of healing and reconciliation. There is still much to be done, however. I believe that the time will come when the tree of reconciliation will bear the fruits of reconciliation and national unity.



Children Who Were Soldiers

*From the Diaries of the former Under Secretary
General and UN Special Representative for
Children in Armed Conflict,
Radhika Coomaraswamy*

Foreword

Thomas Lubanga was the first person arrested and put on trial at the International Criminal Court. The court convicted the Congolese militia leader of the war crimes of enlisting, conscripting, and using child soldiers during the conflict in eastern Democratic Republic of Congo. Radhika Coomaraswamy, then Under Secretary General of the UN, testified before his trial. Reading from her diaries, Radhika Coomaraswamy, Bok visiting international faculty, spoke about her encounters with child soldiers and other children of war, including Ismael Beah, author of *A Long Way Gone* at a talk at Penn Law in October, 2019.

Coomaraswamy served as Under Secretary General and the UN Secretary General's Special Representative for Children in Armed Conflict. Currently, Coomaraswamy serves on the United Nations fact-finding mission to Myanmar. Her talk, "Diaries from the Field," reflected personal accounts of narratives from the field during her long tenure as the first UN Special Rapporteur on Violence against Women and as the UN Secretary General's Special Representative on Children in Armed Conflict. As UN Special Rapporteur for Violence against Women, Coomaraswamy defined new standards of due diligence and state responsibility to hold states' parties accountable to violence against women. As Special Representative for Children in Armed Conflict, she worked with governments, militia, and non-state actors to free child soldiers and create repatriation modalities for the newly released child soldiers to rehabilitate and reenter their communities.

Coomaraswamy has received many awards for her international humanitarian law work, including honorary doctorates from Amherst College, Katholieke Universiteit Leuven, the University of Edinburgh, the University of Essex, and the CUNY School of Law. Coomaraswamy is a graduate of Yale University, Columbia Law School, and Harvard Law School.

The following narrative is excerpted from her talk at the University of Pennsylvania Law School in October 2019 and is a deeply personal story of her engagement with child soldiers in the field. It is a reflection on conflict and the complex narrative of the potential of law and legal institutions to strengthen restorative justice. This profoundly moving meditation is a reminder for groups divided by race, ethnic, religious, and other differences to develop the capacity- grounded in law- to reconcile and rebuild communities and institutions.

No part of this report may be cited.

Rangita de Silva de Alwis

Children Who Were Soldiers

Moi was only thirteen years old. He and his best friend were playing in the backyard of his house in Gulu, Uganda. Suddenly, the Lord's Resistance Army (LRA), led by Joseph Kony, swept into the village. At gun point, he and his friend were asked to act as porters and carry the loot from the village and follow the LRA to their hideout. His friend slipped and fell and spilled his loot and was promptly shot in the head by a drunken commander. They were all taken to the hideout and were immediately given training to raid villages, kill, rape, and murder people. The stories he told are too gruesome to repeat. Kony was supposedly fighting for the rights of the Acholi people, but he had become a murderer and a child stealer. For some years, children marched hours from their villages into city shelters run by NGOs to prevent being recruited. Kony is still around. His mighty army has been broken into multiple ragtag units who scour the thick jungles of the Central African Republic as the countries of Africa and the world unite against him.

After years of fighting, Moi ran away and came to the UNICEF shelter. For a fifteen-year-old, his shoulders were broad and muscular, and his muscles firm. I was slightly frightened by the wildness in his eyes. As he looked at me, he looked like a man soldier. He told me his story in fits and starts and not very coherently. Then his face saddened. He told me that UNICEF had said that his father would come to see him, but he had not come. His whole body changed. He slumped. "My father must be afraid." He became a child and started to weep. I put my arms around him and he drew closer, resting his head on my shoulder. UNICEF reassured him that after a few weeks of getting him accustomed to civilian life they will take him to his family. He was not convinced. Homecoming is not always joyful. It can be very stressful especially when you know your child has killed and looted. Abducted and now hated, Moi will have a difficult future once he leaves the confines of his protective UNICEF shell

Immanuel Jah walked into my room unannounced. "Hey, ma'am! I hear you are helping the children. I was a child soldier in South Sudan. I want to help. I am a rap singer." I stared at him with his Rastafan hair and mischievous smile. My UN imagination was reaching its limitation. My staff came to the rescue. The Security Council was being difficult about a particular resolution and there was a discussion to see how we can move forward. I was a little skeptical. Anyway, shaking the UN up with the reality of children was one of my special delights. "O.K. Immanuel can say a few words about the experience he went through." The meeting was convened at the technical level, a reluctant council not wanting to push the boundaries. I suddenly stiffened. Immanuel was not going to speak he was going to sing, a rap song at that. "Oh, no!" I said to myself. I was not aware if protocol would permit it. Well, he was wonderful. His song ended when he pronounced loudly, "I am here because someone cared; I am here because someone dared." It may have put some energy into member states. The next day, the resolution passed.

