

Accountability, victims and reconciliation in South Africa's Truth and Reconciliation Commission

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Truth commissions and trials are geared towards the achievement of different outcomes, and ideally they should not be mutually exclusive alternatives. However, within the South African context a choice was made, and there are sound reasons for concluding that, while imperfect, the Truth and Reconciliation Commission was nevertheless the more realistic and far-reaching proposition. It delivered elements of accountability and prevention; offered inclusion and answers to victims; and made a contribution to reconciliation. Admittedly, it also skimmed on justice, fumbled reparation and completed its work without reconciliation being realised.

Through a discussion organised around three broad topics — 'Accountability, impunity, amnesty, justice', 'Victims' and 'Reconciliation' — this article makes a case that is critical of some aspects of the commission's work, while maintaining that some important positive outcomes were achieved in limiting circumstances. Moreover, many of the criticisms relate to the South African government's handling of matters pertaining to the commission and are not indicative of deficiencies in the commission itself.

Introduction

The South African Truth and Reconciliation Commission (TRC) served as a focal point for debate and inquiry concerning, *inter alia*, accountability; impunity and justice; victims' needs and rights; the role of truth; competing approaches to 'transitional justice'; and reconciliation and forgiveness. Perhaps partially due to the scale and public exposure of its work, to the preceding decades of international condemnation of Apartheid, and possibly, as Susie Linfield suggests, to the central role it ascribed to truth as a catalyst for reconciliation, the TRC inspired 'a vast and contentious literature — which lauds and lambastes the Commission from legal, historical, anthropological, psychoanalytic, philosophical, and political viewpoints' (Linfield 2000). It followed from similar commissions in Argentina, Guatemala, El Salvador

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and Chile, but it had some significant procedural differences. Most notable of these was the TRC's unprecedented approach to amnesty.

Through a discussion organised around three broad topics — 'Accountability, impunity, amnesty, justice', 'Victims' and 'Reconciliation' — I will make a case that is critical of some aspects of the TRC's work, while maintaining that some important positive outcomes were achieved in limiting circumstances. Moreover, many of my criticisms relate to the South African government's handling of matters pertaining to the TRC and are not indicative of deficiencies in the commission itself.

While my primary preoccupation is the TRC and truth commissions, a number of comparative references will be made to criminal trials. There are good reasons for drawing such comparisons, given the overlap in objectives and context — and also given their mutually exclusive nature if, as was the case in South Africa, criminal trials are precluded by the amnesty provisions of the commission. The position I will adopt on this contentious point is broadly that truth commissions and trials are geared towards the achievement of different outcomes, and ideally they should not be mutually exclusive alternatives. Within the South African context, however, a choice was made, and there are sound reasons for concluding that, while imperfect, the TRC was nevertheless the more realistic and far-reaching proposition. It delivered elements of accountability and prevention; offered inclusion and answers to victims; and made a contribution to reconciliation. Admittedly, it also skimped on justice, fumbled reparation and completed its work without reconciliation being realised.

Accountability, impunity, amnesty, justice

Accountability and impunity, seen as opposite ends of a spectrum, are key concerns of most approaches to transitional justice and the redress of human rights violations. The most evident and instinctive reason for this is the imperative advanced by prevailing notions of justice that those who wantonly visit abuse on undeserving populations be called to account. The idea that perpetrators might be free to carry on their lives with perfect impunity is grossly unfair, given the impossibility of freeing their victims from the legacies of torture, death, loss, displacement, disfigurement, disempowerment and other grievous violations. Justice and accountability are also seen as necessary to future peace and stability in countries that have suffered the ravages of abuse and conflict. The formal condemnation of the actions of perpetrators is thought to strengthen and legitimise the rule of law; validate the new regime; prevent private acts of vengeance; and deter future abuses, both locally and abroad. Prosecution of human rights violators is also held to be a requirement of international law.

It is from this context that a major criticism of the TRC arises. Many international jurists, scholars and human rights activists accept a degree of prosecutorial discretion but maintain that, at the very least, the most culpable perpetrators and leaders ought to be prosecuted (see, for example, Bassiouni et al 2002, 261). Contrary to their urgings, the TRC made it possible that precisely those people could be entitled to amnesty. Paragraph 3(1)(b) of South Africa's *Promotion of National Unity and Reconciliation Act 1995* (PNURA) entrusted the TRC with the responsibility to provide amnesty from criminal or civil proceedings to those perpetrators of gross human rights violations who made a full disclosure of transgressions that were deemed to have been 'associated with a political objective'. This included members and employees of 'any publicly known political organisation or liberation movement' or 'the State or any former state or any member of the security forces of the State or any former state' in the course of their struggle with one another (PNURA, s 20(2)). In addition to leaders and the most culpable, this formulation enabled middling perpetrators, such as Jeffrey Benzien of the South African Police Service, not only to receive amnesty for torturing and murdering in the course of his duties, but also to continue working at the rank of captain (Benzien 1999, 457–60; South African Government Information 1999). The TRC's approach to amnesty was criticised for pursuing truth at the expense of justice and thereby perpetuating impunity.

