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‘Ere their story die’: truth, justice and reconciliation in South Africa

‘War’s annals will cloud into the night, ere their story die.’
(Thomas Hardy, *In Time of ‘The Breaking of Nations’*)

The core purpose of the South African Truth and Reconciliation Commission (TRC) was ‘to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past’ through investigating and establishing as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed in the past conflict in South Africa, that is:

- (a) the killing, abduction, torture or severe ill-treatment of any person; or
- (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed

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during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.¹

The TRC was charged with uncovering the fate or whereabouts of the victims of gross violations of human rights between 1960 and 1994.² It was also to provide an explanation of the antecedents, circumstances, factors and context of past violations, as well as reflect the perspectives of the victims and the motives and perspectives of the persons responsible for the violations. To do this, the commission was to conduct inquiries under the charge of its investigation unit and hold hearings.

Specifically, the TRC was also set up to grant amnesty to people who fully disclosed all the relevant facts relating to acts associated with a political objective. According to the Promotion of National Unity and Reconciliation Act No. 34 of 1995 which established the TRC (the TRC Act), all perpetrators of political offences, regardless of their affiliations, who wanted amnesty – and who had not acted out of malice or personal gain but rather in pursuit of a political objective – had to disclose the full details of their past political crimes to qualify for it.

Amnesty was agreed at the 1990–4 negotiations and legislated for in the postamble to the 1993 interim Constitution. This decision is generally justified on pragmatic grounds and considered critical to ensuring the transition to democracy in April 1994.³ Amnesty, or so the argument ran, was the price of saving innumerable lives that would have been lost had the security services not been placated with some guarantees that extensive prosecution of those supporting the previous government would not take place after the election. However, unlike in Chile, amnesty in South Africa was neither blanket nor automatic. South Africa agreed on a criteria-driven amnesty and the TRC, as well as pursuing its other goals of restoring the human and civil dignity of the victims of violations, became the vehicle for granting (or refusing) such amnesties.

The TRC amnesty committee had to assess each application and, based on the criteria of the TRC Act, decide whether the act for which amnesty was sought was political; whether full disclosure had taken place; and whether the act had been committed in line with a political objective. Amnesty had to be sought for each violation separately and each violation had to be assessed on its own merits, even if a perpetrator had committed more than one violation. Simply put, it was agreed that any seeking of justice through the courts would be set aside, provided the perpetrators told the truth. This was considered an acceptable level of accountability, given the South African context and the negotiations. Truth, it was argued, was vital to understanding

what had happened, assisting victims to come to terms with the past and preventing the repetition of human rights violations in the future.

In addition, the TRC was to provide the victims of atrocities with an opportunity to relate their experiences. It was to document the testimony of such victims, who were to be given the opportunity to divulge how they had suffered in the past and have their cases investigated. Hearings were also extended beyond consideration of individual cases. Special institutional hearings were held which focused on the role of various sectors, such as business, the health sector, the media, judiciary, trade unions and faith communities, in colluding with or opposing racism and the violent impact of apartheid. In addition, special hearings took place on issues such as conscription, prisons, women and youth, as well as event-specific hearings dealing with critical events that had substantially shaped the conflict, for example, the Soweto uprising of 1976.

The TRC was also to make recommendations about reparations for the survivors of violations and, in its final report, it made substantial recommendations in that regard.⁴ In addition, the commission was to recommend measures aimed at preventing gross violations of human rights in the future and to compile as comprehensive an account as possible of its activities and findings. This was to include listing the names of all those who received amnesty and their crimes.

The TRC process began in December 1995; the victim and institutional hearings ended in the third quarter of 1998. The commission handed the first five volumes (totalling 3,500 pages) of its final report to President Mandela in October 1998. The amnesty committee continued its work and finished its public amnesty hearings in May 2001. The commission formally closed on 30 November 2001 when the last amnesty decisions were finalised. Additional volumes of the final report, focusing on the amnesty process, were to be completed by April 2002. The commission thus took over six years, nearly four years longer than was originally legislated, to complete its work.

More than 20,000 people have come forward and made statements to the TRC about how they had been victimised under apartheid. The nation as a whole was bombarded by the images and accounts of some 1,800 victims whose cases had been selected from the original statements. Victims were also given the opportunity to recount their stories in public, and over eighty public hearings took place across the country during the life of the TRC.

By 1 November 2000, 7,112 people – from the state security forces, 'liberation movements', right-wing factions and other ex-combatants – had applied for amnesty. Of these, some 840 people received amnesty, while 5,392 applications were refused. The TRC Act compelled the commission to hear applications in public if the act for which amnesty was sought was a gross violation. About 20 per cent of cases were heard

publicly and the remaining 80 per cent decided in chambers. Around 75 per cent of applications came from people in prison, with a high proportion of those refused being prisoners who tried to frame common crimes they had committed as political, when this clearly was not the case.⁵ Paradoxically, although the proportion of applicants receiving amnesty was small in relation to the total numbers, it was often some of the most heinous political crimes that received amnesty, including torture and murder. These cases were heard in public as the legislation demanded, meaning that South Africans were subjected to the details of many horrendous political crimes.