The next time I met Immanuel was at the ICC on the final day of the Lubanga trial. We sat on either side of Angelina Jolie and I was to explain the legal niceties to her. Immanuel as mischievous as ever said, "Hey, Angelina! Your lips, they are African lips. You must have African blood." I was mortified. Angelina smiled, gracefully, and said she had "Cherokee blood" and those were "Cherokee lips." Immanuel came by the office often and kept us amused and at my felicitation composed a rap song called "Mama Radhika." I was too shy to ask that it be recorded. Instead, I have a memory that is appreciated and will remain soft and nebulous on my mind.

The most intellectual of all of them was Ishmael Beah. Having graduated from the United Nations School and Oberlin, he wrote a book about his life as a child soldier in Sierra Leone. He admitted to all the terrible acts of violence that Charles Taylor's proxies made him do as a child soldier. The famous stories of the chopping of hands and legs were done by child

soldiers, high on a mix of drugs and alcohol that were administered to them. Perhaps the most telling part of the story was their reaction when UNICEF “rescued” them. The rebel leaders were role models and the children considered themselves to be soldiers. They were furious. When they were taken to a UNICEF shelter in turquoise tee shirts, they just rioted, ripping the place apart. Gradually they came to terms with their new life. A young nurse had a profound influence on Ishmael, as did school. Finally, an American teacher and “storyteller” found him and was impressed by his intellect. She adopted him and brought him to New York where he got scholarships, received psychotherapy and is now studying for a Ph.D. In actuality, Ishmael is a very shy and gentle young man who loves to talk ideas. Not for him the talking points and messages of the UN. He wanted to capture the nuances and the root causes of children in armed conflict. For this the ardent activists were not great fans, but I was always impressed with the way he made a presentation. Despite his terrible experiences, he did not play to people's emotions but to their intellect, challenging their ideas and asking them to look deeper into a complicated question. Kony and Charles Taylor produced caricatures but in countries where there are no jobs or resources, the soldier, with strong muscles, discipline, carrying a gun, and wearing those famous sunglasses, was the role model for a generation of young, African males in the 80s and the 90s. Ishmael would repeatedly say, “we should ask why?”

Grace, though, was like my daughter. Born to an upper middle-class family in Gulu, Uganda she went to an elite Catholic convent. The LRA raided the convent and ran off with the senior class, including Grace. The Italian nuns ran after them and the Mother Superior fell at Kony's feet and begged him to let them go. He gave her back half and took the other half. Grace was in Kony's bunch. She suffered the worst indignities that a woman could suffer, mainly in southern Sudan. She managed to escape when a Ugandan army patrol was passing. Things were calmer now in Gulu. She went back to school, though with a new Mother Superior,

graduated with honours and then was received into an MA programme in the US. She came to my office to offer her assistance.

The Security Council was having its famous debate on sexual violence against children, asking groups to be listed for possible sanctions for this violation. We thought Grace would make a great contribution, so we asked the President of the Council to let her speak. He agreed. The Secretary General and all the ambassadors were there since it was the opening session. She made a passionate and moving speech. When she ended spontaneous applause broke out from the round table where normally applause is prohibited. Needless to say, I beamed with pride and the resolution passed easily.

Grace had one request. She wanted to meet her former Mother Superior who at a very old age ran behind Kony and fell on her knees and begged him to let the children go. She also wanted to thank her for the education that she had received. The Mother Superior was now back in the Vatican. I had received an invitation to meet the Pope. I took Grace with me. Being deeply religious, this meant a lot to her. As a born Hindu with a broad spirituality I did not know quite what to do — cover my head with the veil, kiss his ring, kneel on the floor, or generally act awkward. Finally, the Vatican worked out a protocol that was acceptable. The Pope grabbed Grace's hand and spoke to her for a long time. The glow on her face was magical. We then went onto meet the Mother Superior. That moment will be etched in my mind forever. The Italian lady had grown old and very frail, but they rushed towards each other and grabbed and kissed each other all over. They cried and clung to each other for a very long time. I found that I could not stop myself from weeping. I looked at my hardnosed assistants and tears were trickling down their faces. This, too, would be a moment that they would never forget.



