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Tackling the Question of Legitimacy in Transitional Justice: Steve Biko and the Post-Apartheid Reconciliation Process in South Africa

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Abstract
This thesis seeks to determine and understand the impact of the Steve Biko case on the effectiveness of the post-apartheid reconciliation process in South Africa. The Biko case is an example of a highly visible challenge to the South African government’s chosen method of post-apartheid reconciliation, as Biko’s own family did not believe in the process and fought elements of it from its inception.

Steve Biko was a noted anti-apartheid activist who founded the Black Consciousness movement, which advocated for black South Africans to be proud of their blackness. Biko died mysteriously and suddenly in police custody in 1977. The apartheid government conducted an inquest into his death but found no evidence of wrongdoing or criminal activity. After the end of the apartheid regime in 1994, the new government of South Africa negotiated the Truth and Reconciliation Commission (TRC) to attempt to mend the wounds of both white and black South Africans during apartheid, avoiding typical Nuremberg-style trials. However, this unique method of restorative justice, which would provide amnesty to human rights violators who divulged the whole truth of their crimes and could demonstrate that they acted for political motives, greatly upset Biko’s family. His family members desired prosecutions of the apartheid police involved in Biko’s death, and they challenged the constitutionality of amnesty, with the support of Black Consciousness group AZAPO and other victims’ families, to the newly formed Constitutional Court of South Africa. However, they lost their case, and soon thereafter had to face five apartheid police officers’ applications and hearings for amnesty in the death of Biko. In the end, all five officers were denied amnesty, yet there was not sufficient evidence to subsequently prosecute them for their crimes.

After detailing and analyzing the handling of the Biko case, while also discussing the truth versus justice dilemma in the pursuit of peace through transitional justice in divided societies, I will argue that the Biko case actually reinforced the legitimacy of the entire reconciliation process in South Africa, even though Biko’s family members lost their case against the government and did not see Biko’s killers prosecuted.

Keywords
South Africa, Steve Biko, Apartheid, Truth and Reconciliation Commission, AZAPO, Human Rights, Transitional Justice, Constitutional Law, Political Science, Eileen Doherty-Sil, Doherty-Sil, Eileen

Disciplines
Political Science
Tackling the Question of Legitimacy in Transitional Justice:
Steve Biko and the Post-Apartheid Reconciliation Process in South Africa

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ABSTRACT

This thesis seeks to determine and understand the impact of the Steve Biko case on the effectiveness of the post-apartheid reconciliation process in South Africa. The Biko case is an example of a highly visible challenge to the South African government’s chosen method of post-apartheid reconciliation, as Biko’s own family did not believe in the process and fought elements of it from its inception.

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After detailing and analyzing the handling of the Biko case, while also discussing the truth versus justice dilemma in the pursuit of peace through transitional justice in divided societies, I will argue that the Biko case actually reinforced the legitimacy of the entire reconciliation process in South Africa, even though Biko’s family members lost their case against the government and did not see Biko’s killers prosecuted.
TABLE OF CONTENTS

1. Acknowledgments .......................................................................................................................... ii
2. Abstract .......................................................................................................................................... iii
3. Table of Contents ............................................................................................................................ iv
4. Introduction ...................................................................................................................................... 1
   a. Significance
   b. Theoretical Contribution
5. Literature Review ............................................................................................................................ 3
6. Background and Historical Overview ............................................................................................ 11
   a. The Truth and Reconciliation Commission (TRC)
   b. The Biko Case
7. Research Design .............................................................................................................................. 19
8. AZAPO vs. President of the Republic of South Africa ...................................................................... 20
   a. Background
   b. Applicants’ Arguments
   c. Respondents’ Defense
   d. The Court’s Ruling
      i. Establishing Legality of Amnesty Provision
      ii. Amnesty & Criminal Liability
      iii. Amnesty & Civil Liability
      iv. Amnesty & the State’s Civil Liability
      v. Response to International Law & Geneva Conventions Argument
      vi. Mahomed DP’s Conclusion
      vii. Concurring Opinion from Judge Didcott
   e. Immediate Results of the AZAPO Case
   a. Officers Apply for Amnesty
      i. Background: 1977 Inquest
   b. The TRC Amnesty Hearings
      i. Testimony
         1. Snyman Amnesty Hearing
         2. Siebert Amnesty Hearing
         3. Nieuwoudt Amnesty Hearing
         4. Marx Amnesty Hearing
         5. Beneke Amnesty Hearing
      ii. Findings of the Amnesty Committee
   c. Results of TRC Process
   d. No Prosecution of Biko’s Murderers
10. Analysis ........................................................................................................................................ 57
   a. AZAPO
      i. Political Expediency Debate
      ii. Issues with International Law
      iii. Public Perceptions of Amnesty
   b. TRC
i. Domestic Reactions to the TRC
ii. Political Cartoons
iii. Scholarly Response
iv. Biko Family Reaction to TRC
v. President Nelson Mandela on the TRC
vi. Moving Forward
c. Reaction to Lack of Prosecution

11. Conclusion .............................................................................................................................................74
   a. Final Thoughts
   b. Biko’s Enduring Legacy

12. Bibliography .............................................................................................................................................83
INTRODUCTION

In 1980, British musician Peter Gabriel released the song “Biko,” to protest the death of noted South African activist Stephen Bantu Biko. He sang:

“Oh Biko, Biko, because Biko
Yihla Moja, Yihla Moja (Come Spirit)
The man is dead
And the eyes of the world are watching now.”

Released only three years after Biko’s suspicious and unexpected death while in police custody, the song quickly rose on the Billboard charts, and Gabriel began closing out his concerts with this somber song. The line, “…the eyes of the world are watching now,” rang true, as the Biko case gained a strong international following. It was later revealed through autopsy and officer testimony that Biko was tortured, chained for 24 hours, denied medical attention, and then later driven naked and bleeding to a Pretoria prison with a hospital, where he died upon arrival of traumatic brain injuries.1 His family began a long and arduous legal battle for justice that began with an inquest in the 1970s, a case against the government, amnesty hearings at the Truth and Reconciliation Commission (TRC) in the 1990s, and a push for a prosecution in the early 2000s.

Significance

In this thesis, I seek an answer to the question, “What impact did the Steve Biko case have on the effectiveness of the reconciliation process in South Africa?”

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The Biko case is recognized as a challenge of the legitimacy of the Truth and Reconciliation Commission, as his family opposed the TRC’s amnesty provision and challenged the South African government over the constitutionality of amnesty in the commission. However, the analysis of the case usually ends here; this thesis will delve deeper into Biko’s case to determine what impact, if any, the outcome of the case and the subsequent TRC amnesty hearings had on the greater reconciliation process in South Africa. As I will argue, the handling of the Biko case in South Africa during the democratic transition (even though it was unsatisfactory to the Biko family) actually strengthened the reconciliation process, giving it the legitimacy it needed to continue on relatively peacefully.

This guiding question is important as it seeks to better understand truth commissions and transitional justice. Other countries, primarily in Latin America, have used truth commissions after conflicts, and they will most likely be used again in the future. Thus, a further analysis and understanding of the South African TRC process will add to future transitional justice initiatives with a focus on restorative justice. This thesis will also add to the scholarship surrounding to what extent truth commissions are legitimate, and particularly how they maintain legitimacy in the face of high profile opposition to their very existence. Here, I will examine the Steve Biko case in detail, as it is critical case in the transitional justice history of South Africa. It provides a conspicuous opposition to the reconciliation process. Through an analysis of the Steve Biko case opposition to the TRC in South Africa, we can identify and further analyze the politics of legitimacy of the TRC not only in South
Africa but also in other countries that may choose to use truth commissions in resolving conflicts.

**Theoretical Contribution**

This thesis will help inform theory about reconciliation. Analysis of the Biko case’s process in the TRC will add to the scholarship surrounding the debate of truth versus justice in the pursuit of peace, whereby the prevailing assumption is that the pursuance of one automatically leads to an abandonment of the other. This thesis will show that this tension between peace, truth, and justice is not always so clear-cut, and that there are strong merits to truth commissions along with important caveats. Importantly, I will also discuss how the TRC was a political compromise between the African National Congress (ANC) and the apartheid National Party (NP), showing that since truth commissions are typically compromises from their inception, the process already starts with a blurred line between peace and justice.

In addition to the theoretical contribution, this study provides a deeper understanding of the factors affecting the legitimacy of the TRC in South Africa, and it could inform future policy regarding transitional justice.

**LITERATURE REVIEW**

After gross human rights violations, many countries employ a type of transitional justice under the new, typically democratic government. According to Joanna Quinn, transitional justice “focuses specifically on reforms to the justice sector, working toward the re-establishment of the rule of law and assisting in the rebuilding of the system of courts that is required in a functioning, democratic
Although transitional justice is a relatively new development in governance, whereas most human rights abusers get away with their crimes, many scholars and government officials debate the best way to ensure justice. Martha Minow developed three paradigms of transitional justice that most scholars accept: retributive, restorative, and reparative justice.³

Retributive justice relies primarily on trials with the goal of prosecuting and punishing human rights violators.⁴ By serving as an example to others, retributive justice aims to deter future crime. Reparative justice consists of retribution and apology to help heal the injuries of victims from human rights violations.⁵ Finally, restorative justice, which is becoming a popular alternative to retributive justice, focuses on restoring the dignity of victims primarily through truth commissions.⁶

Truth commissions are set up to find out the truth of human rights violations during a certain time period.⁷ Since 1974, there have been twenty-six truth commissions around the world, and they are a popular choice because of their focus on victims as well as their low cost, in comparison to setting up trials.⁸ Minow asserts that “if the goals of repairing human dignity, healing individuals, and mending societies after

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³ Martha Minow, Between Vengeance and Forgiveness (Boston: Beacon Press, 1998).
⁴ Ibid, 121.
⁶ Ibid.
⁷ Ibid, 360.
⁸ Ibid.
the trauma of mass atrocity are central, truth commissions offer features that are often more promising that prosecutions.”

There is an extensive body of literature about restorative justice, and many debates about whether retributive or restorative justice is the best for a transitioning society. While there is no universally agreed upon definition for restorative justice, two definitions are the most widely used. Marshall defines it as “a process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future.” The second most cited definition comes from Bazemore and Walgrave, who define restorative justice as, “every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime.”

Historically and particularly in Western societies, after a crime is committed the focus has been on the perpetrator rather than the victim. Johnstone asserts that the focus should instead be on the victim, and restorative justice “helps to heal the wounds” of a victim of a gross human rights violation. He criticizes retributive justice for its “total neglect and disempowerment of the victim…which amounts to secondary victimization.” Also, importantly, Johnstone discusses another “theme” of restorative justice, where perpetrators are treated humanely, showing them that

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12 Ibid, 147.
14 Ibid.
“we care about them and want to reintegrate them into the community.” By “othering” perpetrators and stripping them of their humanity, Johnstone argues that we push them into “criminal subcultures” where perpetrators become even more estranged from society and its potential positive, rehabilitative influence. Johnstone then cites other proponents of restorative justice who argue that offenders only begin to grasp the impact of their actions if they are “confronted personally with their victims...hearing first-hand of the actual harm caused by their behavior.” The central idea here is that through direct confrontation between victim and perpetrator, the perpetrator experiences a sense of shame about his actions, and therefore will be less likely in the future to harm others. Restorative justice also involves the whole community in the healing process while also limiting the constraints of legal definitions, instead allowing victims and perpetrators to speak and settle on a restorative mechanism such as financial reparations.