This section weighs up these allegations with a discussion that moves from considering the validity of amnesties at international law, to evaluating the allegation that amnesty within the context of the TRC amounts to impunity, to examining the extent to which the TRC was capable of preventing future human rights abuses, and concludes with an analysis of the primary justifications offered for providing amnesty.

A duty to prosecute?

International treaty law includes a number of efforts to secure the accountability of human rights violators under various circumstances, yet the relevant treaties or circumstances did not apply to Apartheid-era South Africa. The Genocide Convention (Art 6), the Convention Against Torture (Art 7), the duty to 'ensure' the rights embodied in comprehensive human rights treaties such as the International Covenant on Civil and Political Rights (Art 2(1)) — all of these instruments explicitly or implicitly require the prosecution of those who violate the rights they safeguard; however, South Africa acceded to them after the period of the TRC's mandate. The four 1949 Geneva Conventions (on international humanitarian law) require the prosecution of war criminals and South Africa was party to them during the period in question, yet, as recognised by the South African Constitutional Court (*Azanian People's Organisation (AZAPO) v President of the Republic of South Africa*, 1996, footnote

29), they are only applicable in situations of armed conflict between contracting states and thus have no application to Apartheid-era events. So, while these treaties illustrate the drift of multilateral consensus towards an insistence on prosecution in response to gross human rights violation, they do not place any relevant legal obligations on South Africa with respect to its response to Apartheid-era abuses.

A number of jurists also make a case for a customary international legal duty to prosecute perpetrators of certain human rights violations (for example, Bassiouni 1995, 20–50; Orentlicher 1991, 2582–85, 2593–94). For Dianne Orentlicher, these violations include disappearances, extra-legal executions, torture and crimes against humanity as a minimum (1991, 2582–87), all of which were features of Apartheid-era conflict and repression. Apartheid itself has been characterised as a crime against humanity in many contexts, including by the United Nations in the Apartheid Convention in 1973, by the TRC in its final report (1998a, 92–104) and, most recently, in the Rome Statute of the International Criminal Court (Art (7)(1)(j)).

While anything approaching comprehensive coverage of customary international law as it relates to a duty to prosecute human rights violations is well beyond the scope of this article, it must be acknowledged that the existence and precise character of such a rule appear to remain open questions. International state practice is replete with examples of failures to prosecute human rights violations and of grants of amnesty to actively prevent prosecution. Michael P Scharf cites the most common response to genocide, crimes against humanity and war crimes over the last 50 years as being ‘to do nothing’ (1999, 622). John Dugard provides a conveniently condensed summary of recent multilateral state practice supportive of a duty to prosecute, before going on to note that the UN has often responded favourably to grants of amnesty to torturers and perpetrators of crimes against humanity, including in the case of South Africa (1999, 1002–03). Orentlicher herself acknowledges that much of the support she cites for a customary duty to prosecute is ‘not authoritative’ and ‘not conclusive’ (1991, 2584).

Certainly, the law of state responsibility does not appear to impose an obligation to prosecute. The International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles) hold states responsible for any breach of international law committed by an organ of the state acting in his or her official capacity (as many Apartheid-era breaches were) (Arts 4 and 7), yet the legal consequences of such responsibility — as they are enumerated in Ch 1 of Pt 2 of the Draft Articles — do not include an obligation to prosecute individual perpetrators. They mention cessation (Art 30(a)), assurances of non-repetition (Art 30(b)) and reparation (Art 31). Prosecution is undoubtedly *useful* in preventing responsibility from arising in the first place by deterring violations of customary

international human rights law, yet the state's specific *obligation* is to not violate international law, however this is achieved.

Thus, an international legal duty to prosecute is not evident within the primary rules of international law (the substantive legal obligations found within customary and treaty law), or the rules of state responsibility for breaches of the primary rules.