Women's Leadership in Law and Foreign Policy

Ambassador Crystal Nix-Hines, Former Permanent Representative to UNESCO

"Since wars begin in the minds of men and women, it is in the minds of men and women that the defenses of peace must be constructed."

- UNESCO Constitution

Foreword

"I was raised in a home where public service was regarded as a duty and a privilege, more important than wealth or fame."

"My temperament is as an intrapreneur: a person who changes organizations from within."

-Crystal Nix-Hines

Against the backdrop of the UN General Assembly's 73rd Session, Ambassador Crystal Nix-Hines spoke at Penn Law in September 2019. Ambassador Nix Hines's moral and legal philosophy was forged by her parents, Dr. Lulu Mae Nix an appointee of the Carter Administration and Theophilus R. Nix Sr, the second African American lawyer to receive his law license in Delaware and who felt a profound responsibility to open doors for minorities, women and the marginalized. Nix Hines has said that as a beneficiary of her trail-blazer parents, "I too would like to effect positive change in the world."

Nix- Hines was appointed by President Obama as United States Ambassador to UNESCO and then returned to Quinn Emanuel as partner in its newly launched Crisis Law and Strategy Practice Group. During her tenure with the firm, Nix-Hines worked on numerous engagements at both the trial and appellate levels, including three successful cases before the U.S. Supreme Court. Nix- Hines graduated from Princeton University where she was a classmate of Michelle Obama and the editor-in-chief of The Daily Princetonian. From 2006 she served for nine years on Princeton's Board of Trustees. She graduated from Harvard Law School, where she served as an editor of the Harvard Law Review with Barack Obama. She clerked for Justices Thurgood Marshall and Sandra Day O'Connor of the U.S. Supreme Court. Nix-Hines has also worked as a writer and producer on several network television shows such as Commander - in -Chief, Alias and The Practice. She began her career as a reporter for The New York Times.

Few women in the law have seamlessly straddled private and public leadership in the way Nix- Hines has. As a Counsellor to the State Department, she helped establish the International War Crimes Tribunals for the former Yugoslavia and Rwanda which have changed the jurisprudence of international criminal justice and feminist legal theory.

On the under- representation of women in foreign policy, Secretary Madeline Albright famously once said: "It used to be that the only way a woman could truly make her foreign policy views felt was by marrying a diplomat and then pouring tea on an offending ambassador's lap." Despite new theories of change like the Feminist Foreign Policy forged by the Swedish government, there is still a long way to go in the US: On average, women constitute 20 percent of US Ambassadors.

Nix- Hines reflected on diversity and inclusion as cornerstones of a new global order. In a world where, since 1992, women only account for 2.4 percent of chief mediator of peace agreements and 9 percent of peace negotiations, in a world where only one in five drafters was a woman in 75 countries that reformed their constitutions from 1995-2015, Nix- Hines continues to bend the arc of the moral universe toward justice for women and minorities.

Rangita de Silva de Alwis

Address by Crystal Nix Hines

Thank you, Rangita, for that warm introduction. It is a privilege to share my thoughts on Women in Leadership on the Global Stage with you and your students.

It occurred to me as I was taking the train down from New York that we have two very prominent examples of women on the global stage – Nancy Pelosi and Greta Thunberg, the 16-year-old Swedish girl who is leading a movement on climate change. I don't intend this to be a partisan talk – in fact we need old-fashioned bipartisanship now more than ever. But whether you agree with them or not, whether you are for impeachment or not, whether you accept climate change or not, it cannot be denied that the eyes of the world are on Nancy Pelosi, and increasingly, young activists like Greta. Textbook examples of the exercise of leadership.

One of the things my parents always taught us is that you need to be ready for whatever comes your way –so get the education, get the skills, and most importantly, have the integrity and strong moral compass to make the right decisions in whatever circumstances you find yourselves.

And that doesn't just apply to leaders in the national spotlight. It applies if you are a worker bee in a large bureaucracy, an employee in a global corporation, or a non-profit or working for a powerful Hollywood celebrity. Don't be an enabler. Don't put your head down and shrug and say it's above your paygrade. Don't excuse things that you know deep down are not right. Your generation is going to have to solve some of our toughest problems – issues like gun violence, and climate change and the growing inequality gap. And we need people of courage and character and emotional and intellectual fortitude to engage and make a difference.

And I believe we will see more progress if we place more of an emphasis on ensuring that we have all voices and perspectives at the table. Over the past two decades, our world has made significant progress when it comes to Diversity & Inclusion because there has been a renewed focus, centered on not only bringing diverse talent to an organization but creating an environment that encourages them to stay. We are seeing women and minorities being promoted to significant positions, and the growth rate of women GCs in Fortune 500 companies continues to climb, reaching a record in 2017 of 32 companies or 6.4 percent (even seeing the first Latina Fortune 500 CEO).