Assessing the TRC

Assessing the impact of the TRC is difficult and complex. In the first place, some of the benefits (and costs) of the process may only be seen in decades to come. Second, the exact aim of the TRC was and, in some senses, remains unclear and understandings of it varied between different players. This makes it difficult to ascertain the criteria against which the achievements and failures of the TRC can be measured.

According to the TRC Act, the TRC was meant to 'promote national unity and reconciliation'. To achieve this, it had to carry out a range of seemingly interrelated tasks which included allowing victims to tell their stories, investigating violations, granting amnesty, making reparations, documenting violations and allocating responsibility, as well as making a set of recommendations aimed at preventing future abuses. It is possible, therefore, to assess the TRC with regard to whether it promoted national unity and reconciliation, and to look as well at how it fared in each of the tasks it was meant to carry out to achieve this.

The TRC's greatest success was the public hearing process and the acknowledgement, by proxy, of past crimes. The brutal horrors of apartheid found their way, via the media, into the living rooms of most South Africans. The *TRC Special Report*, a news programme that reported on its activities, had a 1.1 to 1.3 million audience each week in its first year and was rated as one of the top ten programmes in the country according to its viewing figures.⁶ In the first months of the commission, white South Africans switched to the *Special Report* nearly as often as to the English news bulletin at 8 p.m.

The publicity generated by the TRC and the telling of stories to the nation seem to be what the survivors (including those who were ambivalent about other achievements of the TRC) felt was most useful about the process.⁷ In this context, the power of having a denied truth recognised must be appreciated.⁸ The TRC also created, at least during its lifetime, a legitimate social space for the voices of

victims to be heard, as well as creating open public debate about the needs and concerns of victims. An almost undeniable historical record was created, and it will be very difficult for anyone to deny the impact of apartheid violence now, or for decades to come. It is important to acknowledge the contribution of the TRC, in its multi-volume final report, to documenting the human rights violations that took place in South Africa. The TRC report is particularly strong on assigning responsibility for past actions. It also contextualises all violations within a framework in which fundamental human rights – such as socio-economic equality, decent education and adequate health care – were denied, all as a direct policy of extreme racism. It confirms that apartheid was a crime against humanity and that ‘the predominant portion of gross violations of human rights was committed by the former state through its security and law-enforcement agencies’.⁹ Although the commission found the goals of the ‘liberation movements’ to be more just than those of the apartheid state, their means of achieving those goals were found to be severely lacking in many instances; they also were found to have committed a number of gross violations of human rights. The TRC found the Inkatha Freedom Party (IFP) to be accountable for 33 per cent of all violations reported to it and responsible for the highest percentage of non-state violations. The commission criticised the ‘beneficiaries’ of the apartheid system – specifically the church and faith groups, the media, the legal profession, the judiciary, the magistracy, the medical/health, educational and business sectors – for ‘acts of omission in that they failed to adhere or live up to the ethics of their profession and to accepted codes of conduct . . . they prospered from it [the state system] by staying silent . . . by doing nothing or not enough, they contributed to the emergence of a culture of impunity’.¹⁰

For a minority of victims (some estimates put the figure as low as 10 per cent¹¹), suppressed truths about the past were also uncovered. In some cases, missing bodies were located, exhumed and respectfully buried. For others, the confessions of perpetrators brought answers to previously unsolved political crimes – crimes which the courts, arguably due to cost and inefficiency, might never have tried. However, for the majority of victims, the TRC began a process it was unable to complete. Many victims felt let down and no closer to the truth than before they told of their suffering. Comprehensive truth recovery was difficult because the TRC had roughly sixty investigators to handle over 35,000 violations reported by the approximately 22,000 victims who gave testimony to the commission alone – apart from the thousands of violations reported by perpetrators. Irrespective of the feasibility of investigating every case, victims’ expectations in many instances were dashed and, in their eyes, this has undermined the commission’s credibility.¹²

Promoting national unity and reconciliation

Exactly how successful the commission was in carrying out its inter-related activities, and how far its partial, although hardly complete, accomplishment of these contributed to the broader objective of promoting national unity and reconciliation is more difficult to judge. Goals such as 'national unity' and 'reconciliation' are saturated with flawed assumptions and multiple meanings. Implicit in the notion of 'national unity' is the supposition that its pursuit is a unitary and coherent process, and that individual and national processes of dealing with the past are largely concurrent and equivalent. The entire discourse of nation building was imbued with the pseudo-psychological construction of national healing, incorrectly implying that nations have collective psyches. The problematic results were that individual needs such as long-term healing and the desire for justice were subordinated to the collective drive to 'reconcile', and nationalist discourses were framed in human rights talk.¹³

Similarly, reconciliation as an objective proved problematic. During the lifetime of the commission, the term was never defined nor was a shared understanding ascertained. Most people would probably have agreed that reconciliation embodied some positive connotation about coming together and mending past conflicts, but competing understandings of the term in South Africa have been identified.¹⁴ These include:

A non-racial ideology of reconciliation. This essentially defines reconciliation as dissolving the racial identities arising from the policies of the past and implores the TRC to convert people, through confession and acknowledgement, into non-racial citizens within a harmoniously integrated social setting. This is mainly aimed at those who committed violations but can also include those who benefited from the system and failed to challenge it. A more hard-line form of this approach demands not only acknowledgment but also redress from those who benefited, to ensure more lasting social transformation.

