

Some truth, some justice, little transformation: South Africa's Truth and Reconciliation Commission Assessed

By Brandon Hamber and Steve Kibble

'Unless economic justice issue is the first item on the agenda, with all that means; unless health, homes, water, electricity and, most importantly, jobs became part of the quest for reconciliation, we will remain the very deeply divided society we are.' Alex Boraine, vice-chair of the Truth and Reconciliation Commission at the conference 'From Truth to Transformation?' held by the Centre for the Study of Violence and Reconciliation in Johannesburg, April 1998. Throughout the world, emerging democracies have seen new governments trying to come to terms with the human rights violations of previous authoritarian regimes. The hope that trials would establish the truth about the past has not always been fulfilled. As a result, truth commissions have been set up to establish the history of violations.

The South African Truth and Reconciliation Commission (TRC)'s report and recommendations are out. Chaired by Archbishop Desmond Tutu, the TRC is the first commission to deal practically with the question of amnesty as a compromise between blanket amnesty and judicial prosecution 'a compromise between those who want amnesia and those who want retribution' (Desmond Tutu). The TRC has also attempted to give a voice to the 'victims' of apartheid and draw up a reparations policy for them. What is a truth commission?

There is no commonly accepted definition of a truth commission or norms as to how they should operate, despite some excellent comparative work of the fifteen or so truth commissions that have been set up so far. Ideally, a truth commission should investigate past violations of human rights in a particular country over a specified period, provide a complete picture of past abuses, engender new forms of political legitimacy by making public acknowledgement of the truth, promote national reconciliation, provide reparation to victims, and provide a common history to avoid a future repetition of previous atrocities. Other institutional changes will undoubtedly be necessary (such as reform of political and military bodies), as well as government action in promoting peace, reconciliation and justice.

Importantly, truth commissions can acknowledge locally-known facts and break the culture of silence under authoritarian rule, being part of the psychological healing process of those involved in violence. Establishing a truth commission is one way of moving a country towards lasting peace, reconciliation of historic enemies and the initiation of a human rights culture. The process and outcomes should be essential ingredients to national reconciliation and transformation.

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Most truth commissions share a strong desire to prevent future violations. A commission's terms of work need to be sufficiently broad to allow investigation of all human rights abuses, with considerable autonomy for the commission to determine most appropriate practices and cases. In fact, no truth commission has been able to achieve all these objectives.

This is because of the circumstances in which they are set up. Usually TRCs are established during a negotiated political transition and this means constraints - considerable political, military and economic

power may still rest with the alleged perpetrators of human rights abuses. Truth commissions are likely to face opposition, and in some cases active obstruction, from such groups. Many new governments swap impunity for peace in the interests of political stability and to overcome a long history of military power and a dysfunctional judicial system.

Where commissions grant amnesty to perpetrators of abuses, victims or survivors can be asked to give up their rights to justice or compensation in exchange for the truth (although most amnesties are imposed with nothing granted in return for them) or to ensure peace. Truth commissions have rarely had all the positive impacts that proponents claim. Mostly they have not had the capacity to deal with the full aftermath of extensive political violence. Often, many cases remain unsolved.

Truth commissions can issue recommendations for reform that are never implemented. Similarly to judicial processes, they are not subject to democratic accountability; neither do they come about as a result of popular demand. South Africa is the only country to have had some public debate over the terms and scope of the truth commission and to have proceedings held in public. There is considerable debate over the meaning of terms associated with truth commissions: justice, reconciliation and truth, and what balance is best achieved between them. Revealing the truth must avoid forms of retribution and revenge that damage peace. As Archbishop Tutu rightly said before the TRC hearings began in 1995, if justice alone were allowed to take its course, the country would be reduced to ashes.