And yet, despite how far we've come, to this day – an astounding 85% of lawyers are white and 64% are male, despite a national population that is more than 50% female and 38% non-white. Further, according to a recent survey of 2,827 lawyers, female lawyers, and especially women of color, are more likely than their male counterparts to be interrupted, to be mistaken for nonlawyers, to do more office housework, and to have less access to prime job assignments or the ability to be a rainmaker. America can do better.

A Professor of Law at Stanford said it this way: "Law is the least diverse profession in the nation . . . [a]nd lawyers [simply] aren't doing enough to change that." Unfortunately, our efforts seem to have reached a plateau.

To quote from a report published by the New York City Bar Association: "The data show that straight, white men continue to occupy the vast majority of partner, equity partner, and other leadership bodies in law firms [and corporations]." In fact, over 90% of law firm chairs, managing partners, and others in key leadership positions are white.

And the numbers are not improving, according to a recent Law360 survey. What is particularly troubling is the number of minorities in firms has remained relatively flat, hovering around 3 percent, and the trends are not improving, according to a 2018 Vault

Survey. Racial minorities comprised only 8.2 percent of equity partner positions, a number that has barely increased over the past four years. A stunning 85 percent of African American women leave law firms by their seventh year, according to the ABA.

So much like the tech companies disrupting our traditional ways of doing things, we need new approaches to diversity and inclusion that will pave the way for progress and innovation. Think about the dictionary definition of disruption: disturbance or problems that interrupt an event, activity or process. In our context, I am talking about interrupting the status quo that has become somewhat comfortable or indifferent to the current inequalities and finding tangible ways to foster real change.

How can we do that? With deliberate intention. Even the smallest stones disrupt the surface of water, and if a single stone's disruption is mirrored by more and more stones, the face of the water will, eventually, change.

I had the privilege to serve in the Obama Administration for a President who believed both in American leadership and in the importance of international collaboration to solve some of the world's most pressing global issues. That approach was welcomed at the organization to which I interfaced as ambassador, the United Nations Educational, Scientific and Cultural Organization (UNESCO). Comprised of 195 Member States, UNESCO was founded after the ashes of two world wars to promote international cooperation in the areas of education, science and culture and to "promote peace in the minds of men" – and now women.

When I got to Paris in 2014, I worked with my team to determine where we could have the most value. We identified two gaps in the work that was being done – preventing violent extremism and helping girls and women obtain 21st century skills in the STEAM fields – STEM plus the "A" for art and design. We launched two global public-private partnerships to address these issues.

The first was the global partnership “PeaceWorx,” launched to develop and deliver tools that empower educators and students to prevent violent extremism through global citizenship education. When young people feel isolated and cut off from opportunities, they become prey for terrorists to radicalize them. That's why it's so important we are vigilant and engaged in educating youth and helping countries move forward. When we talk about encouraging inclusion, I want to underscore that it can be a matter of life or death in the international arena. The threat of attack is global.

The second partnership we launched was “TeachHer,” which equipped teachers with state-of-the-art education in STEAM skills so they can encourage girls and young women to pursue these careers. Despite a saturation of low-skilled labor and an unmet global demand for skilled technology and engineering workers, many young women never even consider such careers. In fact, we know that if young girls aren't exposed to STEAM fields by middle school, it is unlikely they will ever consider such a career. Globally, women account for less than 30 percent of the world's researchers and make up only 10 to 15 percent of the engineering workforce internationally.

The national security arena is no better. A report by Foreign Policy Group found that more than half of graduate students of international affairs are female, yet women have never exceeded 20 percent of senior positions at the Defense Department, 40 percent in the State Department. Women make up 20 percent of new lieutenants, but only 12 percent of colonels and less than 10 percent of generals and admirals.

To combat these trends, a group of foreign policy experts has started the Leadership Council for Women in National Security, which has challenged all 2020 presidential candidates to pledge gender parity in national security posts if elected. 15 contenders have signed on so far. But frankly I get tired of these statistics—in 2019. I want to see more breakthroughs. I

want to see more women and more minorities become leaders, game-changers, and rain-makers in their law firms, corporations, and public interest organizations. And not just because it's the right thing to do – although it is – but because it makes business-and-organizational sense. The business case for diversity, in fact, has never been stronger – numerous studies show that diverse teams and organizations produce more results, make better decisions and deliver more value. And we need to be the people who actualize this potential.