An intercommunal ideology of reconciliation. This sees the divisions of the past as a consequence, fundamentally, of the fact that South Africa is made up of separate communities with different cultures and histories. The subsequent process of reconciliation is about bridging the divides of the past (not necessarily through the admission of guilt) by means of improved communication and better understanding between groups, thus leading to greater co-operation and co-existence at the individual and political level.

The religious ideology of reconciliation. This is based on the teachings of the various churches and focuses on honesty and forgiveness. It emphasises the discovering of a new conscience for individuals and society through confrontation with the evil deeds of the past and

the rediscovery of our common humanity through moral reflection, repentance, confession and rebirth.

The human rights ideology of reconciliation. In this, true reconciliation is only possible if social interaction is regulated through the rule of law so as to prevent certain forms of violations of rights from happening again. To achieve this, one has to condemn inappropriate behaviour (irrespective of who is responsible); uncover the truth about how violations were committed; discourage people from repeating these offences by setting up appropriate institutional and social safeguards; prosecute where possible; and learn from past mistakes.

The community building ideology of reconciliation. This is concerned with individual relationships that have broken down between and within communities during the conflict, rather than with broad and abstract values of coexistence and national political tolerance. The public airing of allegations and suspicions via processes like the TRC could help facilitate the reconstruction of interpersonal relationships through creating space for direct interventions such as conflict resolution initiatives.

During the life of the commission, different actors in and around it often spoke about reconciliation in very different ways, thereby confounding the commission's aims. These differing approaches also placed differing emphases on the precise relationship between the work of the TRC (that is, granting amnesty, carrying out investigations and facilitating the hearing of victims) and the subsequent assumed impact on reconciliation and national unity. Furthermore, what reconciliation was, exactly how it was to happen, and how you knew it was achieved, were never clearly articulated. The clearest illustration of this in the TRC legislation comes in its endorsement of the interim Constitution, which states that 'in order to advance [such] reconciliation and reconstruction amnesty shall be granted'. But precisely *how* reconciliation was to flow from granting amnesty was left for the commission to decipher and interpret, and it could be argued that this remains both confusing and confused.

The TRC's own comments on reconciliation show that it seemed to adopt a mixture of non-racial, inter-communal and religious understandings of reconciliation.¹⁵ These underlying assumptions were also expressed in slogans used in the TRC's banners and media: for example, that truth was 'The road to reconciliation' and 'Revealing is healing'. Archbishop Tutu, chairperson of the TRC, articulated similar views throughout the TRC process, as in his address to the first gathering of the commission:

We will be engaging in what should be a corporate nationwide process of healing through contrition, confession and forgiveness.

To be able to forgive one needs to know whom one is forgiving and why. That is why the truth is so central to this whole exercise.¹⁶

Wilson argues that, from the inception of the TRC, two competing visions were present, namely, that the TRC was either a legal process of truth recovery or an instrument of moral and emotional catharsis.¹⁷ This could be reframed, using the definitions outlined above, with, on the one hand, those who saw the process as an exercise in a human rights-based form of 'reconciliation' and, on the other, those holding more of a non-racial, intercommunal and religious understanding of reconciliation.

However, although at a public level the commission seemed to subscribe to the latter view, it is important to note that there were significant tensions within it. There was ongoing friction about how reconciliation should be construed and what the priority of the commission's work should be, as well as the relationship of the different parts of its work to the overall objective of promoting reconciliation. Take, for example, the statement-taking process. Under pressure from lawyers within the TRC, all statement-takers, whose training had originally emphasised documenting the victims' narratives and addressing victims' psychological needs to the greatest extent possible within the process, were retrained to adopt a more factual emphasis in statement-taking.¹⁸ This issue of retraining is interesting to consider. First, it highlights the *perceived* competing tensions within the TRC (and the internal jostling for power), demonstrating that the overall purpose of the commission was unclear from the start and probably throughout. Second, as Wilson argues, drawing on Max Weber's analysis, it highlights how moral considerations can be replaced by technical ones – a process characteristic of bureaucratic rationalisation that can impoverish the life-world of social agents in that it renders the communicative practices of everyday life in instrumental and bureaucratic terms. This is captured by Wilson when he quotes from an interview with the TRC's chief data processor, Themba Kubheka:

When we started it was a narrative. We let people tell their story. By the end of 1997, it was a short questionnaire to direct the interview instead of letting people talk about themselves . . . The questionnaire distorted the whole story altogether . . . it destroyed the meaning.¹⁹

It is no wonder that some victims felt that their story was 'frozen in time' and 'stripped to its essential characteristics'.²⁰ This led to some feeling dissatisfied that their cases had not been thoroughly investigated or documented and that the story-telling process of the TRC was limited. This highlights not only that the exact purpose of the testimony for the commission was unclear, but also that victims came to the TRC

with competing understandings of what the story-telling process could or would achieve for them.