Accountability/Impunity

Of course, the absence of a legal imperative to prosecute is not sufficient reason to abstain. Justice and accountability are rooted in our moral outlook and reflected in our legal codes as a consequence, rather than the reverse. However, the charge that the TRC's dispensation of amnesty provided abusers with impunity warrants closer scrutiny. Accountability is not exclusively a product of formal trials. By demanding that human rights abusers make a full disclosure of their crimes in a public hearing of the Amnesty Committee — in the presence of their victims, friends and families and the media — the TRC's approach satisfied essential elements of the meaning of 'accountability'. Perpetrators were required to clearly articulate their personal responsibility and make themselves answerable to public opinion and the questions of victims. Insofar as accountability is understood to include punishment or sanctions, the TRC subjected perpetrators to the punishment of public shaming.

The truth element of personal accountability that the TRC was able to demonstrate — the *proof* of who did what to whom — was undeniably of a lower calibre than that delivered by criminal trials. The TRC determined truth according to the balance of probability (TRC 1998a, 91–92), rather than the absence of 'reasonable doubt'. With this lighter burden of proof, the TRC succeeded in naming over one hundred individual perpetrators in addition to conducting hearings into institutional complicity (discussed below), despite its short operational lifespan and the constraints imposed by defendants' due process rights (Van Zyl 2002, 751). Thus, with respect to personal responsibility for human rights violations, the TRC could be said to have exposed more truth with less certainty than could have been achieved by formal trials.

Justice

Does this kind of accountability amount to justice? On the whole, it must be conceded that it does not. Retributive models of justice were not satisfied with the TRC's light touch in dealing punishment. While the TRC established that certain violations could be attributed to particular perpetrators by virtue of such and such a body of evidence, it did not impose the expected sanctions. To the contrary, in some cases it actively shielded perpetrators from sanctions.

The TRC claimed that its work was more closely aligned with a restorative justice model (TRC 1998a, 118). The commission certainly displayed some restorative justice characteristics, 'at least in the broad emphasis on establishing truth as a way of resolving conflict ... and on developing the principles of reparation, restitution and compensation' (Cunneen 2001, 87). The value placed on restoring the dignity and agency of victims by facilitating their active participation in a process of responding to the offences they had suffered is also a feature of restorative justice practice to which the TRC can legitimately lay claim. Similarly, the rejection of 'vengeance' and 'retaliation' in favour of 'understanding' and 'reparation' (PNURA, preamble) corresponds well with Braithwaite and Strang's description of restorative justice as oriented towards 'healing (restoration) rather than hurting' (2001, 1–2).

However, contrary to definitions that seek to co-opt the TRC into the broad category of restorative justice by reducing restorative justice practice to 'reconciliation and amnesty through a truth-telling process' (Rakate 1998), restorative justice places a high value on making amends. In conferencing, perhaps the predominant form of restorative justice practice, offenders are generally brought into contact with their victims and guided through a process that aims to generate agreement between victim and offender on how the offender can make amends for the harm that he or she has caused. The TRC's Committee on Reparation and Rehabilitation sought to serve a compensatory function for victims (however unsuccessfully, as discussed below), but the outcome of this process was not within the control of victims and it was not incumbent *on the offender*, as a key element of his or her *personal accountability*, to effect such reparations. This represented a sharp departure from restorative justice practice.

The addition of facilitated meetings between victims and offenders, oriented towards negotiating reparation, would have been a valuable addition to the TRC model. It would have strengthened the TRC's justice credentials, and there is good reason to believe that it would have been welcomed by TRC participants. In two studies, survivors expressed both a strong desire to meet the people responsible for the violations committed against them, and the view that those people should be obliged to effect reparation (Hamber et al 1998; Crawford-Pinnerup 2000). Another study found that amnesty applicants commonly expressed a corresponding desire to meet with their victims (Abrahamsen and van der Merwe 2005).

At least in relation to the two justice models considered above, then, the TRC's processes satisfied some criteria and failed others. The shortfall in the personal price levied on perpetrators, whether through punishment or a requirement that they make amends, resulted in a justice deficit when measured against either model. This is particularly significant in cases where grants of amnesty precluded trials and denied victims the opportunity to secure justice elsewhere.

For those who were denied amnesty (the vast majority of self-confessed human rights abusers who participated in the TRC), it is sufficient to note that the TRC was not really in the justice business. It was, as the name suggests, an attempt to uncover truth and foster reconciliation. If a further accounting for the misdeeds of perpetrators was required in the interests of justice, it should have been sought through the courts as recommended by the TRC. In its final report, the TRC urged that those guilty of gross violations of human rights should be prosecuted and pledged to make its records available to the authorities for that purpose (TRC 1998a, 309). The subsequent general failure by the South African authorities to pursue that recommendation was beyond the TRC's control (Van Zyl 2002, 753–54).