A common criticism of restorative justice is that “the power of restorative justice lies in its rhetoric rather than its outcomes.” Clifford Shearing states in an interview about restorative justice that “people think they've made a difference when they've taught something; however you only make a difference when it's been learnt,” and a common question issue with restorative justice is how to measure or

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16 Ibid.
17 Ibid, 12.
18 Ibid.
19 Ibid, 13.
ascertain whether a human rights violator has internalized shame about his actions or if he or she is just going through the motions of acting remorseful.²¹

Within criminology, there has been much debate about how to define restorative justice and where to place it among prevailing theories of criminal justice and law. Criminologist John Braithwaite argues in his re-integrative shaming theory that “disapproval of the [criminal] act within a continuum of respect for the offender, disapproval terminated by rituals of forgiveness, prevents crime,” more so than retributive justice.²² He goes further to argue in this theory that “it is not the shame of police or judges [as in retributive justice] that is most able to get through to us...it is shame in the eyes of those we respect and trust,” which restorative justice ensures.²³ He also critiques retributive justice for “seeking to blacken the character of another” instead of being fair and “empowering others through process control” of a truth-telling.²⁴ Perhaps most important to combat the criticism of restorative justice for not doing enough to deter future crime, Braithwaite claims that criminal trials by their nature are extremely disrespectful, where another human being is “criminally exploited.”²⁵ He quotes fellow criminologist Howard Zehr, writing, “disrespect begets disrespect,” and this disrespect can lead to future crimes as a sort of retribution for the callousness of the trial process.²⁶ Thus, according to Braithwaite and Zehr, criminal trials are inherently disrespectful and therefore

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²³ Ibid.
²⁴ Ibid.
²⁵ Ibid, 50.
²⁶ Ibid.
when they concern broad societal conflicts, they can have broad societal implications.

Of course, there are other perspectives on transitional justice. Professor Diane Orentlicher, as discussed by Claudia Braude and Derek Spitz, argues that there are other ways for a state in transition to reconcile other than providing amnesty.27 She argues the merits of prosecutions, asserting that they “end cycles of state violence” and actually move along democratic transitions by enforcing and encouraging respect for the rule of law and individual dignity and rights.28

Importantly, she takes the issue of amnesty and situates it within international human rights law. After the Holocaust and then after multiple genocides in the 1990s, the international community stepped up to find an end to mass human rights violations, first with a series of ad hoc tribunals, and then in 1998, by creating the International Criminal Court through the Rome Statute, which entered into force in 200229. Through this greater process, customary international law developed that permits and perhaps even requires prosecutions for human rights violators.30

The main goal of international criminal and human rights law is to deter future crimes by prosecuting human rights violators around the world.31 If states allow indemnity for gross human rights abusers, the international community has universal jurisdiction to intervene, meaning that any nation’s domestic courts can

28 Ibid.
29 Ibid.
30 Ibid, 278.
31 Ibid, 280.
prosecute grave human rights criminals, even if the crime was committed elsewhere and by a foreigner.\textsuperscript{32} Orentlicher explains the relationship between domestic and international law, and the rationale for claiming universal jurisdiction, as she writes:

“Crimes against humanity could be punished by an international court because the conduct, by its nature, offended humanity itself. Because the crime originated in ‘humanity’ – presumably under natural law – its legal status and consequences transcended the province of municipal [domestic] law. A person who committed crimes against humanity was, like the pirate, hostis humani generis – ‘an enemy of all mankind’ – over whom any state could assert criminal jurisdiction. It was a very short step from recognition of crimes against humanity as violation of international law to the assertion that such crimes could be punished by an international court.”\textsuperscript{33}

Therefore, the pressing international question becomes whether apartheid was a crime against humanity. If apartheid were labeled as such, this would open South Africa up to future prosecutions by the International Criminal Court.\textsuperscript{34} Furthermore, there would not be much of an argument for amnesty, as surely anyone who commits a crime against humanity cannot face indemnity for his or her actions.

After citing Orentlicher to explain the customary international law potentially at play in South Africa’s choice of transitional justice, Claudia Braude and

\textsuperscript{33} Ibid, 281.
\textsuperscript{34} Ibid, 282.
Derek Spitz present a question that is still valid today: would South Africa have been better served if the international community had intervened to prosecute apartheid criminals?35

Many scholars argue that this would have been impossible, as both apartheid and anti-apartheid figures committed dangerous crimes worthy of prosecution. As the end of apartheid was a negotiated solution, not a military victory, between apartheid and anti-apartheid groups, the only way forward was a political compromise about reconciliation, where the apartheid regime demanded an amnesty process. While this choice may not be entirely just, perhaps the amnesty provision was necessary to negotiate an end to apartheid and move the country towards democracy. Boraine writes, "...in a deeply divided society [war crimes tribunals] cannot be the final word if healing and reconciliation are to be achieved...consideration must always be given to reconciliation so that the risk of the process being repeated is to some extent diminished."36

This literature review serves to illuminate some of the debates surrounding truth versus justice, as well as peace versus justice, when choosing between restorative and retributive justice in divided places, such as South Africa. These debates are important to understand before analyzing the handling of the Biko case in South Africa’s reconciliation process, where these larger systemic questions

become more tangible in courtrooms, hearings, as well as in the press and in public perceptions.

**BACKGROUND AND HISTORICAL OVERVIEW**

*The Truth & Reconciliation Commission (TRC)*

Following the collapse of apartheid and the transition to a democratic government, the former apartheid leaders of the National Party (NP) worked together with the African National Congress (ANC), under the leadership of newly elected leader Nelson Mandela, for a new South Africa. What might have appeared to be a miraculous transition of power from the white minority to the black majority actually reflected a tough set of political negotiations. Mandela’s government believed there was now a “compelling need to restore moral order,” but many conflicting political interests were at play between the NP and the ANC. The former government under President F.W. de Klerk favored a blanket amnesty proposal, whereby all human rights abuses and other crimes under apartheid would be forgiven by the state. The ANC was staunchly opposed to a blanket amnesty provision, and instead many of its members pushed for Nuremberg-style retributive justice, where gross human rights abusers would be put on trial. Finally, de Klerk and Mandela agreed upon a truth commission that would have the power of granting individual amnesties, as long as violators could prove that their actions

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38 Ibid, 143.
were politically motivated.\textsuperscript{39} However diplomatic this process may have seemed, Deputy President Thabo Mbeki would later reveal in a personal interview that senior generals of the apartheid security forces had threatened him with “dire consequences” if security force members had to face compulsory trials after the democratic transition.\textsuperscript{40}

Although the decision for a truth commission was negotiated among political elites, it had broad support among the greater South African population and even many foreigners. Professors and nongovernmental organizations planned conferences and published books in favor of restorative justice and a truth commission, such as the book \textit{Dealing with the Past: Truth & Reconciliation in South Africa}, which was a compilation of the experiences of scholars and advocates from South America, Central Europe, and Eastern Europe with reconciliation in their home countries.\textsuperscript{41} In 1995, the South African parliament passed the National Unity and Reconciliation Act 34, which officially created the Truth and Reconciliation Commission.\textsuperscript{42} The TRC’s stated purpose was “not to punish but to help the country come to terms with its past.”\textsuperscript{43} The Commission covered crimes taking place between March 1960 to May 1994, marking the period between the Sharpeville Massacre and crimes committed by right-wing Afrikaners surrounding the democratic election in April 1994.\textsuperscript{44}

\textsuperscript{39} Leonard Thompson, \textit{A History of South Africa} (New Haven: Yale University Press, 2001), 275.  
\textsuperscript{40} Alex Boraine, “Truth and Reconciliation in South Africa: The Third Way,” 143.  
\textsuperscript{41} Ibid, 144-145.  
\textsuperscript{42} Roger Beck, \textit{The History of South Africa} (Westport: Greenwood Press, 2000), 197.  
\textsuperscript{43} Ibid.  
\textsuperscript{44} Alex Boraine. “Truth and Reconciliation in South Africa: The Third Way,” 141.
As outlined in the National Unity and Reconciliation Act 34, the TRC had four main goals:

- to establish “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date”;
- “to facilitate the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective”;
- “to establish and make known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them”; and,
- “to compile a report providing as comprehensive an account as possible of the activities and findings of the Commission...which contains recommendations of measures to prevent the future violations of human rights.”

Although the South African TRC was modeled on past truth commissions in Chile and Argentina, it was unique in that the commission itself had the power to grant individual amnesties and to subpoena witnesses. And, importantly, it met in public and was completely open to the media. Additionally, if suspected gross human rights abusers did not come forward to tell the truth of their crimes, they

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could be prosecuted, which helped appease elites who were opposed to a complete lack of traditional retributive criminal justice for human rights violators and also motivated many apartheid police to apply for amnesty.\textsuperscript{48} Additionally, the South African TRC was unique from other truth commissions in that it was based off of an act of parliament, meaning that “a democratically elected group of people participated in the debate and finalized the content of the commission,” while most other truth commissions were established by an executive order of that country’s president or prime minister.\textsuperscript{49} All of these important differences meant that the South African TRC was a revolutionary combination of elements of past truth commissions along with new untested initiatives, which arose unprecedented debates surrounding the commission’s very legitimacy.

The TRC was divided into three branches: The Human Rights Committee, The Amnesty Committee, and The Reparation and Rehabilitation Committee.\textsuperscript{50} The Human Rights Committee conducted public hearings for victims and survivors.\textsuperscript{51} The Amnesty Committee heard amnesty requests, and the Reparation and Rehabilitation Committee was responsible for deciding and dispensing reparations to victims in both the short and long term.\textsuperscript{52} Mandela chose 17 commissioners of the TRC from recommendations from nongovernmental organizations.\textsuperscript{53} There were two Afrikaner commissioners, four English, two Indians, two Coloured, and seven Africans, with nine men and eight women, all coming from an anti-apartheid

\textsuperscript{49} Alex Boraine, “Truth and Reconciliation in South Africa: The Third Way,” 145.
\textsuperscript{50} Ibid, 145-146.
\textsuperscript{51} Ibid.
\textsuperscript{52} Ibid, 146.
These commissioners were responsible for hearing victims’ and perpetrators’ testimonies, and some were responsible for granting or denying amnesty.

The TRC process meant that violators who received amnesty would therefore be exempt from future criminal prosecution as well as from civil action. If amnesty was denied, criminal prosecution could occur. In order to qualify for amnesty, violators had to prove that there was a political motive behind their actions. The National Unity and Reconciliation Act 34, Chapter 4 detailed explicitly how to define “politically motivated” actions. The Committee had to consider:

“The motive of the person who committed the act; the context in which the act took place; the legal and factual nature of the act including its gravity; the object or objective of the act and whether it was primarily directed at a political opponent or state personnel or property; whether the act was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement, or body of which the person who committed the act was a member, an agent, or a supporter; the relationship between the act and the political objective pursued.”

Importantly, The Amnesty Committee would not grant amnesty for any act or offense that was for personal gain or committed out of malice.

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57 Ibid, 149.
By the time of its final report in 1998, the Truth and Reconciliation Commission heard over 20,000 victims’ testimonies and reviewed over 7,000 amnesty applications, with less than 900 receiving full amnesty.\(^{58}\)

**The Biko Case**

Steve Biko was a noted anti-apartheid activist in South Africa, who is most famous for founding the Black Consciousness movement and philosophy. The Black Consciousness Movement arose out of the South African Students’ Organisation (SASO) and had much in common with the United States’ black rights movement. Its members lauded the history of black Africans and sought to increase young people’s self esteem in their blackness.\(^ {59}\) Biko was considered by many to be “the single most important black leader of all,” as he was the figurehead of the enormous and most active student population.\(^ {60}\) The apartheid government quickly came to know Biko well, and he was arrested multiple times, where he was previously never physically harmed. The government banned him to his natal city in 1973 for his anti-apartheid activism.\(^ {61}\)

In 1977, Steve Biko was arrested at a roadblock after he was found in violation of his banishment. The police arrested him under the Terrorism Act,

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which stipulated that suspects could be held indefinitely without trial. He was interrogated in solitary confinement. Three weeks later, he was dead.

Biko’s close friend and journalist Donald Woods responded to the shocking news immediately in his newspaper column, writing, “The basic facts are that when he was detained about three weeks ago he was fit and healthy; that he was imprisoned without trial; and that he was in the custody of the Security Police throughout until his death.” Woods went further, and based in major part on his close relationship with Biko, he suggested potential foul play at the hands of the police, especially under the well-known brutal leadership of Colonel Pieter Goosen. He wrote, “I hold responsible all those associated with his detention, because his death occurred while he was under their control, and control exercised through morally wrong powers is morally unjustifiable control, making those who exercise it accountable for all that occurs in terms of it.” Chief Gaisha Buthelezi of the Zulu tribe immediately also suspected foul play, stating that Biko had joined “the long list of those who have died for a just cause in South Africa.”

Minister of Justice Jimmy Kruger responded publicly that Biko had died of a hunger strike while in custody. A few days later, Kruger stated at the Transvaal Congress of the Afrikaner Nationalist Party that Biko’s death “dit laat my koud (leaves me cold),” which infuriated not only many South Africans but also the...