At a broader level, the TRC was also accused by some of having too narrow a focus, which resulted in only a limited 'truth' coming out of the process. Mamdani, writing from a position apparently influenced by a more hard-line, non-racial concept of reconciliation emphasising acknowledgement and redress from the beneficiaries of the system in order for reconciliation to take place, asserts that the TRC failed to provide a more racialised and structural economic analysis in its hearings.²¹ Rather, the TRC chose to define victims narrowly, that is, as the direct victims of gross human rights violations such as murder, torture, abduction and disappearance. From this perspective, the TRC failed sufficiently to make the link between the structural violations of apartheid (for example, systematic poverty or inequality in access to services) and the direct human rights violations suffered by those who testified. Victimisation was defined as stemming from a direct act of political violence, while those who suffered the ravages of apartheid through forced removals, pass laws, malnutrition or poor education were not asked to testify. Neither were they directly categorised as victims.

Taken to its logical conclusion, this argument would imply that, through the failure of the TRC to address structural issues, it was inevitable that, in the post-TRC period, the inequalities of the past and their racial flavour would loom large – as indeed they do. It has been argued that by focusing selectively on some of the horrors of the past, the TRC's hearings paradoxically diminished understandings of the full iniquity of that history.²²

In assessing these arguments, it is useful to draw a distinction between the way the TRC managed its public profile and what it concluded in its report. In its final report, the TRC was at pains to point out that 'we cannot hope properly to understand the history of the period under review unless we give apartheid and racism their rightful place as the defining features of that period'.²³ In regard to the institutional hearing on the business sector, for example, it pointed out that inequality was a direct result of business collusion with apartheid policies and that 'most businesses benefited from operating in a racially structured context'.²⁴ The commission also noted that 'reconciliation requires a commitment, especially by those who have benefited and continue to benefit from past discrimination, to the transformation of unjust inequalities and dehumanising poverty'.²⁵

Basing an assessment on the TRC's final report, it is not correct to find the commission totally lacking in its ability to acknowledge the wider context in which human rights violations were committed. In fact, the institutional focus of the TRC – a first for a truth commission – can be seen as a serious advance in processes aimed at uncovering the

full picture about past violations. Trying to inquire systematically into acts of omission, rather than simple acts of collusion, especially in institutional settings, can be helpful in sketching a comprehensive picture of the causes of any conflict. That said, there are instances in the final report where human rights violations are narrowly construed. For example, in discussing the statements from deponents from the Orange Free State (largely farm labourers), the commission noted:

Many deponents . . . told the Commission that they had been victims of assault and attack, including social and economic deprivation, purely on the basis of race. The Commission was not always able to make a positive finding in respect of such cases, particularly when no clear-cut political motive was identifiable.²⁶

It is comments of this type that have fuelled the criticism that the TRC did not tell the full story of the past and defined political crimes too narrowly. However, in the same way that it is simplistic to assume that truth would lead to reconciliation, or that revealing past atrocities would lead to healing,²⁷ so, too, it is a mistake to assume that labelling apartheid as a structural violation through a truth commission process would result in a definite change in the socio-economic structure or deliver social justice.

It would no doubt be useful in reinforcing calls for a more fundamental transformation and for the beneficiaries to redress the inequities of the past, but the relationship between the different institutions, such as the TRC and many others set up in post-apartheid South Africa that promoted or hindered transformation, is simply not that straightforward. Nor is the power of the TRC that extensive. Given the high profile of the TRC, it was hard to avoid the impression that the TRC was *the* transformation process, with its high visibility overshadowing other dimensions of the peace-building process.²⁸ But the socio-economic trajectory for the new South Africa was being set long before the negotiations and the TRC were put in place. That is not to say that, from the moment the negotiations were concluded, the outcome was predetermined. For Marais, the principles embodied in the new South Africa did not in themselves scuttle attempts to marshal a popular transformation project:

What mattered were the terms on which inclusion and assimilation occurred – specifically, which social classes' interests would become privileged in the resultant hegemonic project . . . in the South Africa of 1994, the class content of that project was still undefined.²⁹

It could be argued that the TRC was integral to helping define the class content of the new South Africa through its limited focus on the social injustices of the past. However, the TRC's mandate was the product of

a social process already in motion (although not predetermined in its outcome, as Marais points out) at the negotiations. As such, the TRC was part of, and one of, the first symptoms of a 'depoliticising' and liberalising process, hardly the cause of it. Criticisms of the TRC's narrowly construed mandate tell us more about the serious need to redress ongoing socio-economic inequity, the threat of this to stability, and the lack of transformation in the neo-liberal 'new' South Africa, than they do about the commission's missed opportunities to highlight structural violations in its public discourse and impact significantly upon them.