Prevention/Deterrence

As prevention or deterrence of future abuses is commonly identified as an important product of criminal trials, the preventative value of the TRC's version of accountability deserves attention. Insofar as 'accountability mechanisms ... are ... designed to be preventative through enhancing commonly shared values' (Bassiouni et al 2002, 52), the TRC seemed capable of making a contribution. The TRC sought the truth of the 'nature, causes and extent of gross violations of human rights' (PNURA, preamble); the language alone is value-laden and expressive of the underlying premise that such acts were unjust and deserving of public condemnation. This tone was also evident in the full and public disclosures, in victims' confronting accounts of the injustices they had suffered, in the refusal to provide amnesty if information was withheld or untrue, and in the character of the questions asked of perpetrators. A good example of the last was provided by one of Jeffrey Benzien's victims, who wanted to know 'what type of person could repeatedly take people so close to death, all the while listening to their moans and cries for mercy' (Benzien 1999, 459).¹

For Paul Van Zyl, prevention is achieved through institutional reform (Van Zyl 2002, 746). The TRC's flexible processes illuminated institutional complicity in Apartheid-era oppression to a far greater degree than could have been achieved by trials. Through specially convened institutional hearings and the investigative efforts of the TRC's research teams, the TRC brought a specific focus to bear upon the health, legal, media, business, prison and faith community sectors (TRC 1998a, 149). The degree to which the various organisations accepted responsibility is mixed. Importantly though, in some cases where complicity was disputed by the organisations concerned,

1 For a more detailed account that illustrates the condemnatory tone of some of the questions asked of Jeffrey Benzien, and the general interpersonal dynamics between Benzien and his victims, see the discussion in du Bois-Pedain 2007, 225–32.

the TRC was able to submit evidence to publicly contest this position. For example, despite claims by the business sector that Apartheid was bad for business and that they too struggled under the former state's policies, the TRC named businesses that had actively supported, contributed to and benefited from Apartheid (TRC 1998b, 58).

There seems to be general agreement that the precise nature and extent of institutional complicity in Apartheid-era oppression warrants further investigation. At the very least though, the TRC's processes served as a catalyst for important debates and introspection (Van Zyl 2002, 759; Kgalema and Gready 2000). They also led to some substantive outcomes, such as the South African Police's new anti-torture policy (Van Zyl 2002, 759) and the establishment of a business trust to implement social and educational initiatives (Deegan 2001, 153). Even if we allow for the cynical possibility that in some cases these kinds of initiatives might have been little more than public relations exercises, the TRC still deserves credit for generating enough exposure of complicity to create a climate where such an exercise became necessary. Criminal trials, by comparison, are constrained by a much narrower focus on the responsibility of individual perpetrators for pre-defined offences and are not so well-equipped to illuminate this kind of big picture culpability or to engage in wide-ranging critical dialogue with social sectors.

Consistent with the justice deficit identified above, the TRC is most vulnerable to criticism of its capacity to prevent future abuse to the extent that this is achieved by deterrence. The internal overhaul of the South African state that accompanied the transition to the new order — new institutions, new and more representative government, new legislative context — seems to have made it unlikely that the particular human rights abuses of South Africa's past will reoccur within the new South Africa. However, the work of the TRC is intuitively unlikely to deter potential human rights abusers, within South Africa or without, for fear of the dire consequences that may be imposed upon them if they face a process of redress in the future. Prosecution of the many perpetrators who did not receive amnesty would have performed better against this measure.

Why amnesty?

Nothing in the foregoing discussion of the TRC's contribution to justice, accountability and prevention provides an explanation for the decision to grant amnesty from criminal and civil litigation to eligible gross violators of human rights. Truth commissions have been combined with trials in other jurisdictions, so why was justice compromised in South Africa?