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64 Ibid.
international community that began following Biko’s death because of his high profile position as an anti-apartheid activist. Tensions in the black community mounted, and Chief Buthelezi warned whites that he would not be able to control his people if they sought “an eye for an eye.”

In the midst of extreme tensions between blacks and whites, Biko was laid to rest peacefully with over 20,000 people in attendance, both black and white. After continued domestic and international pressure, in 1977 there was a 15-day inquest into his death, but a judge ruled that he could not charge the police officers who had detained Biko with murder as there were no eyewitnesses. Biko’s family received $78,000 compensation, which Biko’s widow called “blood money” and “an admission of guilt” by the apartheid government for his death. She lamented, “It doesn’t bring the man back...The most important thing was the man’s life, not the money.”

In time, as will be discussed in greater detail below, five police officers would apply for amnesty in the death of Steve Biko through the TRC. The TRC denied them amnesty as it was determined that they lied on the stand, as their new description of accidentally killing Biko in self-defense did not match up with Biko’s autopsy

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72 Ibid.
Biko’s family subsequently sought prosecution of the men involved, but the cases fell through in 2003 as there was “insufficient evidence” for a murder trial 26 years after the fact.\footnote{74}{"No Trial of Police in Biko Case." \textit{Los Angeles Times}, October 8, 2003. Accessed December 1, 2014. \url{http://articles.latimes.com/2003/oct/08/world/fg-safrica8}.}

**RESEARCH DESIGN**

The Steve Biko case stands as an important and visible challenge to the TRC process. This thesis will provide a close analysis of this opposition. First, the thesis examines a high-profile national court case brought by the Black Consciousness movement party AZAPO, along with the Biko family and other victims’ families, against the government, arguing that the amnesty provisions of the National Unity and Reconciliation Act 34 were unconstitutional. Second, the project examines the TRC amnesty hearings of the five apartheid police involved in the death of Biko while under police custody. Then, this thesis analyzes the overall public perception of the reconciliation process and examines the enduring legacy of Steve Biko. The analysis and conclusion will answer this thesis’s analytic question, arguing that the Biko family’s visible challenge to the reconciliation process decided on by the government, and the results of the court case and the amnesty hearings, actually reinforced the peaceful reconciliation process in South Africa. This thesis also discusses that while the Biko case reinforced the transitional process, there are lingering issues regarding truth, justice, peace, and reparations.

AZAPO & OTHERS VS. PRESIDENT OF SOUTH AFRICA & OTHERS

Background

In 1996, six months following the passage of the National Unity and Reconciliation Act 34 (hereafter referred to as the Act) which established the Truth and Reconciliation Commission, the Azanian Peoples Organization (AZAPO) filed a court case against the President of the Republic of South Africa and Others to challenge the constitutionality of the amnesty provision of the Act.

AZAPO was a political group formed from the union of the South African Students’ Association (SASO), the Black Community Programmes, and the Black People’s Convention (BPC), all groups that had been inspired by Biko’s Black Consciousness Movement. The case quickly gained national attention, as three widows who had lost their husbands to the anti-apartheid struggle, including Steve Biko’s widow Ntsiki Biko, joined AZAPO as applicants in the case.

Applicants’ Arguments

AZAPO’s attorney argued that Section 20(7) of the Act violated Section 22 of the Interim Constitution, which states that “every person shall have the right to have justiciable disputes settled by a court of law, or where appropriate, another independent or impartial forum.” Section 20(7) of the Act reads,

“Section 20(7)(a): No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such

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

Section 20(7)(c): neither the State nor any individual person or organisation can be held liable for the acts, omissions, or offences of any deceased person who could have qualified for amnesty.”

Here, Section 20(7) lays out that anyone who receives amnesty is exempt from all liability, which is in direct conflict with the Interim Constitution’s provision on ensuring that citizens possess the right to have disputes settled in a court of law. Thus, this section of the Act strips citizens of this individual right from impunity. Therefore, the Act’s amnesty provision, according to the AZAPO counsel, was unconstitutional.

The AZAPO counsel also presented the argument that the amnesty provisions of the Act violated international law, in particular the four Geneva Conventions of 1949 on the laws of war, which South Africa had signed and ratified in 1952. They referenced Article 49 of the first Geneva Convention, Article 50 of the second Geneva Convention, Article 129 of the third Geneva Convention, and Article 146 of the fourth Geneva Convention:

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“Article 49 Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...

Article 50 Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: Grave breaches...shall be...willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully or wantonly.

Article 129 Treatment of Prisoners of War: The High Contracting Parties undertake to enact any legislation necessary to provide penal sanctions for persons committing...grave breaches of the present Convention...

Article 146 Protection of Civilian Persons in Time of War: The High Contracting Parties undertake to enact any legislation necessary to provide penal sanctions for persons committing...grave breaches of the present Convention...”

Therefore, the AZAPO counsel argued that South Africa had agreed to provide “penal sanctions” for human rights violators by signing the Geneva Conventions. Thus, any invocation of amnesty would directly contradict South Africa’s international treaty obligations. So, in the eyes of international law, the AZAPO counsel argued that the Act’s amnesty provision was illegal.

The applicants’ arguments to the Court were thus twofold. They claimed that the amnesty provision of the Act was in violation of the South African Interim Constitution and that the amnesty provision was illegal under international law.

**Respondents’ Defense**

The state’s defense was that the epilogue of the Interim Constitution, which called for the creation of an act of government to foster reconciliation in the country, was an equal part of the constitution. Thus, the South African government was compelled by the constitution to create the Act. Given this constitutional mandate, the Act’s amnesty provision was therefore authorized by the Interim Constitution and was indeed constitutional.

**The Court’s Ruling**

After almost two months, the Constitutional Court reached its final decision, written by Deputy President of the Constitutional Court Ismail Mahomed. The Court recognized the pain behind the applicants’ court case, yet it upheld that the

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83 Ibid.
legislature had not exceeded its powers in adopting Section 20 of the Act. After establishing the amnesty provision as legal, Mahomed DP presented the Court’s judgment in several separate headings: “amnesty in respect of criminal liability, amnesty in respect of the civil liability of individual wrongdoers, and the effect of amnesty on any potential civil liability of the state.”

**Establishing Legality of Amnesty Provision**

Mahomed DP begins the Court’s judgment with a quick overview of apartheid in South Africa, and notes that the Interim Constitution was written out of a shared realization that the nation could only survive through “a generous commitment to reconciliation and national unity.” He cites the epilogue of the Interim Constitution, which describes the constitution as a “historic bridge” between the country’s past and future, and that there is a “need for reparation but not for retaliation, a need for ubuntu [universal bond of shared humanity] but not for victimization.” The epilogue of the Interim Constitution also states:

“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,

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85 Ibid.
86 Ibid, 105.
87 Ibid.
including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.”\textsuperscript{88}

Using this paragraph of the epilogue, Mahomed DP details how the Act of 1995 was then created to establish the TRC and begin the country’s path to reconciliation. He then argues that while the applicants’ argument that Section 20(7) of the Act violates Section 22 of the Interim Constitution giving individuals the right to have disputes settled by impartial forum makes logical sense, it does not hold, as he argues that the epilogue of the Interim Constitution, which grants the Act’s amnesty provisions, is indeed on equal footing with Section 22 of the Interim Constitution. He goes one step further and argues that Parliament has a duty to create the Act and provide amnesty, as he writes:

“What is clear is that Parliament not only has the authority in terms of the epilogue to make a law providing for amnesty to be granted in respect of the acts, omissions and offences falling within the category defined therein but that it is in fact obliged to do so. This follows from the wording in the material part of the epilogue which is that ‘Parliament under this Constitution shall adopt a law’ providing \textit{inter alia}, for the ‘mechanisms, criteria and procedures...through which...amnesty shall be dealt with.”\textsuperscript{89}


\textsuperscript{89} Ibid, 112.
Thus, Mahomed DP establishes the epilogue of the Interim Constitution as equal to any section of the constitution and thus argues that Parliament had to write and pass a law ensuring reconciliation through amnesty, which resulted in the Act.

In establishing the epilogue of the Interim Constitution as equally legal and enforceable as the rest of the constitution, Mahomed and the rest of the Court helped create a critical foundation of South African jurisprudence. This crucial decision, upon which the Court’s defense rested as it made reconciliation a central goal of the government, created a legal debate that exists even today.

**Amnesty & Criminal Liability**

Next, Mahomed DP argues that amnesty for criminal liability is necessary to discover the truth of past crimes. He argues there is not enough evidence in many instances to even bring up charges against individuals and thus the Act and its amnesty provision are necessary for reconciliation. He writes,

“The Act seeks to address this massive problem [not enough evidence to open criminal cases] by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances did it happen, and who was responsible.”

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He argues further that the incentive of amnesty is necessary to encourage those with information to come forward. He remarks on the healing power of finding out the truth through amnesty from criminal liability, stating,

“The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for ‘reconciliation and reconstruction’ which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue [of the Interim Constitution].”

Mahomed DP argues that without amnesty from criminal liability, victims’ families will never learn the truth about their loved ones and there will not be enough evidence to open criminal cases. Additionally, perpetrators of human rights abuses will remain on the outskirts of society, filled with guilt and uncertainty. Through amnesty, he argues that both abusers and victims will walk on the “historic bridge” provided by the constitution to a new, healed South Africa.

Here, the Court presents a strong favor for restorative justice, yet does not consider citizens’ individual rights, which include seeking justice through

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92 Ibid, 114.
retributive justice. Defending amnesty also raises important questions about impunity and whether victims should have their choice of justice against perpetrators.

**Amnesty & Civil Liability**

The applicants argued that even if the court upheld amnesty for criminal liability, it should not and could not also grant amnesty for civil liability. Mahomed DP counters this claim, arguing that he does not see anything in the wording of the Interim Constitution that would grant amnesty from criminal prosecution yet would not grant the same for civil damages. He argues that the inclusion of the words “acts and omissions” in addition to “offences” in the epilogue shows that amnesty expands beyond solely criminal liability.93

**Amnesty & the State’s Civil Liability**

Mahomed DP argues that Parliament had the right to give the state amnesty from civil damages, as the epilogue of the Interim Constitution was purposefully open-ended in what forms of amnesty Parliament could choose. He also argues that the state would have a difficult if not impossible time of repaying all of those who were hurt by agents of the apartheid state.

**Response to International Law & Geneva Argument**

The court rejected the plaintiffs’ argument that the amnesty provision of the Act violated the Geneva Conventions on the laws of war, which “obliged signing parties to enact legislation to provide effective penal sanctions for persons

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committing grave breaches of the Conventions."

Mahomed DP asserts that this argument is not relevant to a case disputing the constitutionality of Section 20(7) of the Act and that the Constitutional Court questioned the applicability of the four cited Articles of the Geneva Conventions to South Africa, as the Court defined the apartheid struggle as an internal conflict within a sovereign state, and thus not a war between two states.

Perhaps the most contentious argument in the Court’s majority decision, the debate about international law and amnesty continues today. By allowing amnesty for egregious human rights abusers, some scholars, as discussed by Braude and Spitz, still claim that the South African government violated its international treaty obligations (specifically under the Geneva Conventions) and sanctioned impunity for world criminals. However, this argument raises the question about whether apartheid was a domestic issue or a crime against humanity. If categorized as a crime against humanity, the international community would have universal jurisdiction over apartheid criminals, yet international law continues to be inconsistently enforced. Opening South Africa up to international prosecution may have caused more harm than good.

**Mahomed DP’s Conclusion**

Mahomed DP argues that Parliament was entitled to create the Act as it did and that the epilogue of the Interim Constitution authorizes amnesty. In

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95 Ibid.
96 Ibid.
97 Ibid, 282.
implementing amnesty, Parliament had many choices, as the epilogue left amnesty provision open and vague. He argues that “the exercise of that choice does not, in my view, impact on its constitutionality.” He concludes that the Interim Constitution authorizes Section 20(7) of the Act, and thus the applicants’ case fails.