Among many possible perspectives on justice, two are relevant here: The first is the western-based formal justice system which has little to do with amnesty or indeed finding out all the truth, and more to do with establishing guilt and then punishment. 'Restorative' justice, by contrast, puts at the heart of the process reconciliation rather than punishment and the concept of healing the community rather than punishing the individual perpetrator. It looks to the future in asking how the perpetrator makes personal restitution or change. Supporters claim this to be a better form of justice than

retributive justice, giving central importance to victims, rather than rendering them spectators of alienating court processes.

Similarly, offenders are brought face to face with the consequences of their actions and have to answer for them in the community rather than in prison. It is, say proponents, a community-centred approach and more democratic. Despite the unique nature of apartheid, South Africa shares characteristics with other emerging democracies of the 1990s. There was a negotiated settlement where the 'losers' retained the ability to overthrow or destabilise the new regime if their demands are not met or conditions of 'handover' not agreed. In South Africa, the balance of forces at the time of transition played a significant role in shaping the reconciliation process and hence the TRC.

The African National Congress (ANC) and its allies had insufficient power at the negotiations table to ensure that perpetrators would be prosecuted, but enough to demand truth in exchange for amnesty. Amnesty was an inescapable precondition to the negotiated peace settlement. This exchange, along with giving survivors space to tell their stories, is the essence of the TRC, with its aims of promoting national unity and reconciliation in a spirit of understanding to transcend the conflicts and divisions of the past. The TRC gives voice to the survivors, witnesses and perpetrators of apartheid-era violence to provide as complete a picture as possible of the causes, nature and extent of past abuses that occurred between 1 March 1960 and 10 May 1994.

Structure of the TRC

The TRC had three committees. The Human Rights Violations Committee facilitated a truth recovery process, listening to the testimony of survivors and families of victims of gross violations of human rights. At public hearings of cases chosen for their 'representative' nature, survivors and families of victims have told how they were victimised. Some 20,000 statements have been taken and more than 50 public hearings held.

The TRC has been responsible for granting amnesty through its Amnesty Committee. Amnesty could be applied for only in relation to offences committed between 1 March 1960 and 10 May 1994; applications must have been registered before 30 September 1997. Amnesty is not automatic, and is only to be granted where applicants have made full disclosure of acts associated with a political objective committed in the course of the conflicts of the past where the individual was not acting on his or her own, for private gain, or personal

malice. Individuals must be acting on behalf of a political party or be an employee of the state who believed that he or she was acting under orders from higher authority.

Perpetrators of gross violations of human rights who meet the criteria for amnesty are freed from prosecution and all criminal and civil liability. To date some 7,000 people have applied for amnesty. Only 'gross' violations require a public hearing, yet the TRC remains desperately behind in processing these applications and is unlikely to finish before 1999.

The work of the third committee, the Reparations and Rehabilitations Committee, has been to submit for government implementation recommendations in the general TRC report for a comprehensive reparations policy for those found to be 'victims' (both direct victims and their family members or dependants) of gross violations of human rights during the defined period. Other recommendations will aim to contribute to the prevention of a recurrence of abuses by producing a record of such violations. Why and How Amnesty? The above amnesty provisions have thwarted formal judicial processes for those wishing to prosecute former abusers of human rights.

If perpetrators are granted amnesty, victims are not allowed their usual constitutional rights to seek redress through civil court actions. In response, those arguing for the amnesty provision note that the South African TRC was set up within the conditions of the negotiated settlement and that, except in tribunals such as Nuremberg or Tokyo after World War Two, preconditions for full retributive justice (such as the new government having unlimited power to bring to justice transgressors of the previous regime) will not occur. Second, criminal trials have not always been effective in South Africa and have revealed little in the way of truth; for example, the prosecution for murder in 1996 of former Defence Minister Magnus Malan collapsed owing to lack of direct evidence linking him to Inkatha hit squad killings.

It is extremely difficult for courts to find the truth in large numbers of human rights violations cases: shredders have been heavily used since 1990 and some of the violations occurred many years ago. Proponents of the TRC argue that justice and amnesty are complementary. The publication of perpetrators' names at an amnesty hearing or in a truth commission report shames the offenders. Furthermore, alleged perpetrators could be prosecuted if they do not apply for amnesty. Third, the amnesty process in theory at least helps for a speedy transition to a democratic transformation, i.e. peace with justice.