The TRC's development was not a purely linear process, nor was its focus uncontested. In the process of the TRC's formation, many of those who supported the idea of a truth commission – generally subscribing to a human rights and hard-line non-racial ideology of reconciliation – saw it as the option with the most potential to address what had happened and to hold to account both the 'beneficiaries' and some direct perpetrators in a way that the courts could not. From my experience of being present in some of the early meetings, the humiliation that the process inflicted on perpetrators (particularly state perpetrators) when they were forced to confess publicly was certainly considered by some to be the best 'revenge' possible, a genuine way in which perpetrators could be held to account to the nation, and lessons learnt thereby for the future.

Different forces also jockeyed for space within the liberal framework of the TRC throughout its life. The TRC attempted, at least in its report, to push the boundaries of what was acceptable within a rapidly liberalising South Africa in which a new authority sought hegemony. Good examples of this included: arguing for an extended wealth tax to redress the imbalances created by apartheid; labelling beneficiaries of the system as responsible through acts of omission; and finding that members of the ANC, now the party of government, were responsible for some of the violations in the past. In this, the TRC cannot be dismissed as merely a product of the negotiations and as having no intrinsic potential to assist in radical transformation – if anything, it represented the already contested nature of South Africa's broader process. Intrinsic to the TRC was sufficient power to make deep incisions into past impunity and to hold people to account. However, the degree to which the TRC did this was, in the end, as much about its contested internal and external reality as about opposing and competing ideologies of reconciliation within and around it. For example, the commission possessed much stronger extensive search, seize and subpoena powers than other truth commissions.³⁰ In one of the more high-profile events, the commission subpoenaed the former prime minister, P. W. Botha, who refused to appear. On 21 August 1998, Botha was found guilty of failing to attend at the time and place specified in the

subpoena and was sentenced to a fine of R10,000³¹ or twelve months' imprisonment, and twelve months' imprisonment suspended for five years.³²

Equally, the TRC did not, on the whole, use some of its powers to the extent that it could have. Piers Pigou, former TRC investigator, argues that, although the investigation unit was empowered to conduct searches, it only exercised these powers in one or two cases, despite many opportunities to do so.³³ This is evidenced in the TRC's own admission that it should have subpoenaed Chief Buthelezi, leader of the Inkatha Freedom Party (responsible for the highest percentage of non-state violations that came before it), but failed to do so. The commission wrote:

Given its stance in regard to Mr P. W. Botha, the Commission is thus vulnerable to the charge of double standards. The only defence that can be offered is that the issue was intensely debated by the Commission, which ultimately succumbed to the fears of those who argued that Buthelezi's appearance would give him a platform from which to oppose the Commission and would stoke the flames of violence in KwaZulu-Natal, as indeed he himself promised. In retrospect, it was probably an incorrect decision.³⁴

This statement highlights the contested nature of the TRC's internal processes and the way in which the 'truths' that came out of the commission's work can be said to be less than complete in several areas. (The TRC admits to not having dealt with the 1990-4 violence in South Africa to the extent that it should have done.) It also highlights how fearful the TRC was of destabilising the situation in South Africa.

More importantly, it is symptomatic of a larger issue that was present throughout the life of the TRC; that is, the tension between those who favoured the voluntary participation of people before the commission and those who favoured the use of subpoena powers to force testimony from alleged perpetrators. The differing approaches were often underpinned by divergent conceptualisations of reconciliation. There were those who saw reconciliation as an unfolding process in which remorse and admission of guilt could not be forced but, if achieved voluntarily and through goodwill, could have a profound impact on a new national unity. This was in contrast to those influenced by a more human rights ideology of reconciliation which saw labelling those responsible and calling them to account as paramount.

'The problem of amnesty'

When the conceptualisation of reconciliation as requiring not just the 'will' but the 'goodwill' of perpetrators was prominent among the multiple discourses on it unfolding simultaneously in South Africa,

victims particularly criticised the TRC for bending over backwards for alleged perpetrators at the expense of *their* concerns. Extending the deadline for the receipt of amnesty applications from December 1996 to May 1997 was a good example of this. Arguably, the commission extended the dates because it had not received enough applications – which angered some victims because, if perpetrators failed to apply before the cut-off date, they could have been prosecuted after the life of the TRC.