**Concurring Opinion from Judge Didcott**

Fellow Constitutional Court judge Judge Didcott wrote a separate but concurring judgment in the AZAPO case. He argues that “opening the state up to a long process of civil actions that could run for many years with great (probably negative) publicity would not further the broad aims of reconciliation as the Constitution required,” upholding Mahomed DP’s argument that the goal of reconciliation was paramount to all other concerns. Judge Didcott also wrote about the necessity of amnesty to bring the truth to light:

> “The amnesties made available to individuals are indispensable if an essential object of the legislation is to be achieved, the object of eliciting the truth about atrocities committed in the past and the responsibility borne for them...The emergence of truth, or a good deal of that at any rate, depends after all on no fear of the consequences continuing to daunt them from telling it, on their encouragement by the prospect of amnesties to reveal it instead. The shroud of silence that has enveloped their activities for too long would otherwise go on doing so. And that would have put paid to the bulk of legal

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claims against them...had their escapes from liability not disposed of the lot in any event. For enough evidence to substantiate the claims would then seldom have come to light.”

While Didcott was proven correct in the case of Biko, as there was not enough evidence to prosecute the apartheid police implicated in his death, it is interesting to note that a country’s national court effectively stripped individuals of the right to prosecution and the right to freedom from impunity, in an almost utilitarian belief that amnesty would be better for the majority of South Africa.

**Immediate Results of AZAPO Case**

This court case had immense importance for the Truth and Reconciliation Commission, as it argued the important and necessary duty of the commission to help the country move across the “historic bridge” to democracy and healing. The court’s judgment upheld the Amnesty Committee and constitutionalized the epilogue of the Interim Constitution. The Constitutional Court survived its first challenge and in turn created a new jurisprudence and strengthened the legality of the Interim Constitution. Amnestyt was deemed necessary for ensuring the constitution’s demand for national reconciliation.

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TRC AMNESTY HEARINGS

Officers Apply for Amnesty

Only a few months after the Constitutional Court upheld the amnesty provision of the Act establishing the TRC, five apartheid policemen, Gideon Nieuwoudt, Harold Snyman, Daantjie Siebert, Ruben Marx, and Johan Beneke applied for amnesty in their involvement in the death of Steve Biko while in police custody. Biko’s family was upset by the news, and Biko’s oldest son told the press, “My impression is that the police took it upon themselves to knock the living daylights out of Steve. That is a criminal, not a political crime. I have yet to be convinced they are motivated by reconciliation.” Deputy chairman of the TRC told the press that after two decades of no new evidence regarding Biko’s death, this public amnesty hearing “may be the last chance to learn the truth.”

Biko’s family was now faced with the one result they most opposed – Biko’s killers seeking amnesty. To understand the surprise many felt at the five officers applying for amnesty after previously claiming they were not involved in Biko’s death, it is necessary to briefly discuss the 1977 inquest.

Background: 1977 Inquest

Two months after Biko’s sudden death while in Port Elizabeth Security Police custody, public outcry led to an inquest. An inquest is an investigation into a

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104 Ibid.
person’s death due to something other than natural causes. Such investigations are set up primarily to unearth the truth and are presided over by a magistrate. In this case, Sir Sydney Kentridge and George Bizos represented the Biko family, responding to a state-appointed prosecutor. An inquest is not a trial and there is no set accused or defense; rather, the end goal is to determine if there was any wrongdoing or illegal activity that led to the victim’s death. Even so, it follows a similar structure to a court case.

The inquest into the death of Steve Biko lasted thirteen days, and testimony was heard from security police, doctors who examined Biko while in custody, as well as outside physicians who commented on the medical issues at stake in the case. Throughout the weeks, security police consistently denied that they knew Biko had hurt his head, and instead many claimed that they thought he was “shamming” to avoid further interrogation. All of the policemen who testified as witnesses denied seeing a large bruise on Biko’s head, and Sergeant van Vuuren claimed that Biko’s skin color was “much darker” than the photograph presented in court, therefore obscuring the bruise on his head, which was indicative of a head injury. The policemen also justified their inhumane treatment of Biko in custody, where they kept him in leg irons and naked for months, claiming that it was “customary” to keep inmates chained and that he was denied clothing to prevent

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106 Ibid.
Most importantly for the goal of the inquest, determining the cause of Biko’s death and if anyone was responsible, the policemen testified that Biko had become violent during an interrogation that led to a “scuffle” with five officers. It was probable, but not confirmed, that Biko could have hurt his head during the altercation. Donald Woods describes Major Snyman’s recollection of what happened in the interrogation room 619 in early September:

“Major Snyman said that shortly after Mr. Biko had his leg irons and handcuffs removed, and was offered a chair to sit on, he got a wild expression in his eyes suddenly and jumped off the chair. Mr. Biko threw the chair at Major Snyman, but he jumped out of the way. After this, Mr. Biko charged at Warrant Officer J. Beneke, lashed out wildly at him and pinned him against a steel cabinet. Major Snyman said he and Captain Siebert went to Warrant Officer Beneke’s help. They tried to grab Mr. Biko, who was ‘clearly beside himself with fury.’...Two other members of the team came to assist. They overpowered Mr. Biko, and put handcuffs and leg irons on him...Mr. Biko was fastened to the grille in the office but continued to struggle against his handcuffs and leg irons...”

After the “skirmish,” Biko was visibly confused and non-responsive to officers.

Colonel Goosen, the commander in the prison, called in Dr. Lang and later Drs. Tucker and Hersch on separate visits who all determined that nothing was physically wrong with Biko. Colonel Goosen testified at the inquest, “At this stage...

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111 Ibid, 240.
112 Ibid, 258.
I was honestly of the opinion that Mr. Biko was playing the fool with us as neither the district surgeon [Dr. Lang] nor I could detect any scars or signs of illness.”\textsuperscript{113} However, Biko’s condition continued to deteriorate and he was eventually transferred to Pretoria in the back of a Land Rover, hundreds of miles away, which supposedly had a better medical facility. He died soon after arrival in his cell.

During the inquest, the attorney for the Biko family Sir Sydney Kentridge presented the evidence of a lumbar puncture conducted on Biko, which showed red blood cells in his spinal fluid, which was indicative of a brain injury. Dr. Lang claimed he misreported the results, stating that Biko was physically fine, by error.\textsuperscript{114} Kentridge then questioned Dr. Tucker and presented him with a hypothetical case of a child with all of the same symptoms as Biko, stating:

“Let us assume that some holidaymakers from Pretoria had come to see you in Port Elizabeth about their child who had been acting in a bizarre way. The parents suspected that the child did not want to go back to school, but it showed a plantar reflex, was lying on the floor, had red cells in its spinal fluid, froth at the mouth, was hyperventilating and was weak in the left limbs. Would you have permitted his parents to drive seven-hundred miles to Pretoria?”\textsuperscript{115}

Dr. Tucker replied that under normal circumstances he would have sent this child to the hospital immediately, but that there was “uncertainty” in Biko’s case and that

\begin{footnotes}
\footnote{Ibid, 326.}
\footnote{Ibid, 319.}
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Colonel Goosen was “averse” to sending Biko to a nearby public hospital.116 However, everyone present at the inquest, including all of the doctors, agreed on the cause of Biko’s death: complications from a brain injury.117

After a difficult thirteen days of hearing the evidence of various witnesses, Kentridge argued that the policemen’s testimonies did not match their affidavits, and thus their accounts of events were not trustworthy. He argued, “A firm and clear verdict may help to prevent further abuse of the system. In the light of further disquieting evidence for this court, we submit any verdict, which can be seen as an exoneration of the Port Elizabeth Security Police will unfortunately be widely interpreted as a license to abuse helpless people with impunity.”118 Mr. van Rooyen, representative of the security police, asked the magistrate to find that the police were not involved in any “act or omission” that caused Biko’s death.119

Magistrate Prins delivered his finding in only 80 seconds, after being translated into both English and Afrikaans.120 He found that Biko died on September 12 of a brain injury and that his head injury was most likely a result of an altercation with police officers on September 7 in an office of the security police.121 Finally, he declared that, “on the available evidence the death cannot be attributed to any act or omission amounting to a criminal offense on the part of any person.”122

119 Ibid, 353.
122 Ibid.
The verdict caused outrage throughout South Africa and around the world. In a speech in 2011 at the University of Cape Town, Sir Sydney Kentridge discussed his memories of the inquest, stating, “The real point was to exonerate policemen. None were disciplined or even reprimanded for Biko’s treatment.” Colonel Goosen and Captain Siebert were both later promoted, and according to Kentridge, more than 30 people died while in security police custody over the next ten years.

The international press exploded over the inquest, condemning its findings. South African journalist Roger Osmond boldly wrote that the only benefit of the inquest was learning how the secretive security police operated:

“We know now as we didn't know before that a detainee can be kept naked in a prison cell for three weeks, that he can be deprived of exercise, washing facilities and the right to buy food in direct contradiction of regulations, and that he can be kept handcuffed and in irons, chained to a grille for more than 48 hours. We know that he can be allowed to lie in his urine-soaked trousers on urine-soaked mats, while district surgeons don't even suggest a change of clothing, that doctors can miss classic symptoms of brain damage, that when the doctors eventually begin to worry they meekly follow Special Branch orders that he cannot be allowed anywhere near a decent hospital, that even when he is supposed to be under observation for brain damage he can be moved from a prison hospital back into a police cell, that a doctor can authorise a 700-mile journey overnight without first getting the results of a

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123 *Sir Sydney Kentridge Speaks on the Public Inquest into the Death of Steve Biko*. South Africa: University of Cape Town, 2011. Film. https://www.youtube.com/watch?v=YwTDxflASUI

124 Ibid.
lumbar puncture, that the same doctor does not check whether the form of transport is the same as that promised by the Special Branch. We have also learned that a detainee can be sent naked on his last journey...[with] a couple of Special Branch men with no medical training as orderlies, a water container as the sole medicine, that when they reach Pretoria they persist in saying that the detainee is shamming, that no medical port accompanies the semi-comatose detainee, that a man hours away from death can be given a vitamin injection and a drip and that he can be allowed to die alone on a cell floor.... There's no word of sorrow or anger by the authorities, not even a suggestion detainees a future won’t suffer the same treatment. They just don’t care."125

Outside the Old Synagogue where the inquest was held, a group of twenty people chanted, “They have killed Steve Biko. What have we done? Our sin is that we are black.”126

The 1977 inquest into Steve Biko’s death left many with little hope for the future of the justice system of South Africa, forcing the public to accept limited truth and no justice. However, after the end of the apartheid government and the passing of the Act, new hope was restored for discovering the truth and reaching national reconciliation under the Truth and Reconciliation Commission, which began its public hearings in the late 1990s.

The TRC Amnesty Hearings

Twenty years later and with a new democratic government, between the end of 1997 and March of 1998, the Amnesty Committee of the Truth and Reconciliation Commission heard the testimonies of the five security police who applied for amnesty regarding the death of Steve Biko. The hearings, as all TRC proceedings, were public and attended by the domestic and foreign press. In order to successfully obtain a grant of amnesty from the Amnesty Committee, the officers had to demonstrate that they had acted illegally for a political motive, and they had to divulge the full truth about their crimes. The Biko family lawyer George Bizos represented the family again, opposing the officers’ application for amnesty, bringing much of his expertise from assisting Sir Sydney Kentridge in the inquest twenty years prior.

Testimony

Bizos’s two main goals during the hearings were to show that the officers were not divulging the whole truth and that they had not acted with a political motive in the death of Biko, thus they could not legally be granted amnesty as stipulated under the Act. He focused his cross-examination on highlighting the discrepancies between the inquest and the present hearing and with the aim of demonstrating that the officers acted out of personal malice and ill will towards Biko. Thus, they were not politically motivated in the events that led to his death.
Harold Snyman was the first officer to take the stand, on September 10, 1997, now very old and in poor health. During cross-examination by Bizos, he admitted to perjury during the 1977 inquest, asserting that he was pressured by higher-ups in the security police to obscure and withhold details regarding Biko’s death. He recanted his previous statement at the inquest that Biko had “gone berserk” and thrown a chair at the officers, provoking a scuffle. He now testified that Captain Siebert had provoked Biko, refusing to let him sit down during the interrogation and lifting him out of his seat. Officer Beneke allegedly entered the room after hearing the commotion and “shouldered the detainee in his stomach.” However, although Snyman now admitted there was a fight rather than a simple “scuffle,” he could not seem to recall who led the assault, stating, “…there were punches dealt out,

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administered left and right. I cannot recall where – who hit whom.”

Importantly, Snyman also admitted that Biko hit his head during the altercation; he testified, “...everyone fell on top of each other and in that process it is clear that Mr. Biko bumped his head against the wall,” once again contradicting his testimony during the inquest. He later stated, “in the process [of the ensuing struggle] his head knocked against the wall and he was temporarily dazed and confused.”