A number of answers are offered in response. Many critics allege that the decision was driven by political expediency (for example, McCarthy 1999, 489). Interestingly, proponents largely agree. The limited amnesty administered by the TRC was part of the negotiated political settlement that ended Apartheid. The Apartheid government pushed for a blanket amnesty, but through a process of compromise and civil consultation between 1990 and the change of government in 1994, this was whittled down to a limited amnesty for political crimes (TRC 1998a, 52–53). While for many victims and onlookers the failure to punish those responsible for the suffering of thousands of people was intolerable, the argument in favour of sacrificing some justice in the pursuit of peace was compelling. The TRC claimed that ‘the negotiated agreement in South Africa averted the costly return to the politics of confrontation and mass mobilisation’ (TRC 1998a, 118). Alex Boraine points to the security forces’ threats to leave the elections undefended in the absence of agreement on post-transition amnesty for their Apartheid-era conduct (2000, 285). If the choice was between a limited amnesty and a peaceful transition to a more just regime, or an insistence on full criminal accountability and a return to conflict and oppression with fresh additions to the ranks of perpetrators and victims, the former certainly looks preferable to this observer.

Admittedly, this is a contentious stance to adopt. Some argue that a failure to deliver justice undermines the likelihood of continued peace in the long term (Bassiouni et al 2002, 8). The case of Sierra Leone, with its renewed hostilities following the general amnesty of the Lomé Peace Accord, seems to support this perspective (Poole 2002, 580). On the other hand, the amnesty offered to the Haitian military leaders who killed 3000 civilians in 1992 convinced them to leave the country and make way for a democratically elected government (Scharf 1999, 622–23). South Africa steered a middle course with its restrictive approach to amnesty, and it is difficult to predict what the outcome might have been had a different choice been made.

Amnesty has also been justified as a means to reconciliation. This is reflected in Ch 16 of the South African Interim Constitution 1994 and repeated in the preamble to the PNURA. Forsaking vengeance and retaliation is thought to aid reconciliation and help heal the divisions of the past.

Yet the notion that the state’s grant of criminal immunity to human rights violators might engender their popular forgiveness is not self-evidently true, and has the ring of wishful thinking or convenient rhetoric intended to cultivate support for the above political accommodation. The outcry against perpetrator amnesty by some victims, such as those who contested its legal validity before the South African Constitutional Court (*AZAPO v President*), suggests that the failure to prosecute

did not lay all grievances to rest.² As Anthony Holiday has argued, the intricacies of remorse and forgiveness are a highly personal affair and are not susceptible to impersonal institutional regulation (1998). This is not to say that elements of the TRC's functioning did not promote degrees of reconciliation, only that the approach to amnesty is probably not deserving of the credit.

One final important point about the South African approach to amnesty remains to be made. The possibility of receiving amnesty acted as an incentive for disclosure of human rights violation. The significance of this is best understood with reference to the limited prospects for successful trials in post-Apartheid South Africa. During the South African Constitutional Court's deliberations in *AZAPO v President*, Judge Mahomed observed that 'much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof' (at 17). Charles Villa-Vicencio, the former head of investigations at the TRC, also expressed the view that there was insufficient evidence to support criminal prosecution of many Apartheid-era offenders (Deegan 2001, 156). The TRC devoted a whole chapter to the Apartheid government's systematic destruction of documents 'in an attempt to remove incriminating evidence and thereby sanitise the history of oppressive rule' (TRC 1998a, 201). In addition to a lack of evidence, many commentators have also drawn attention to the poor state of the South African criminal justice system at the time of transition, citing poor resources, substandard skills and a lack of will among the police, attorneys-general and the judiciary (Garkawe 2003, 356; Schiff 2002, 339; TRC 1998a, 122).

This estimation of the criminal justice system's capacity seems to have been borne out by a number of failed cases. Due to a lack of evidence, Stephen Biko's killers, after being refused amnesty by the TRC, were never prosecuted (New York Times 2003). Similarly, former Minister of Defence Magnus Malan and 19 other defendants were acquitted in 1996, as was Dr Wouter Basson, the head of the corrupt chemical and biological weapons program, in 2003 (Garkawe 2003, 356). Eugene de Kock was successfully prosecuted, but overall the record seems to substantiate claims that this avenue would not have been particularly fruitful.

This has important implications for the charge that by offering perpetrators amnesty in exchange for their confessions, the TRC was trading justice for truth. With

2 This was reinforced in late 2008, when a group of victims' families made a successful challenge before the High Court to the National Prosecution Authority's (NPA's) policy of not prosecuting Apartheid-era offenders where they had not been granted amnesty but nevertheless were considered by the NPA to meet similar criteria to that applied by the TRC (Centre for the Study of Violence and Reconciliation 2008).

insufficient evidence and a justice system too dysfunctional for trials to be successfully conducted, the question of truth or justice might have been more accurately characterised as a question of more or less truth. Within this context, the possibility of amnesty provided a valuable incentive to perpetrators to make a full disclosure of their misdeeds, enabling the collection of information that in all probability could not have been proven and would otherwise have remained hidden. One perpetrator's confessions often implicated his or her colleagues, leading to further investigations and further disclosures in the hope of securing amnesty and bringing more truth into the public domain (Van Zyl 2002, 753–54). With such considerations in mind, Judge Mahomed concluded:

That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do ...