The late Supreme Court Justice Thurgood Marshall, for whom I clerked years ago, said it best: We must dissent from the indifference. We must dissent from the apathy. We must dissent from a government that has left its young without jobs, education or hope. We must dissent from the poverty of vision and the absence of moral leadership. We must dissent because America can do better, because America has no choice but to do better.

Like him, I, too, believe that America can do better but the catalyst for such change can only be brought on by disruption.

The questions we must all ask ourselves are: “What can I do to dissent? How can I challenge overt hostility towards diversity if I confront it? How can I overcome diversity fatigue? What can I do to disrupt the status quo in my law firm or in my legal department or my law school? What can I do to make the spaces I navigate more diverse and bring more diverse voices to the table?”

These are the questions that can move us toward the type of disruptive energy that will effectuate the fundamental change and greater inclusion we all seek. But it is not enough to ask the right questions. These questions beg for smart and innovative solutions.

So, where can you start?

If you join a law firm, perhaps that means building a referral network that you can use to refer to diverse attorneys the cases your firm can't take on. Or maybe it means sponsoring or mentoring a high-potential attorney with a diverse background. For those in corporations, perhaps that means introducing whoever purchases legal services in your department to your diverse law firm contacts. For those of us in other spaces, that could mean volunteering with pipeline programs or engaging with your local bar association about how to stem the hemorrhaging of diverse talent in your law department.

It is sometimes disappointing to me that women and minorities do not use all the disruptive power we have. As organizational psychologist Ronald Riggio put it: "Men's friendships are often based on shared activities (e.g., poker or golfing buddies), and are more 'transactional'—reciprocating favors and working together on projects." Referring business back and forth is expected.

But a recent Forbes article interviewed many professional women and found that: Women who received an ask from a friend said they didn't expect their friends to hit them up for business and when they did, it sometimes caused an unspoken tension that dampened their enthusiasm for the relationship. Some even began to doubt the true motives behind the friendship in the first place. Others went so far as avoiding those who might ask for business later.

What does this tell us? Women need to help each other overcome this discomfort and be more proactive about helping each other. So, here are three specific things you can do: Ask how you can help every time you meet with a woman—socially or professionally. Be as direct as possible- it tends to elicit an actionable response, rather than vague promises to follow up.

Recommend friends to friends. We need to intentionally promote each other as the experts, leaders, and business resources we are, particularly since women are generally more prone to highlight others' accomplishments rather than their own.

Seek women out—don't wait to be approached. With or without a concrete need, women need to actively build their professional support system and network. If you have a need, ask for help, and if you don't have a need, ask how you can help.

Ultimately, no matter the commitment or the path you take, everyone must have a hand in this work if we are going to make progress. And that includes white men too.

The New York City Bar Association's report says that: "Unless we engage non-minority members . . . in inclusion efforts, these percentages will never change—there is simply not a critical mass of women and minority attorneys at the most senior levels of leadership to effect change." So again, we need to partner together to achieve real results, and men need to use their power to insist on inclusive teams.

In my faith tradition, one of the sermons I heard that has stayed with me says that all of us should have a Paul, a Barnabas and a Timothy in our lives. A Paul is someone who mentors you and advocates for you, helps you build your career. A Barnabas is someone on your own level, a close friend, where you support each other. And a Timothy is someone you mentor – whose career and life you are invested in advancing and supporting. Sometimes we are so intent on finding the Pauls we neglect the Timothys.

When I was on the Princeton Board of Trustees, we had a dinner with first-generation students, and their stories were incredible. One woman had to study with a coat on because they didn't have any heat at home. Another had to dodge gangs to get home safely. But

they all had someone – a coach, a teacher, a pastor, a chance encounter with an alum – who gave them hope and a vision that they could achieve more for their lives than their circumstances predicted.

Let's be those people. Let's together be purveyors of hope and intentional, determined catalysts for diversity and inclusion.

Just remember- even the smallest stones will still create ripples of change.

Thank you.

This semester, Penn Law's International Programs hosted trailblazing women of color for substantive engagement with the law school community. These leaders included Roza Otunbayeva, the former President of Kyrg Republic and the first women head of state of a Central Asian Republic, Crystal Nix-Hines, the first black Ambassador to UNESCO and Partner at Quinn Emanuel, Justice Khampepe, the first woman acting Chief Justice of South Africa, Radhika Coomaraswamy, the first UN Special Rapporteur on Violence against Women and Special Representative for Children in Armed Conflict, and Sandie Okoro, the first black General Counsel of the World Bank.

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