Apartheid was a system of gross racist human rights violations. Therefore the amnesty deal means that instead of prosecuting a few, the TRC's mandate is to establish the whole truth of the system - providing the historical background, to set individual violations within that context and giving a voice to certain survivors or their families. Giving up retributive justice rights now institutionalises a future culture of human rights with better socio-economic rights. The counterview, however, is that it is those who suffered the most (the direct victims) who are being asked to forego retributive justice for the sake of a majority who did not suffer so directly.

Pros and Cons of the TRC

Underlying most criticism of the TRC is that its focus is too narrowly on direct violent actions i.e. that it has sought to construct the 'truth' solely from testimony of individual victims and abusers. Critics say it has missed the structural inequalities of apartheid, and the larger truth of systematic oppression over centuries. The majority of survivors who appear before the TRC were victimised under apartheid not only because of their political affiliation and activities, but also because of structural circumstances such as their gender, poverty, race and social marginalisation. Furthermore, the narrow interpretation of 'gross violations of human rights' precludes investigation of such matters as gender-related violations when women were victims of broader violations such as arrests for contravening the pass laws, forced removals, and other acts of systematic apartheid violence.

In addition the effectiveness of truth commissions in bringing reconciliation as well as justice and truth will remain constrained unless their work is complemented by significant social and economic change that address the structural consequences of apartheid. South Africa has emphasised addressing these needs through government economic programmes, and the TRC process rules out retributive justice in South Africa in favour of restorative. The application of these interlinked principles is therefore vital in assessing the success of the TRC. Restorative justice implies restitution from the perpetrator to the community or individual.

The South African TRC is intended *inter alia* to restore the humanity and dignity of the victim, but in a way that neither excludes nor replaces justice. On an individual level this is a way of amending the rifts between the survivor and the perpetrator. Amnesty breaks the link between violation and obligation. The TRC has opened up possibilities for restorative processes, where victims meet perpetrators. In a few cases perpetrators have attempted to make direct amends to the victims or survivors

involved, such as paying for the education of the children of a victim.

But the TRC process places most of the onus on the State for 'reparation', while the victims have no say in determining the perpetrators' contribution. Restorative justice must involve the making of satisfactory reparations to demonstrate perpetrators' willingness to take responsibility for their actions and to offset the denial of other rights to survivors and families.

This is still problematic in South Africa because the system has only just begun to process claims. Although nationally the TRC proclaims a restorative approach, the practice at individual level is less clearcut. Victims have had no more say than in the judicial process in what happens to perpetrators, and because of the amnesty perpetrators are not even sentenced/ punished. This relates to the problem that there is no inherent or structural link between truth and reconciliation. It had been assumed that reconciliation would occur spontaneously as the truth unfolds; perpetrators would confess or ask for forgiveness. This has occurred as when Eugene de Kock ('Prime Evil'), commander of the notorious Vlakplaas assassination squad, asked for forgiveness for his actions, but it has not always happened. Importantly for healing and reconciliation purposes however, some survivors have used the TRC process in creative ways and have taken charge of the proceedings to establish their truth.

For example survivors of Western Cape torturer Jeff Benzien, including ANC MP Tony Yengeni, successfully demanded he demonstrate at the TRC hearing the wet bag torture method used on them. This reversed the previous balance of power between torturer and victim. More important, it showed that the TRC was a process in which civil society and individual initiatives could make a difference (although this was more true of the start of the process) and not merely one that happened to people.

It has been important throughout the TRC process that it was a local one, with local solutions propounded by ordinary South Africans themselves. The TRC by its mere existence has helped give birth to a range of locally organised initiatives such as the Khulumani Victim Support Group, a Gauteng based support group with links with neighbouring provinces.