Even without these sorts of concessions to amnesty applicants, the entire justification for amnesty was often unacceptable to many victims.³⁵ Bringing perpetrators to justice is an important and sometimes essential component of a victim's recovery and psychological healing,³⁶ and can have a significant impact on preventing impunity in the future and entrenching the rule of law.³⁷ Furthermore, research has shown that retributive understandings of justice are often more salient in South African society, rather than understandings of justice which emphasise reconciliation and forgiveness.³⁸

At the core of the unacceptability of amnesty to some victims in South Africa is the fact that the victims of successful amnesty applicants were denied *any* prospect of justice through the courts. It is possible to argue – as the South African Constitutional Court did – that amnesty was inescapable as it was cemented in the postamble to the interim Constitution and was in the interests of the broader reconstruction of the country.³⁹ However, the denial of justice through the courts for certain individuals was, and remains, a severe personal blow. This reality was not only painful for some direct victims, but no doubt placed a psychological strain on the TRC commissioners, who were the instruments responsible for inflicting this retributive injustice. The result was that an entire set of justifications, correct or otherwise, was built up as to why the denial of justice through the courts was necessary in South Africa. Furthermore, in the ensuing debate, the multiple meanings, discourses and differing interpretations of what justice was became conflated.

At the beginning of the TRC process, truth was often seen as a panacea for the difficulties of enforcing or ensuring retributive justice, with justice and truth often counterposed. The nuances of the process were often underemphasised with commissioners – and those who opposed amnesty – being forced to take a position either for or against a 'truth' or 'justice' approach. This led to some startlingly polemical statements, such as Tutu's claim that the commission had contributed more to uncovering the truth about the past 'than all the court cases in the history of apartheid'.⁴⁰

Clearly, the relationship between truth and justice is blurred at times, and the space to argue that different forms of retributive justice, restorative justice and social justice could and should coexist in the

moment and into the future was often closed down. In fact, it is possible to argue that the South African TRC process was not a clear-cut case of truth being traded for justice as commonly portrayed. There were inklings of formal retributive justice in some instances (for example, the de Kock trial ran during most of the commission's life) and the opportunity to enforce a more rigorous form of retributive justice was present within the limited time-frame of the TRC, and certainly after it ended.

For example, although the TRC could grant amnesty, it also had substantial powers to refuse amnesty. The TRC could, arguably, have dealt with alleged perpetrators and applicants in a much stronger fashion, with more extensive use of subpoenas and some of the context and proportionality clauses of the amnesty provision. In addition, those who did not apply for amnesty could also have been prosecuted subsequently. The TRC handed over the names of those responsible for certain actions to the Attorney General, but the political will to prosecute does not seem to be there, just as there appears a lack of will on the part of the ANC government to implement a substantial reparations programme.

Finally, the TRC could have made more hard-hitting recommendations about issues of retributive justice – such as the establishment of a permanent investigation unit into past crimes; or that those found responsible (even if granted amnesty) should be removed from public office. In fact, it recommended in volume 5, chapter 8 of its report that ‘where amnesty has not been sought or has been denied, prosecution should be *considered*’ (emphasis added), but then stated that ‘imposing a time limit on such prosecutions’ should also be considered. It recommended against ‘lustration’ or removal of persons from office because this was simply ‘inappropriate in the South African context’.⁴¹ Most bemusing of all, the commission then defended the architects of apartheid against possible international prosecution by arguing that it had dealt with the issue:

The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.⁴²

Conclusion

Although I have dealt critically with certain processes and practices of the TRC, it is important to see these in the context of the whole. South

Africa's TRC was a bold attempt, first and foremost, to uncover the truth about what had happened in its past and, in a minority of cases, this did occur. The atrocities of the past were opened up for debate, examination and for lessons to be learnt. Each individual act of coming together (and there were several) or the few genuine acts of repentance seen during the process cannot be scoffed at in a deeply divided society.

The TRC went a long way in naming individuals who were responsible for past atrocities and in outlining the causes of the conflict and the wider historical context. It also taught some hard lessons about the complexity of dealing with a conflict-ridden past and the necessity not to avoid 'pain or reality, but to deal with the never-ending quest for self-determination and negotiation required to transform differences into assets'.⁴³ It assisted in setting some accepted limits over *what happened to whom* and, in this, reduced the range of permissible historical revisionism.⁴⁴

Several of the TRC's recommendations or, more accurately, its calls for ongoing social, economic and political reform in South Africa are also instructive. The South African government now and in the future would do well to measure its progress against many of the TRC's recommendations concerning the monitoring of the abuse of power and the degree to which equality in South Africa is being achieved and racism tackled. Several other institutions, including the media, the health sector, judiciary and big business are also implored to ensure the development of a more robust human rights culture within their structures, while ensuring that South Africa becomes a more equal society economically. The liberation movement is urged to apologise to and assist those it tortured and maimed – particularly those from within its own ranks and in cases where it failed to live up to its own standards. This is an issue that has never been addressed.

The TRC had substantial space in choosing how to deal with the interrelated demands of truth, justice and reconciliation. The trajectory of the TRC was not set in stone from the moment that the legislation was agreed, but it was forged and it operated in the context of a rapidly liberalising South Africa, which undeniably narrowed its options. Its nature and remit became contested and were impacted upon by internal and external factors. Differing ideologies of reconciliation profoundly influenced the work of the TRC. Generally, the ideologies of non-racial reconciliation, intercommunal reconciliation and the religious connotations of reconciliation were more dominant than the human rights conceptualisation of reconciliation. This had important consequences for how the TRC dealt with alleged perpetrators and how penetrating it made its recommendations. Its findings on the apartheid state and various key players are damning, but this was not matched by an

unequivocal commitment to continuing the search for truth and justice, certainly not on the part of the new government.