Although Bizos and the rest of the Biko family counsel gained this important bit of truth, Snyman claimed he did not witness Biko hitting his head, but rather “heard the sound” of his head bumping against the wall. Bizos capitalized on this moment to probe the witness further, asking how he could determine the sound of a head hitting a wall, rather than any other body part, highlighting a shortcoming in Snyman’s supposed truth-telling. Snyman could not produce a satisfactory answer and attributed his lack of memory to his old age.

After finally getting Snyman to admit that the “skirmish” was in fact a fight and that Biko had hit his head in some manner as a result of the altercation, Bizos turned his attention towards disproving the claim that Snyman acted under a political motive, instead attempting to show that Snyman and the other officers acted out of maleficence towards Biko. First, he cornered Snyman, arguing that if the injuries Biko sustained during the fight were accidental as he had claimed, the officers would have “done the decent thing” and treated Biko’s busted lip and other

130 Ibid.
131 Ibid.
132 Ibid.
injuries. He went further, stating, “But because you hated Mr. Biko and what he stood for, you did nothing.” Snyman shirked responsibility yet again, claiming that he did not hate Biko and that he had reported the incident to his superior and felt that that was good enough.

Bizos also referenced Snyman’s written amnesty application, where he wrote that Biko was stubborn and “too big for his boots for a Black man,” after he demanded to be allowed to sit during his interrogation. Bizos pushed further, attempting to show the Amnesty Committee that the altercation was begun out of racism and contempt for Biko:

Bizos: I see. So that you were offended, personally offended that you, a White man, had a pretender of political power before him and that you were not going to tolerate it and you told him to get up? Is that correct?

Snyman: That is correct, your Honour.

Bizos: And had it not been for your personal pride, combined with the personal pride of your fellow security policemen, and he was allowed to sit down, the scuffle or beating up may not have happened at all?

Snyman: Your Honour, our instruction had been very clear from our commanding officer with regard to the manner in which we had to break down this person.

After arguing that Snyman and the other officers reacted out of hatred towards Biko demanding the decency of sitting during his interrogation, Bizos then further argued

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134 Ibid.
135 Ibid.
that the officers acted under no political motive, and in fact the apartheid leaders of the time did not support the officers’ actions against Biko.

**Bizos:** I want to turn to the basic attempted justification on your part. That is that this was done for a political purpose, because of the National Party [apartheid] politicians’ statements and your superiors...Was torture sanctioned to your knowledge by any National Party politician?

**Snyman:** There was no pertinent instruction given to us in this regard.

...

**Bizos:** So that you admit that you had no instruction or any encouragement from any politician to torture detainees?

**Snyman:** Your Honour, the instructions were that when a person was in detention, these instructions were received from the commanding officer who gave directives with regard to how the interrogation should be managed.

**Bizos:** We’ll come to your superiors in the police force. Let’s finish with the politicians. Do you admit that no politician, either privately or publicly ever told you that torturing detainees was to be used?

**Snyman:** Your Honour, they did not state this pertinently, but from their speeches it was clear that they exerted pressure on us to bring the situation under control.

**Chairperson of Amnesty Committee:** Are you really saying that what politicians said publicly for public consumption and what they allowed to happen, were two different things?
Snyman: Yes, your Honour.\textsuperscript{136}

Here, Snyman’s justification of a political motive was shaky at best, and Bizos highlighted this shortcoming to the Amnesty Committee.

Then, Patrick Mpshwulana, another Biko family attorney who cross-examined Snyman after Bizos, prompted him further regarding his perjury, asking why he would lie at the inquest if he were indeed not responsible for Biko’s death. Snyman replied, “The false statement, your Honour, was made under the instructions of the commanding officer who put the words in our mouths, in a manner of speaking, with regard to what we had to say in our statements,” shirking responsibility to higher-ups in the apartheid security police machine, and very importantly, continuing to never admit his own fault in the incident leading to Biko’s death.\textsuperscript{137}

The international press followed Snyman’s hearing very closely, and headlines around the world read, “Biko ‘too big for his boots’,” lauding George Bizos’s impeccable cross-examination of a man who the world had already deemed a murderer.\textsuperscript{138} The world also read about how throughout the hearing in the spectator section, protestors silently held signs calling for justice before reconciliation.\textsuperscript{139}

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\textsuperscript{137}Ibid.
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Siebert Amnesty Hearing

On December 8, 1997, Bizos and the rest of the Biko family counsel continued their twofold strategy of disproving the officers’ supposed political motive in killing Biko as well as demonstrating that the officers were still not divulging the whole truth. The cross-examination of Daniel Petrus Siebert further demonstrated that the officers were not being completely truthful.

Firstly, like Snyman, Siebert denied personal fault in Biko’s death. However, Snyman had testified previously that it was Siebert who had provoked the fight that would end up costing Biko his life. Siebert’s defense appeared shaky:

Bizos: Mr. Siebert, did you assault Mr. Biko?

Siebert: No, I did not.

Bizos: Did you cause his death?

Siebert: His death was caused by the incident which took place.

Bizos: I asked you a simple question. Did you cause his death?

Chairperson: You, personally?

Siebert: I would not be able to say if it was my own, if I was responsible. There were a few of us present there.

Bizos: Were you either responsible or partly responsible, which would make you responsible, for his death? Do you admit or deny your responsibility for Mr. Biko’s death?

Siebert: My participation in the incident, by implication, yes.

Bizos: Now, you say you did not assault him. Please have a look at page three of your application. The question in 9(a)(1) is clear. “What crime are you
asking for amnesty for?,” and your response is "Assault of Stephen Bantu Biko.” Is that a false statement in your application?

Siebert: No, it is not. What I understood by the question was whether there was any other assault apart ...(end of tape 1A) ... that or the fact that no medical assistance was given to him for a day and the fact that he was chained to or handcuffed to the gate, that is what boils down to assault.

Bizos: Not giving a person proper medical assistance is not an assault, Mr. Siebert. You are a person who has a degree, you are an intelligent person, not giving medical assistance is not an assault.

Siebert: I understand that it could boil down to assault, as such.140

Evidently, Siebert denied culpability in the death of Biko, even though Snyman had testified previously that Siebert helped provoke the fight that led to Biko’s brain injury. However, later in the hearing, Siebert admitted to punching Biko during that fight, which was also written into his physical amnesty application, highlighting further inconsistencies in his story.

Bizos then steered the cross-examination similarly as he did with Snyman to discount the claim that the officers operated under a political motive. Instead, he argued that Siebert acted under racism and hatred towards Biko. He focused his questions on the failed interrogation that led to Biko hitting his head, where it was agreed upon that the issue began when Biko refused to stand during his interrogation and instead took a seat. While Snyman admitted that the fact that Biko, a black man, defied an order by a white man to stand angered him, Siebert

claimed that race had nothing to do with the altercation, and that it was rather an
issue of respect between detainee and interrogator:

Bizos: And how did you feel having in your absolute power a man so opposed
to apartheid that he would actually claim the right to sit if he wanted to, even
though the powerful White man, like yourself, ordered him to stand? How did
you feel about that?

Siebert: It was not about racial differences or colour of skin. As I said earlier,
what it was about was the relationship between the interrogator and the
detainee and, obviously, to this day, the person who is doing the
interrogating must be in a controlling position.

Bizos: And I am going to put to you that Mr. Biko’s death was as a direct
result of your attitude to him as a Black person, as a person who stood up for
his rights, that you, believing that you were a superior White being, were not
prepared to respect him at all, which, and that you assaulted him, injured his
head and his brain, which led to his death.

Siebert: Mr. Bizos is entitled to his opinion and he is entitled to express his
opinion, but I do not think he has the ability to see inside my mind and to
interpret what is in my head. So, I never said that, anywhere, that I, as a
White person, was a Black person’s superior and I would like to know where
he gets that from, where I said that. That is a lie.141

Thus, while portraying Snyman as a racist was rather easy, Siebert refused to admit
any racial prejudices during the failed interrogation with Biko. However, Bizos was

assisted by Advocate Potgieter of the Amnesty Commission, who was successful in showing an inconsistency in the testimonies of the officers, when he had Siebert recount what provoked the fight in the interrogation office. Siebert said Biko threw a chair and swung at him; however, Snyman testified previously that they had lied in the 1977 inquest about Biko throwing a chair, and in fact, Siebert had provoked him into a fight. Instead, Siebert threw responsibility onto Officer Beneke, acknowledging that perhaps the fight would not have happened if Beneke had not intervened and knocked into Biko.142

In the hearing, Bizos also showed that Siebert had not acted under the order of a superior in the altercation with Biko and was not operating under a political motive. Siebert testified that he was tasked with maintaining the apartheid status quo as a security police officer “at all costs.”143 However, Bizos read him the Standing Orders under apartheid that prohibited the use of force against detainees.144 Bizos argued that chaining Biko with leg irons for days at a time and keeping him naked was in violation of these Orders, and thus the officers were actually disobeying the apartheid security command and therefore could not have been acting under a given order. However, Siebert countered that these Standing Orders were just for show, and that they were encouraged to disregard them.

Bizos then questioned Siebert under whose authority he acted in maintaining the status quo; who gave him this command?

143 Ibid.
144 Ibid.
**Siebert**: This was said from all political platforms at the time. At that stage the feeling was that the existing constitutional dispensation should be maintained, the State should be protected, because there was a major onslaught against the State and the people in the Black townships took part in this onslaught, it took place during conferences and the information was also obtained from circulars from head office, etcetera.

**Bizos**: What did you understand by the expression "at all costs"?

**Siebert**: Well, within the bounds of the Law and legislation, which was at our disposal.\textsuperscript{145}

However, Bizos argued that in the altercation in the interrogation office, Biko was beaten so badly and treated so inhumanely during the entirety of his time in custody, that it was unreasonable and frankly unbelievable that the policemen could have expected any useful information out of him that would have helped “maintain the status quo.”\textsuperscript{146} He argued that they were motivated by hatred for Biko and what he represented and treated him “like a battering ram,” running his head into the wall in the interrogation office.\textsuperscript{147} Legally, the apartheid government outlawed torturing prisoners and thus the officers could not claim their treatment of Biko was justified by the apartheid state; there was no justifiable political motive for the treatment of Steve Biko.


\textsuperscript{146} Ibid.

\textsuperscript{147} Ibid.
Nieuwoudt Amnesty Hearing

Gideon Johannes Nieuwoudt not only applied for amnesty in the killing of Biko, but he also was applying for amnesty from assaulting Peter Jones, a black activist who was arrested with Biko in the Eastern Cape. Peter Jones survived, and his testimony to the Amnesty Committee about his abuse in police custody, similar to that sustained by Biko, showed the brutality of the security police and supported the Biko family counsel’s claim that none of the officers acted under any sort of political motive. Nieuwoudt’s hearing was conducted separately from the other four officers applying for amnesty, as he was also testifying regarding Peter Jones.

Nieuwoudt admitted to more than his fellow officers in his role in the killing of Biko, although he also continued to withhold information. Regarding the altercation in the interrogation office that led to Biko’s head injury, he claimed he acted in “self-defense” against an enraged Biko but admitted that Biko hit his head in the ensuing fight.148 He admitted to striking Biko with a house pipe, something that was evident from Biko’s autopsy but that none of the other officers had admitted to whatsoever. Yet, he claimed that Biko’s head injury was an accident in the altercation. Afterwards, Nieuwoudt admitted that Biko was nearly unconscious and that he personally handcuffed Biko in a “crucifix position to an iron grille.” 149

Importantly, Nieuwoudt testified that he did not know if Biko was part of a political party, and thus Bizos argued that Nieuwoudt’s actions against Biko could not have been for a political motive. Nieuwoudt testified that the actions leading to

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149 Ibid.
Biko’s death were “accidental” and intended only to constrain him in the interrogation room. His entire recounting of that day did not match with the other officers and thus cast all of their testimonies further into question.

**Marx Amnesty Hearing**

Rubin Marx testified that he had entered the interrogation room after hearing a commotion and fell with the other officers onto Biko in an effort to restrain him. He admitted no personal wrongdoing and in fact stated that he did not need to apply for amnesty but was encouraged to do so by Nieuwoudt. He stated to the Amnesty Committee, “I did not do anything. They handcuffed him and that is when I thought, let me rather leave. I did not like the idea of him being handcuffed to the metal grille and that was the last of it. I went to Colonel Goosen, I said ’please excuse me’ and he said to me ’carry on with your normal duties’, and that was my only involvement with the deceased, Bantu Biko.”