Has the TRC uncovered as it was charged to do, as complete a picture as possible about the past? Based on the evidence put before the TRC, the final report will reveal a considerable amount of information about the workings of the apartheid system and blame the previous regime for atrocities, despite its

leaders' refusal to take full responsibility for developing the apartheid system and its impact on individuals. At an individual level, however, the amount of truth revealed has been less impressive. Most individuals who wanted their case solved have not had their high expectations met.

On the other hand, the sheer number of cases the TRC had to investigate made this task impossible. Although the TRC has revealed some new truths and enormous amounts of information, much needs to be undertaken. Establishing a permanent body to continue investigating the crimes of the past needs to be considered. Prosecution of those who did not apply for amnesty should be pursued. Calls for formal justice have not been ameliorated by the work of the TRC. Social and psychological support mechanisms for survivors. The TRC may have started some individual and collective healing processes in the country. Much social and psychological support for survivors is still needed. It is imperative that civil society organisations are helped to provide these services. Reparation needs to be speedily processed.

The gap between the reparations process and the amnesty granting process remains unacceptably wide. Although it is difficult to organise compensation or reparations to thousands of people suffering from a multitude of violations, the TRC only began to provide 'urgent' interim assistance after two years. This leaves in question how long it will take to process longterm reparation. TRC recommendations need to be taken up. Implementation of the TRC's recommendations needs a detailed and rigorous monitoring process which takes account of previous recommendations - such as human rights training for the police - that remains unimplemented. Institutions and funding to take the work of the TRC forward.

The relationship between the TRC, current human rights bodies and commissions needs to be examined. There is a danger that organisations such as the South African Human Rights Commission and a range of NGOs will be expected to take up the TRC's work without a clear assessment of capacity and needs, including financial ones. The TRC has tried to find a balanced way between truth and justice; blanket amnesty and retributive prosecutions; reconciliation and justice; the right to know the truth and the desire for retribution.

Its biggest contribution may prove to be the laying down of a detailed history of apartheid's abuses, affording people the opportunity to record a common version of the past, together with work towards a sustainable human rights culture. The TRC has been engaged in part of

this process, but transformation in other spheres is also vital. Many people have stressed the need for the TRC to take a survivor-centred approach, involving social and psychological support for survivors and families of victims, reparations and awareness of the effect on victims and survivors, and of how amnesty and related issues have affected victims. The TRC provided a starting point for working through past trauma by breaking the culture of silence.

In some cases it supported victims through their suffering, giving a voice to the voiceless, thereby counteracting propaganda, encouraging a human rights culture and opening up the possibility for healing. Nonetheless, many people have been critical of the way in which the TRC supported survivors, and of its inability to provide psychological services to victims. Its limited definition of gross human rights violation left some people feeling that their pain had been overlooked. The TRC's work was also defined by parameters established during the 1992 to 1994 negotiating period. It has been restricted by the need for the compromises between truth, justice, reconciliation and peace.

Its biggest failing may prove to be its lack of engagement with the wider transformation process. Yet it would be unfair to lay all the faults of the lack of transformation at the door of the TRC. The tragedy is that so little transformation appears to be occurring elsewhere that the foundations of reconciliation and openness may be undermined. The government can justifiably point to a number of progressive measures in land, housing, infrastructural improvements, provision of electricity, and so on. However, the impression is that the government is wedded to a neo-liberal programme that has little chance either of overcoming the inequalities and economic oppressions of the past or alleviating poverty. Anger (perhaps misdirected at the TRC) will undoubtedly surface as the 1999 elections approach.

This anger may be exacerbated by the fact that, despite the high quality of the TRC's final recommendations, a significant gap still exists in general in South Africa between enunciating policy and its implementation. The TRC has looked forward as well as back. Although it has officially been wound up (the amnesty hearings will continue into 1999) much of the TRC's historical work is incomplete.

This will have an impact on its recommendations and the implementation of reparations. There are thousands of unsolved cases and many survivors waiting for responses. The TRC has uncovered huge trauma that needs to be dealt with, a task that will last well into the future.