This may have significantly damaged the prospects for entrenching a human rights culture and signalling the end of impunity. The linking of amnesty into the South African TRC process has meant that human rights talk has become associated with the language of pragmatic political compromise, rather than with the language of principle and accountability, and this association remains an obstacle to the popular acceptance of human rights as a new ideology in South Africa.⁴⁵ That amnesty was at the centre of the South African TRC process, although innovative in one way, has also distracted from, and thus in some senses undermined, the real benefits of truth commissions: that is, telling the story of the past from the perspective of victims; assigning responsibility while leaving justice to the courts; explaining conflicts in broad terms; and allowing victims to tell their stories in an uninhibited fashion.

In fairness, the TRC did begin these processes and the uncovering of the truth about South Africa's past, but this can hardly be said to be complete on the completion of its work. Equally, social justice and justice through the courts remain elusive for many victims, while the amnesties that have been granted are evident. The steps the TRC (and the government) could have taken to attempt, even partially, to address this remain unfinished and fragmentary. Such steps include, among others, the government reporting on progress over implementing the TRC's recommendations; prosecuting those who did not apply for amnesty; ensuring substantial reparations for victims; and finding ways of ensuring that the still unmet right to truth and justice in South Africa is guaranteed to the fullest extent possible.

As long as conditions remain such that the memory of the past can live on, either through the lives of perpetrators who walk free, or in the legacy of the inequality that is so tied to the historical memory of violation, the victims' legitimate drive for truth and justice will continue. South Africa may have suppressed this drive to some degree through its reconciliation project and its flagship, the TRC. However, what is left undone now may become manifest in the future, in the form of vehement calls for the prosecution of the apartheid generals, or emerge as misdirected anger and revenge. This may seem unlikely at present, but will become more of a reality once the fears of a return to the conflicts of the past have faded and the necessity of compromise is forgotten.

References

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- 1 Promotion of National Unity and Reconciliation Act, No. 34, 1995, 3(1). The cut-off date was originally 6 December 1993 and was later extended to 10 May 1994.
- 2 These dates were chosen as they roughly coincided with the Sharpeville Massacre (21 March 1960) and the ANC's declaration of the armed struggle (16 December 1961), and the formal signing of the peace settlement in South Africa in December 1993. The latter date was later extended to 10 May 1994 (the inauguration of President Mandela) largely at the request of the Freedom Front and Pan-African Congress so that some acts that took place immediately prior to the election in April could be considered for amnesty. The extension angered the human rights community significantly.
- 3 A. Boraine, *A Country Unmasked: South Africa's Truth and Reconciliation Commission* (New York, Oxford University Press, 2000); D. Tutu, *No Future without Forgiveness* (London, Rider, 1999).
- 4 B. Hamber, 'Repairing the irreparable: dealing with the double-binds of making reparations for crimes of the past', *Ethnicity and Health* (Vol. 5, nos. 3/4, 2000), pp. 215–26.
- 5 Piers Pigou, former TRC investigator, personal communication (25 January 2002).
- 6 The figure finally dropped to an average of about 510,000 viewers after the programme was finally moved to the 6 p.m. slot on SABC1 at the end of 1997. (G. Theissen, 'Common past, divided truth: the Truth and Reconciliation Commission in South African public opinion', Paper presented at the 'Commissioning the Past' conference, hosted by the Centre for the Study of Violence and Reconciliation and the Wits History Workshop, University of Witwatersrand, Johannesburg, 11–14 June 1999.) The number of white viewers also dropped over the later years and months of the TRC.
- 7 B. Hamber, D. Nageng, and G. O'Malley, 'Telling it like it is . . . : understanding the Truth and Reconciliation Commission from the perspective of survivors', *Psychology in Society* (No. 26, 2000), pp. 18–42.
- 8 P. B. Hayner, *Unspeakable Truths: confronting state terror and atrocity* (New York, Routledge, 2001).
- 9 Truth and Reconciliation Commission (TRC), *Final Report*, volume 5, chapter 6, para. 77.
- 10 *Ibid.*, paras 74–5.
- 11 Piers Pigou, *op. cit.*
- 12 Hamber, Nageng and O'Malley, *op. cit.*
- 13 See B. Hamber and R. Wilson, 'Symbolic closure through memory, reparation and revenge in post-conflict societies', *Journal of Human Rights* (Vol. 1, no.1, 2002), pp. 1–19.
- 14 B. Hamber and H. van der Merwe, 'What is this thing called reconciliation?' Paper presented at the Goedgeacht forum, 'After the Truth and Reconciliation Commission', Goedgeacht farm, Cape Town, 28 March 1998. See <<http://www.csvr.org.za/articles/arttrcb&h.htm>>.
- 15 TRC, *Final Report*, volume 5, chapter 9, paras 143–52.
- 16 TRC press statement (16 December 1995).
- 17 R. Wilson, *The Politics of Truth and Reconciliation in South Africa: legitimising the post-apartheid state* (Cambridge, Cambridge University Press, 2001).