**Beneke Amnesty Hearing**

Jacobus Johannes Oosthuizen Beneke testified that he had heard that Biko had assaulted security police before, and thus rushed into the interrogation room after seeing Biko throw a chair and swing at Siebert. He was involved in the fight but supposedly only to protect Siebert, denying any political motive. Importantly, he provided new evidence as to how Biko sustained his head injury, as he testified, “After we collided with the wall, Mr. Biko fell forward and banged his head against the corner of a table,” which was information that none of the other officers had

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Beneke once again denied any wrongdoing and said he believed he did not need to apply for amnesty but was worried a court could find him guilty of assault. He also admitted to perjury at the 1977 inquest, allegedly under the orders of Colonel Goosen, who was deceased at the time of the amnesty hearing.153

Findings of the Amnesty Committee

In January 1999, Nieuwoudt, who had testified separately from the other four apartheid police applicants, was denied amnesty in the killing of Steve Biko.154 George Bizos was obviously pleased at the finding but said this ruling was not completely satisfying, as it only withheld amnesty. However, he told The New York Times that perhaps regardless of this outcome and the upcoming results of the rest of the officers’ amnesty hearings, “The world’s jury has decided.”155 Just a few weeks later, the other four officers who applied for amnesty in the death of Biko were also denied amnesty.156

The Amnesty Committee found that all officers involved lacked any justifiable political motive for the fight and subsequent injuries Biko suffered in interrogation room 619. The only objective the officers had was to restrain Biko after a supposed violent outbreak against Officer Siebert. The claim that this incident furthered the officers’ greater goal of criminally prosecuting Biko for anti-apartheid activities was found to be untrue by the Amnesty Committee, and instead they attributed the

153 Ibid.
155 Ibid.
scuffle and indeed their greater search for evidence to “normal police duties” that were “not political in nature.”¹⁵⁷

The Committee also found that the officers did not admit personal wrongdoing in Biko’s death; instead, they either claimed they had acted legally in self-defense or that they were simply trying to restrain Biko.¹⁵⁸

Finally, the Committee found that the officers did not tell the whole truth, as highlighted through Bizos’s cross-examinations. They write in their decision,

“It appears more probable that Biko was attacked after Applicants did not take kindly to his arrogant, recalcitrant and non co-operative attitude particularly exemplified by his occupying a chair without their permission to do so. This attack appears to be actuated by ill-will or spite towards Biko. This view is reinforced by the cruel and inhumane manner in which Biko was treated after he sustained the fatal injury, in particular the manner in which he was shackled to the metal grille and his transportation to Pretoria.”

Thus, the Amnesty Committee found that the applicants had failed to meet the requirements for amnesty as stipulated in the Act, and thus they were denied amnesty. Harold Snyman died before hearing the decision on his amnesty application.¹⁵⁹

¹⁵⁸ Ibid.
Results of TRC Process

In all, the TRC received the testimony of 21,000 victims of apartheid, with
2,000 people presenting their stories at public hearings.\textsuperscript{160} The Amnesty Committee
received 7,112 amnesty applications and granted 849 amnesties.\textsuperscript{161} In its final
report presented to President Nelson Mandela in October 1998, the 17-member TRC
provided a summary of their activities and also provided recommendations for next
steps in South Africa.\textsuperscript{162} They called for reparations to all victims totaling $3,500
each year for six years, prosecution in cases where amnesty was denied, archiving of
all TRC documents, and a reform of South Africa’s society and political system to
include nearly all institutions in the reconciliation process.\textsuperscript{163}

However, the TRC’s final report was almost not released, as both the ANC and
former President F.W. de Klerk launched legal proceedings to prevent the
presentation of the report to President Mandela.\textsuperscript{164} De Klerk’s legal proceeding was
successful in that he got a small section of the final report removed that implicated
him in human rights abuses.\textsuperscript{165} Meanwhile, the ANC’s legal proceeding, claiming
that the TRC failed to respond to the party’s objections surrounding the
commission’s findings on the ANC’s own human rights abuses while fighting


\textsuperscript{161} Ibid.

\textsuperscript{162} Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa’s Truth and
http://center.theparentscircle.org/images/d96de38c44bc4080be6d8f8e2a172ccc.pdf.


\textsuperscript{164} Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa’s Truth and

\textsuperscript{165} Ibid.
apartheid, was denied.\textsuperscript{166} Deputy President Thabo Mbeki, serving as president of the ANC, announced to the press that the ANC had “serious reservations” about the report and continued to fight its release until October 1998.\textsuperscript{167}

President Mandela commended the TRC on its final report and publicly apologized on behalf of the state to all victims of apartheid.\textsuperscript{168} In 2006 the government created a body to implement the TRC’s final recommendations, and it focused primarily on exhumations of bodies and reparations.\textsuperscript{169} Then, there was a resistance to post-TRC prosecution by many in the government that led to a 2005 prosecution policy that allowed the National Director of Public Prosecutions to refuse to prosecute.\textsuperscript{170} Although a Pretoria High Court later found this policy unconstitutional, it showed a governmental resistance to pursuing tricky prosecutions where much evidence was either destroyed or nonexistent. In 2007, President Thabo Mbeki created a special pardons program for apartheid criminals, which was continued by Presidents Mothlanthe and Zuma, although many civil society organizations fought against this program, as they felt it diminished the TRC and went against the Act’s original provisions.\textsuperscript{171} There seemed to be a turning tide, sanctioned by the country’s top leadership, towards forgetting apartheid and moving on without prosecutions or investigations.


\textsuperscript{168} Ibid.

\textsuperscript{169} Ibid.

\textsuperscript{170} Ibid.

\textsuperscript{171} Ibid.
No Prosecution of Biko’s Murderers

Following the denial of amnesty to all five applicants in the death of Steve Biko, the officers were therefore open to prosecution by the Justice Ministry for their crimes. The initial idea in 1999 was to prosecute the officers for murder, as the statute of limitations for any count less than murder had expired under South African criminal law. However, in 2003 the Justice Ministry announced that it would not seek criminal prosecution of the five officers, as there was insufficient evidence to support a murder charge, especially as there were no eyewitnesses to the event. Additionally, the statements made by the men during their amnesty hearings would likely not be admissible in court. Thus, in actuality, there were no real legal consequences for the five officers involved in the death of Biko.

Although the majority of applicants to the Amnesty Committee were denied amnesty, only three prosecutions were initiated after the end of the TRC, and only one person was convicted. There was typically a lack of evidence and often too much time had passed to open a case. Thus, the Biko case was not an exception by any means but was rather the norm.

176 Ibid.
ANALYSIS

Following an undeniably emotional and tense transition to democracy, what exactly was the impact of the AZAPO case and the TRC in general on the reconciliation process in South Africa?

AZAPO

Undeniably, the AZAPO case had enduring political impact on the new democratic nation of South Africa. Two main issues surrounded the reaction to the AZAPO court case: first, was the Court’s decision an act of political expediency or was it rather a well-reasoned and legal court decision? Second, did the Court’s decision to uphold the amnesty provision of the Act mark a violation of international law, allowing indemnity for human rights violators?

Political Expediency Debate

First of all, amnesty was a central tenet of the negotiated settlement between the apartheid government and the ANC (representing the black majority population of the country). It is important to remember that in the case of South Africa, there was not a clear victor or loser; there were bitter and seemingly insurmountable debates between the two sides regarding the transition to democracy, with the apartheid government pushing for amnesty for its members. The agreement to create the Act was on shaky ground to begin with, due to its very nature as a political compromise. Thus in the AZAPO case, the new Constitutional Court faced strong pressure to reach an equitable decision. Most challengingly, the Court had to ascertain the relative validity of the epilogue of the Interim Constitution in order to make its decision, which is described by one scholar as, “the product of political
wheeling and dealing appended to a transitional constitution in a last minute attempt to ensure a relatively peaceful transition to a new dispensation.”

This raises the question of whether the Court’s decision to uphold the Act’s amnesty provision in the AZAPO case was an act of jurisprudence or rather an act of political expediency to further a political goal of reconciliation. The Court’s decision hinged upon determining whether the epilogue of the Interim Constitution (which called for an act of parliament to promote reconciliation and was inherently a political compromise) was on equal legal footing with the rest of the constitution.

Some scholars argue that the Court knew the political risk of revoking the amnesty provision of the Act, and potentially casting South Africa into racial violence, which colored their decision-making in the AZAPO case. In other words, even before the AZAPO counsel presented its arguments, the Court knew it had to find a way to legally uphold reconciliation and amnesty because of political pressure. Thus, the Court deemed the epilogue of the Interim Constitution to be on equal footing with the rest of the constitution and it refused to comment on the international law provisions that the AZAPO legal team had brought up. Professor Lourens de Plessis argues, “Had the Court in AZAPO struck down the impugned section 20(7) of the Promotion of National Unity and Reconciliation Act, the truth and reconciliation process would have certainly ground to a halt – with (potentially) ghastly consequences.”

177 Lourens du Plessis. “AZAPO: monument, memorial...or mistake?” In Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa (Cape Town: ABC Press, 2007), 62.
178 Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa (Cape Town: ABC Press, 2007).
179 Lourens du Plessis. “AZAPO: monument, memorial...or mistake?” In Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa (Cape Town: ABC Press, 2007), 63.
was “messy,” he argues that the future would have been “messier” without the “admittedly imperfect and legally problematic truth and reconciliation process,” which the AZAPO decision upheld. He further argues that the Court itself was “charged with the responsibility to pronounce on the constitutionality of the ‘truth and reconciliation legislation,’” insinuating that the Court knew the decision it had to make even before hearing the AZAPO legal team’s arguments.

Instead of looking at the AZAPO decision as a “messy” but overall positive and indispensable act in South African history, scholar Nthabiseng Mogale offers a more critical response to the AZAPO decision, writing, “In AZAPO, it is clear that the Constitution and the law became instruments that were mobilised and manipulated by the state to make it impossible for victims of apartheid to secure the enforcement of their rights and freedoms.” Mogale argues that the Court made a decision based on political expediency and that “the essential precondition for the effectiveness of law is that it shall display an independence from gross manipulation and shall seem to be just...it cannot seem to be so without upholding its own criteria of equity, rather than the criteria that fit in with a political agenda,” in this case, furthering the truth and reconciliation process, which depended on an amnesty provision. Mogale further attacks the Court’s decision, claiming that the Court

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180 Lourens du Plessis. “AZAPO: monument, memorial...or mistake?” In Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa (Cape Town: ABC Press, 2007), 64.
181 Ibid, 62.
182 Nthabiseng Mogale, ”Ten Years of Democracy in South Africa: Revisiting the AZAPO Decision.” In Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa (Cape Town: ABC Press, 2007), 147.
183 Ibid, 148.
presented amnesty as a right, instead of as what it truly was – a “negotiated political privilege” between the ANC and the apartheid government.184

Patrick Lenta provides a middle ground between du Plessis and Mogale, arguing that while indeed the AZAPO court case was imperfect, there is no solution to every moral question in the world. He presents an argument from many scholars in South Africa’s transition, that “in upholding the constitutionality of the amnesty provision, the Court licensed the sacrifice of justice, in the form of prosecution of perpetrators, for truth, in the form of full confessions by perpetrators motivated by the prospect of amnesty.”185 Thus, here, these scholars see the amnesty provision of the Act as a false way of motivating human rights violators to tell the “truth,” whatever that may be, solely for the hope of amnesty. In the AZAPO case, the Court “licensed” this tradeoff of justice for truth, thus demonstrating that the court was working under political expediency.

Lenta also presents another, new argument from other scholars, that amnesty for civil liability is not explicitly written into the epilogue of the Interim Constitution and thus the Court’s defense of amnesty for civil liability was not legally justifiable, and thus was another clear example of political expediency.186

Thus, while there are many debates within scholarly circles about the AZAPO decision, most would agree that the future of South Africa would have been markedly different, and probably more violent, if the Court had struck down the

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185 Patrick Lenta, “In defence of AZAPO and restorative justice.” In Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa. (Cape Town: ABC Press, 2007), 151.
186 Ibid.
amnesty provision of the Act. Perhaps integral to the potential denial of the legality of amnesty was international law, which the Court did not comment on as they deemed it had no direct bearing on a domestic law case, which presents the next major debate surrounding the AZAPO decision.