- 18 Initially statement-takers were trained by the author and Thulani Grenville-Grey, TRC mental health expert. I undertook the training as part of my work as coordinator of the truth commission programme at the independent non-governmental organisation, the Centre for the Study of Violence and Reconciliation (CSVR) in Johannesburg. The CSVR ran a truth commission programme throughout the TRC process. In the initial stages of the TRC, the CSVR programme attempted to offer direct support to the TRC and its operations. However, over the life of the process, CSVR turned the bulk of its attention to those testifying before the TRC and developed into a primary support arm to the Khulumani Victim Support Group. Khulumani (Zulu for 'speaking out') was set up in early 1995 to assist those testifying before the TRC in preparing for the hearings. Khulumani is still in operation and has become a powerful support mechanism and advocacy organisation, lobbying for ongoing reparations and justice for survivors of apartheid violence. See the piece by Cahal McLaughlin in this issue.
- 19 Personal interview, 9 November 1998, cited in Wilson, *op. cit.*, p. 45.
- 20 Wilson, *op. cit.*, p. 48.
- 21 M. Mamdani, 'Reconciliation without justice', *Southern African Review of Books* (No. 46, 1996), pp. 3–5. See also M. Mamdani, 'A diminished truth', in W. James and L. Van de Vijver (eds), *After the TRC: reflections on truth and reconciliation in South Africa* (Cape Town, David Philip, 2000).
- 22 C. Bundy, 'The beast of the past: history and the TRC', in James and Van de Vijver, *op. cit.*
- 23 TRC, *Final Report*, volume 1, chapter 1, para. 63.
- 24 *Ibid.*, para. 156.
- 25 *Ibid.*, para. 152.
- 26 *Ibid.*, chapter 4, para. 27.
- 27 For an exploration of the limits and potentials of the TRC to contribute to healing, see B. Hamber, 'Does the truth heal? A psychological perspective on the political strategies for dealing with the legacy of political violence', in N. Biggar (ed.), *Burying the Past: making peace and doing justice after civil conflict* (Washington, Georgetown University Press, 2001).
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- 29 H. Marais, *South Africa Limits to Change: the political economy of transformation* (London, Zed Books and Cape Town, University of Cape Town Press, 2000), p. 95.
- 30 TRC *Final Report*, volume 1, chapter 4, para. 26.
- 31 The equivalent of about US\$1,500 at the time.
- 32 TRC, *Final Report*, volume 1, chapter 7, para. 116.
- 33 Piers Pigou, *op. cit.*
- 34 TRC, *Final Report*, volume 5, chapter 6, para. 55.
- 35 Hamber, Nageng and O'Malley, *op. cit.*
- 36 D. Kaminer, D. J. Stein, I. Mbanga, and N. Zungu-Dirwayi, 'The Truth and Reconciliation Commission in South Africa: relation to psychiatric status and forgiveness among survivors of human rights abuses', *British Journal of Psychiatry* (No. 178, 2001), pp. 373–7. D.W. Shuman and A. McCall Smith, *Justice and the Prosecution of Old Crimes: balancing legal, psychological and moral concerns* (Washington, DC, American Psychological Association, 2000).
- 37 D. Orentlicher, 'Settling accounts: the duty to prosecute human rights violations of a prior regime', *Yale Law Journal* (Vol. 100, 1991), pp. 2539–615.
- 38 Wilson, *op. cit.*
- 39 The Azanian People's Organisation (AZAPO) and the survivors' families of high-profile murder cases (Biko, Mxenge and Ribeiro) challenged section 20(7) of the National Unity and Reconciliation Act which permitted the TRC to grant amnesty according to certain criteria laid down in the Act denying victims access to justice

(Azanian Peoples Organisation (AZAPO) and Others v the President of the Republic of South Africa CCT 17/96, Constitutional Court, 25 July 1996). This constitutional challenge was dismissed. In sum, the judgment largely argues that amnesty was a pragmatic necessity to ensure democracy in South Africa, and that hopes for large-scale prosecutions were not viable given the inefficiencies of the court system. It argues that the TRC offered at least potentially some truth and reparations to a greater number of survivors than the courts could have, while also ensuring peace.

- 40 Cited in M. Meredith, and T. Rosenberg, *Coming to Terms: South Africa's search for truth* (New York, Public Affairs, 1999), p. 316.
- 41 TRC, *Final Report*, volume 5, chapter 8, para. 19.
- 42 TRC *Final Report*, volume 5, chapter 8, para. 114.
- 43 A. Krog, *Country of my Skull* (London, Vintage, 1999), p. 449.
- 44 Hamber and Wilson, op. cit.
- 45 Wilson, op. cit.