**Issues with International Law**

Many scholars agree that the Court failed to answer valid questions about the Act and international law, which perhaps would have led to a rejection of the amnesty provision. According to Mogale, the Court “failed to consider the sources of international law on the right of a victim both to have the perpetrators of a war crime or crimes against humanity punished by a competent tribunal and to seek civil redress from the perpetrator.”\(^ {187}\) However, while the Court was upholding the validity of the epilogue of the Interim Constitution, it was ignoring the Interim Constitution’s high regard for international law.\(^ {188}\)

A larger and more comprehensive argument is that international law forbids amnesty and thus the Court was in violation of international law by upholding the amnesty provision of the Act.\(^ {189}\) Noted international law professor Diane Orentlicher, as quoted by Braude and Spitz, writes that while an amnesty law may indeed be legal domestically, the amnesty law can still violate a state’s international obligations under international human rights law.\(^ {190}\)

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\(^ {187}\) Nthabiseng Mogale, “Ten Years of Democracy in South Africa: Revisiting the AZAPO Decision.” In *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa* (Cape Town: ABC Press, 2007), 139.

\(^ {188}\) Ibid.

\(^ {189}\) Patrick Lenta, “In defence of AZAPO and restorative justice.” 151.

However, the Court stated that the AZAPO legal team’s stance on the violation of international law was not a part of the case, which primarily centered on the constitutionality of the amnesty provision of the Act. Yet, one might wonder whether here the Court perhaps betrayed its hope for political expediency, as undeniably the Interim Constitution recognized the authority of international law, and international law was the arguably the only way to discredit the amnesty provision in the greater truth and reconciliation process.

A London-based newspaper, *The Independent*, reported on the AZAPO decision and quoted Biko’s widow as being “very frustrated” with the Court’s decision.\(^{191}\) The families and their legal counsel claimed that “the state was ignoring its obligation under international law to ‘criminalise, prosecute and punish war crimes and crimes against humanity,’” which thus raises the question of if the South African government was rejecting the question of whether apartheid merited the label of “crime against humanity” (much to the chagrin of many victims’ families).\(^{192}\)

**Public Perceptions of Amnesty**

Similarly to the heated scholarly debate, the people of South Africa were divided on the issue of amnesty. According to surveys conducted by various research firms in South Africa, 48% of South Africans agreed in the 1990s that, “amnesty may be granted if people come forward and confess their crimes,” while 50% of South Africans believed that people who did not apply for amnesty should

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\(^{191}\) Mary Braid, "Victims of Apartheid Lose Right to Put Killers on Trial." *The Independent*, July 26, 1996.

\(^{192}\) Ibid.
be prosecuted.\textsuperscript{193} Interestingly, according to a 1996 survey conducted by Market Research Africa, African respondents were more in favor of amnesty than any other ethnic group in South Africa.\textsuperscript{194} Additionally, more than two in three respondents believed that families of victims should have the legal right to bring civil claims (suing for damages) against human rights violators, thus demonstrating a strong dislike of civil amnesty that the AZAPO decision upheld.\textsuperscript{195}

\textit{TRC}

From the beginning, the TRC was contentious and perhaps even increased racial tensions between black and white South Africans. All 17 commissioners chosen for the TRC were anti-apartheid activists, which worried many apartheid leaders about the fairness of the process.\textsuperscript{196} There were two Afrikaner commissioners, four English, two Indians, two Coloured, and seven Africans, with nine men and eight women.\textsuperscript{197} Outside of the commission, in the Orange Free State, Afrikaners refused to serve black South Africans in restaurants during the entire TRC process.\textsuperscript{198} Many black South Africans became disillusioned with the TRC process as some human rights violators walked away unscathed, with amnesty. And politically, while the creation of the TRC received widespread support from most political parties, including the apartheid architect National Party, the Afrikaner

\textsuperscript{194} Ibid, 46.
\textsuperscript{195} Ibid.
\textsuperscript{196} Leonard Thompson, \textit{A History of South Africa} (New Haven: Yale University Press, 2001), 275.
\textsuperscript{197} Ibid, 275.
\textsuperscript{198} Ibid, 277.
nationalist Freedom Front party voted against the Act establishing the TRC. The Zulu nationalist Inkatha Freedom Party abstained from the vote but later condemned the TRC as a nothing but a political “tool” of the ANC and the United Democratic Front party.

Although the South African TRC has been largely respected for its unique approach to transitional justice, how was the TRC perceived by the people directly involved in the process? Did it promote racial harmony and reconciliation, as originally hoped for?

**Domestic Reactions to the TRC**

Various research firms conducted public opinion surveys before, during, and after the TRC process in South Africa. Interestingly yet unsurprisingly, many perceptions of the TRC process differed along racial lines. In a survey conducted by Research Surveys in 1998, 56% of African respondents believed that the TRC “contributed to peace and reconciliation,” while 54% of white respondents held the opposite belief that the TRC “failed to promote reconciliation.” Although it is not clear, the most probable explanation for this racial difference may have been that black South Africans were more likely to support the ANC and thus were prone to support ANC-backed initiatives, such as the TRC. It may also be due in some part to many black South African’s belief in ubuntu, meaning that all of our humanities are

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linked together, and thus any attempts at healing a society should be supported, as everyone would benefit.

A continuous survey combining data from several research firms tracked public perceptions of white and black South Africans regarding whether the TRC would be fair and then after it began, if it was fair to all sides involved.\textsuperscript{202} In the chart of results below, the researchers found that a majority of African respondents believed the TRC was fair while consistently a minority of white respondents found the same to be true. But it is also important to note that both ethnic groups’ endorsement of the TRC dropped several percentage points after the TRC commenced.

\begin{figure}
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\textsuperscript{203} Ibid.
(Important to note for this thesis, these perceptions do not include public perception of the TRC after the landmark amnesty hearings for Biko’s murderers in the late 1990s. Thus, although these data cannot demonstrate any specific impact of the Biko case on public attitudes, they offer insight into racial differences in attitudes as well as trends over time).

In a separate study from the HSRC in 1998, respondents were asked, “Do you think the TRC has been a good or bad thing for the country?” The results are summarized below:

While a majority of respondents found the TRC to be a good thing for South Africa, African respondents held the most positive views of the process, while a majority of white South Africans believed the TRC was a “very bad thing” for the country. Thus, can the TRC be deemed effective in its goals of reconciliation, if the perceptions of the entire process are so skewed along racial lines?

205 Ibid.
In a study conducted by two professors from St. Cloud State University who surveyed 158 participants at a South African university who identified as either English South African (white), Afrikaner (white), or Xhosa (black), they found that none of the three ethnic groups found the TRC to be highly successful, although the Xhosa held a slightly more favorable view of the process than the white South African groups.\(^{206}\) The three ethnic groups also found the TRC to be less successful at bringing about reconciliation than finding the truth.\(^ {207}\) Qualitative comments from all of the ethnic groups believed that the TRC “opened old wounds without proper support for healing and with a high potential for generating anger and revenge” as victims had to relive their traumas.\(^ {208}\) This prevailing belief calls into question whether the TRC promoted the goal of reconciliation as much as originally intended.

Only the Xhosa participants found that the TRC gave South Africa a positive image in the world, whereas no Afrikaner participant believed this to be true.\(^ {209}\) Also, while the majority of Xhosa participants believed that the TRC had a positive effect on South African society and that society was better off as a result of the TRC, both the English and Afrikaner participants were concerned that the TRC was a “waste of money” with little long-term success for the country, as it continuously reopened old wounds.\(^ {210}\)


\(^{207}\) Ibid.

\(^{208}\) Ibid, 318.

\(^{209}\) Ibid, 319.

\(^{210}\) Ibid.
**Political Cartoons**

Important for assessing public perceptions of the TRC, political cartoons, the most notable ones coming from South African cartoonist Zapiro, showed how some people perceived the TRC. In this famous cartoon, Zapiro shows the TRC commissioners being led by TRC Commissioner Desmond Tutu on a hike up a hill made of skulls of victims of apartheid, with a woman representing retributive justice being left out of the journey, demonstrating Zapiro’s frustration with the commission’s lack of prosecutions and criminal justice for human rights violators under apartheid.\(^{211}\)

Zapiro also drew a cartoon that perhaps encapsulated many people’s perception of the difficult goals of both full truth and reconciliation in South Africa as a result of


\(^{212}\) Ibid.
the commission, showing TRC Commissioner Desmond Tutu failing to reach reconciliation from truth.213

These political cartoons, among many others, were seen around the world and showed a general dissatisfaction with the TRC proceedings, with critiques of the truth versus justice tradeoff as well as the question of amnesty versus retributive justice.

Scholarly Response

There are countless scholarly articles written surrounding the effectiveness of the TRC in promoting truth and reconciliation in South Africa, with almost every possible viewpoint represented. Professors Vora and Vora remarked that perhaps

214 Ibid.
reconciliation may have been “too much to ask” in post-apartheid South Africa. Professor Thomas Nagel of New York University writes that “it is naïve to suppose that there is a solution to every moral problem with which the world can face us,” which Patrick Lenta interprets as supporting his claim that South Africa did the best it could with the Act and the subsequent TRC. Elizabeth Stanley writes that the TRC only symbolically promoted reconciliation, as it did not deal with “the central issues of social and criminal justice” and lacked “a thorough attempt to tackle the fall-out from apartheid.” Alex Boraine defends the TRC and asserts that it was necessary and beneficial for South Africa, writing, “...There is a determination that what was experienced in the past must never happen again. It is this new spirit, this commitment, that was primarily the TRC’s greatest contribution to a country emerging from a very dark night of the soul into a new day.”

Clearly, there is no scholarly consensus on the effectiveness of the South African TRC, with compelling arguments on multiple fronts.

**Biko Family Reaction to TRC**

After failing to get the amnesty provision of the Act stricken down, the Biko family was understandably dismayed to see five apartheid police apply for amnesty in the death of Steve Biko. Biko’s widow, Ntsiki Biko told *The Independent* in 1997

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216 Patrick Lenta, “In defence of AZAPO and restorative justice,” 182.
that the TRC would “rob” her of justice.\textsuperscript{219} She also commented in 1996 that Biko’s grave was “unattended and overgrown” and that the ANC did not commemorate his death.\textsuperscript{220} She told the press, “Many politicians in high places seem to have forgotten what they owe Steve.”\textsuperscript{221}

\emph{President Nelson Mandela on the TRC}

At a speech in 1997 on the twentieth anniversary of Steve Biko’s death, President Mandela commented on the truth versus justice tradeoff as a result of the TRC. He stated, “As the Truth and Reconciliation Commission inches its way towards truth, we are all bound to agonise over the price in terms of justice that the victims had to pay. But we can draw solace from the conviction that the half-truths of a lowly interrogator cannot and should not hide the culpability of the commanders and the political leaders who gave the orders. For we do know, that what they desperately sought to get from him was his contact with the leadership of the liberation movement. In time, the truth will come out!”\textsuperscript{222} Here, although Mandela recognizes how difficult it is for the TRC to uncover the whole truth, he supports the TRC as a process that “inches” towards the truth, even though victims have to sacrifice a bit of justice to hopefully get there.

\emph{Moving Forward}

Above all, there is a pervasive critique in both scholarly circles and the general populace that the South African government did not follow through on the\textsuperscript{219} Mary Braid, "An Enduring Influence, but Nation Divides over Legacy of Steve Biko." The Independent. January 28, 1997. Accessed March 13, 2015.
\textsuperscript{220} Ibid.
\textsuperscript{221} Ibid.
\textsuperscript{222} President Nelson Mandela, \textit{Address at the Commemoration of the Twentieth Anniversary of Steve Biko’s Death}, September 12, 1997.
TRC’s recommendation for widespread and generous reparations to apartheid victims. The 1998 TRC final report included survey data on survivors’ expectations from the TRC:

Mogale writes that reparations are “a fundamental human right” that has been denied by the South African government. Regarding the TRC’s main recommendation of reparations for all apartheid victims, the government proved reluctant to repay them. 21,000 victims received some cash reparations from the government, but in a lesser amount than recommended by the TRC. The government also refused to release the amount of money available for reparations, and the fight still continues today for better reparations to apartheid victims. Many

224 Nthabiseng Mogale, "Ten Years of Democracy in South Africa: Revisiting the AZAPO Decision." In Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa (Cape Town: ABC Press, 2007), 148.
argue that the economic inequality in the country cannot be rectified without these reparations.\textsuperscript{226}

\textbf{Reaction to Lack of Prosecution}

After the five apartheid officers were denied amnesty by the TRC, they were legally open to prosecution for the death of Biko. However, the Justice Ministry claimed that too much time had passed and that there was insufficient evidence for criminal charges. Smuts Ngonyama, speaking for the ruling African National Congress, called the rejection of prosecution in the Biko case “unfortunate” and that “[prosecution] would have been necessary for...our country on a direct course of reconciliation.”\textsuperscript{227} Thus, here, although limited amnesty was denied to the officers involved in Biko’s death, a bad taste was left in the ANC’s mouth (a sentiment probably shared by many others) as Biko’s killers walked free, without any tangible repentance or retribution for their crimes. This unsatisfactory conclusion to the Biko case marks a pitfall and a limit of the commission, where many people were left in want of justice, but there was arguably not much more than could have been done in this case.

\textsuperscript{226} Nthabiseng Mogale, "Ten Years of Democracy in South Africa: Revisiting the AZAPO Decision." In \textit{Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v. President of South Africa} (Cape Town: ABC Press, 2007).

CONCLUSION

Final Thoughts

Anti-apartheid activist Steve Biko has had an enduring legacy throughout the world. Over 20,000 people attended his funeral, and his teachings on Black Consciousness survive to this day. Although South Africa still has many social problems and is attempting to find a way to move forward from the still painful memory of apartheid, the country’s transition to democracy from minority rule under apartheid has been widely lauded and studied. After discussing the AZAPO court case and the subsequent TRC amnesty hearings, what impact did the Steve Biko case have on the effectiveness of the reconciliation process in South Africa?

In the AZAPO case before the Constitutional Court that challenged the constitutionality of the amnesty provision of the Act, the Biko family’s wishes were denied as the court upheld the constitutionality of amnesty in the TRC. By denying an extremely high profile victim’s family its choice of prosecution for the officers involved in the death of Steve Biko (criminal justice), the Court showed that individual rights and wishes would be surrendered for the larger goals of reconciliation in the country. It is impossible to know for sure, but one might wonder whether this public and painful denial of the Biko family’s desire for justice through prosecution and the denial of amnesty deflated and discouraged other victims who had hope for the transition to cater to the needs and desires of victims over perpetrators.

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The Court’s decision in the AZAPO case strengthened the new democratic government’s choice of transitional justice, although the Court ignored the plaintiffs’ challenge on international law, which may have been the most solid argument in defense of the unconstitutionality of amnesty. However, since its inception, international law has been tricky, and it has often been implemented differently throughout the world, and it has very little real enforceability. However, critically, the Court was able to back up the new nation’s Interim Constitution, giving it the highest validity in the highest court of law. By proving the strength of this constitution, including its politically negotiated epilogue, the Court was then able to show the constitutionality of the Act in its entirety. By being able to support both the constitution and the Act against the high profile Biko family, the Court actually reinforced the reconciliation process and provided it with the strength to carry on.

The Court’s decision in the AZAPO case was a turning point in South Africa’s transition from apartheid, as it gave the highly contentious TRC some legitimacy and thus set South Africa on a unique and unprecedented path towards the current South Africa. Without this court decision and the upholding of amnesty, perhaps the threatening apartheid and Afrikaner factions would have resorted to violence, and the South Africa we know today that transitioned to democracy relatively peacefully would not exist.

The five apartheid policemen applying for amnesty soon after the AZAPO decision for their involvement in the death of Biko was the next huge test of the reconciliation process in South Africa. While the Biko family was denied its preferred form of justice in the AZAPO case, the Amnesty Committee was now under
intense international scrutiny. Many were afraid that the Amnesty Committee
would provide a blanket amnesty to apartheid human rights violators and that
justice would not be served. However, in the case of Biko, the five officers were
compelled to divulge important information that would arguably have never been
shared if not for the chance of amnesty. While some may argue that any
perpetrators motivated by amnesty to testify could not be trusted to share the truth,
the hearings provided more of a picture of Biko’s last days and treatment under
apartheid police custody. While the “whole truth” remains elusive, the five officers’
testimonies, no matter what their motivation, at least provided some extra element
of truth to the public and the Biko family. Additionally, the Amnesty Committee
provided at least some justice by denying amnesty to all of the applicants regarding
the death of Biko, as the Committee did not believe that they had shared the full
truth and they had not shown that they were politically motivated in the murder of
Biko. These five denials of amnesty quelled the public’s fear of the Amnesty
Committee providing a blanket amnesty to anyone who applied, and actually
showed how difficult it was to obtain amnesty. Conditions had to be met, which
gave the amnesty process some legitimacy. While indeed there was no criminal,
retributive justice as a result of the amnesty hearings, the five policemen were
compelled to testify publicly and their names are now forever tied to the murder of
Biko. The hearings uncovered some truth about the treatment of Biko in police
custody, yet much is still unclear. However, the Biko family arguably found out
more about Biko’s last days as a result of these hearings than they would have heard
in a criminal proceeding. Indeed, as the Chief Prosecutor later announced, there
was not enough direct evidence to even put these five apartheid police officers on trial. Even if South Africa’s statute of limitations had been extended to allow a prosecution to go forward regarding Biko’s death, the case was unfortunately unwinnable.

The greatest failure in the truth versus justice debate surrounding this transition in South Africa is the lack of adequate reparations to victims of apartheid. The government knowingly decided to accept a tradeoff of justice for truth and a common understanding of the horrors of apartheid. Reparations, as called for in the TRC’s 1998 Final Report, would be the most just form of acknowledgment of past suffering and a commitment to bringing the country forward. Many families left the TRC process with very little new truths and almost no justice, especially as amnesty was in fact granted to hundreds of human rights violators. Reparations would give all victims of apartheid the recognition and validation that perhaps the TRC could not provide to everyone, despite the Commission’s best efforts.

While many people would probably prefer traditional criminal justice in the face of horrible human rights atrocities, the situation in South Africa was unique. Two opposing sides now had to work together for a new government, and there was an egregious lack of evidence to prosecute human rights abusers. And importantly, both sides in the apartheid struggle had committed crimes worthy of prosecution. But in this situation, where justice through criminal prosecutions was not guaranteed by any means, the TRC was arguably the best way to appease both sides enough to continue moving forward and to obtain, in some cases, at least more elements of the truth about what happened to many victims, many of whom lay in
unmarked graves and would not have been located without the truth-telling of the TRC, which was motivated by amnesty.

Thus, while there is a lack of concrete data specifically linking the Biko case to public perceptions of the legitimacy of the reconciliation process, it is possible to tease out the implications of AZAPO and the subsequent TRC amnesty hearings, arguing that this handling of the Biko case strengthened the reconciliation process in South Africa. The Biko case, through AZAPO and later the TRC, first provided the Interim Constitution with legitimacy, legally defining reconciliation as a crucial goal of the new South Africa, and then showed that amnesty under the TRC was a difficult measure to obtain. The Biko family’s disillusionment and negative emotions regarding the lack of justice and full truth regarding Biko’s death are understandable and very unfortunate, yet Biko’s reputation as a high profile anti-apartheid activist offered ideal ground to provide a sort of ethos to the reconciliation process. Steve Biko was not only a martyr for black South Africa and his cause at the time of his death, but he also became a martyr for the reconciliation process, providing it with the necessary authority to continue a relatively peaceful transition to democracy.

**Biko’s Enduring Legacy**

“Help to finish the work of Steve Biko. Help to smash the remaining links of the chains he broke, and let the sound of this work echo around the world so that chains may be broken wherever they hold in bondage the bodies and minds of men.”

-Donald Woods

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Even though Steve Biko did not survive to see his country escape apartheid, he has a lasting legacy both in South Africa and around the world. Singer Peter Gabriel’s song *Biko* helped make Biko a world icon and household name in the early 1980s. In 1982, the Steve Biko Housing Association was founded in Liverpool, England to provide affordable housing primarily for black people and other ethnic minorities.230

Many books and movies were produced around the world, including the critically acclaimed *Cry Freedom* in 1987, starring Denzel Washington as Steve Biko and grossing more than $5 million in the USA, telling the story of journalist Donald Woods and Steve Biko.231 The film was nominated for three Academy Awards.232

In 1992, the *Instituto Cultural Beneficente Steve Biko* was founded in Salvador, Bahia, Brazil, which created the first pre-university courses for black Brazilians.233 The mission of the institute is to “promote political and social advancement of the black population through education and appreciation of their ancestry.”234 The institute provides an education for many poor black Brazilians who otherwise would have to attend underfunded public schools with little chance of ever escaping the cycle of poverty.235

In 1997, President Nelson Mandela commemorated the twentieth anniversary of Biko’s death by unveiling a statue of Biko in his hometown of

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232 Ibid.
234 Ibid.
Ginsberg, South Africa. He spoke about Biko's impressive legacy and how to continue his work, stating:

“In those difficult hours ten years ago, the slings and arrows of outrageous fortune robbed a nation of a gifted young man whose contribution to our cause would have been even more immense. But our commitment to the unity that Steve Biko stood for will continue to guide us as we join hands in practical action to redress the legacy of oppression. It means working together, government in each sphere and all sectors from society, in bringing prosperity to the province, the country and the continent, which spawned him. It means all of us helping to take South Africa across the threshold of greatness on which it stands. That will be achieved by each of us respecting ourselves first and foremost, and in turn respecting the humanity in each one of us. It means an attitude of mind and a way of life that appreciates the joy in the honest labour of creating a new society. In time, we must bestow on South Africa the greatest gift - a more humane society.”

At this address, Mandela also renamed a bridge to the town and made Biko's childhood home a national monument. Mandela stated that all of these actions were made in an effort to “immortalise” Biko's life. This Steve Biko Memorial still stands in Ginsberg and is a leading tourist attraction in the area.

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237 Ibid.
In 1998, the Steve Biko Foundation was created to continue the work of Biko with the central mission of “restoring people to their true humanity.” The Foundation works in partnership with the University of Cape Town on the Steve Biko Memorial Lectures, where each year a keynote speaker presents on a subject related to the activism of Steve Biko. Past speakers have included the former UN High Commissioner for Human Rights Navi Pillay, Biko family attorney Sir Sydney Kentridge, TRC Commissioner Archbishop Desmond Tutu, President Thabo Mbeki, and American professor Alice Walker.

Evidence of Biko’s lasting legacy also lies with the continued existence of AZAPO in South Africa. The group still operates on Biko’s Black Consciousness ideals, but now has more of a political wing that is pushing for the political incorporation of the black working class. On a broader level, Biko’s intellectual and philosophical Black Consciousness Movement is still studied and referenced today internationally.

Most recently, in 2013, Biko’s former lover Mamphela Ramphele founded the AGANG political party in South Africa in an effort to “stay true to the blood of young and not very young martyrs” during the anti-apartheid struggle. She hopes to improve education, improve health care, prevent maternal death, and above all to increase morality in South Africa. Her and Biko’s son Hlumelo commented that Biko would “not be happy” with the current state of South Africa, which is still

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243 Ibid.
reeling from the long-term detrimental effects of apartheid.\textsuperscript{244} Ramphele vows to build on Biko’s legacy, as she feels South Africa under the ANC has taken several steps backward.\textsuperscript{245} In the 2014 national elections, the AGANG party gained only 0.28\% of the vote and two seats in the National Assembly.\textsuperscript{246} Following internal struggles in the party, Ramphele stepped down for the party’s leadership in July 2014 and announced that she would increase her activism in civil society with a focus on young people and women to ensure a better South Africa.\textsuperscript{247}

All of the above examples show that Stephen Bantu Biko did not die in vain. The South Africa we know today, an example of a relatively peaceful transition to democracy, would arguably not exist without his role in fighting apartheid, and later, in death, helping to give legitimacy to a revolutionary transitional process. He was a martyr twice over for his country, and his legacy will continue to empower others around the world and especially in South Africa, where there is still much work to be done on the path to equality.

\textsuperscript{245}Ibid.
\textsuperscript{247}Ibid.