The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution ... without the evidence to sustain the prosecution successfully ... [AZAPO *v* President at 17.]

Of course, this is not the whole story. In addition to perpetrators whose acts had been previously unknown (at least, unknown to formal criminal inquiry), the TRC provided amnesty to convicted killers such as those responsible for the death of human rights lawyer Griffiths Mxenge (McCarthy 1999, 489) and to Brian Mitchell, the imprisoned former police officer responsible for the deaths of 11 people in the 'Trust Feed Massacre' (TRC 1998c, 394–96). Granting amnesty to convicted perpetrators clearly cannot be justified by an inability to convict. While there is merit to the argument that the criminal justice system would have yielded far from satisfactory results, it needs to be weighed alongside the other considerations outlined in this section.

Victims

The issues of accountability and justice discussed above are predominantly concerned with the TRC's handling of Apartheid-era perpetrators. Yet, in many ways, the TRC was quite victim-oriented: it played an important role in answering victims' questions; providing an opportunity for substantial victim participation; and financially compensating victims for their suffering. On the other hand, not all of their questions were answered, not all of their stories were told, and the payment of financial reparation was grudging and inadequate. This section of the article examines this dimension of the TRC's work.

Which victims?

The TRC did not set out to engage with all of Apartheid's victims. In accordance with its legislated mandate, it focused on the victims of gross violations of human rights committed in pursuit of a political objective. Even within these parameters, the TRC did not take as wide a reading as it might have. The TRC's interpretation of the phrase 'in furtherance of a political struggle' in s 20(2)(a) of the PNURA excluded the victims of pass laws, unjust labour conditions, forced removals and other structural discrimination. Mahmood Mamdani disputes the validity of this interpretation on the basis that these institutionalised violations *were* of a political character, arising as they did from the policies of the Apartheid state, and that the failure to include them 'ignored Apartheid as experienced by the broad masses of the people of South Africa' (Mamdani 2002, 38). Such a restrictive reading resulted in the exclusion of 3.5 million victims of forced relocations alone (TRC 1998a, 34).

In its final report, the TRC described the narrow interpretation of its mandate as a necessary product of limited time and resources (TRC 1998a, 60). Not only were whole categories of victims excluded, the TRC did not engage with many victims who *did* come within its interpretation of its mandate. The onus was on victims to self-select and approach the commission if they wished to be included.

The TRC's limited mandate was significant in two important respects. First, it risked devaluing the experiences of those victims who were not represented in the commission's work (their human rights violations were not *gross* enough to warrant a formal reckoning). Second, the image the TRC projected into the public eye by giving equivalent treatment to black and to white perpetrators and victims (that of reciprocal violations committed by warring factions) was not representative of the institutionalised, unilaterally oppressive nature of Apartheid.

In fairness, these criticisms are significantly mitigated by the following considerations.

- The TRC was not the only transitional mechanism implemented by the new regime. The Land Claims Court was established expressly to deal with the issue of forced relocation and the resultant inequities. One of its functions involved compensating claimants who had been removed from their land from 1913 (the date of the South African *Land Act 1913*) onwards (Adams 1995).
- Realistically, the TRC could not have personally engaged with the millions of victims of Apartheid.
- The TRC's final report was very clear about the broader abuses visited upon South Africa's non-white population by the Apartheid state and the prior colonial

administration. It located the specific incidents addressed in the report within the context of oppression, explored institutional complicity over the course of a whole volume (vol 4), and discussed the sorts of violations suffered by the millions of victims who were ineligible for individual attention.

Despite these points, the TRC remained post-Apartheid South Africa's most visible process of social redress and its reconciliatory aims linked it to a wider social audience than the particular victims with whom it engaged. In addition, most of the population would only have been familiar with the TRC's work to the extent that it was disseminated by mainstream media. Most would not have browsed through the 3500-page final report. Given these realities, there would have been value in including a sample of the victims of Apartheid's social policies in the TRC's public processes, even though it necessitated further restrictions on participation by victims of individual abuses. This might have done something towards lessening any sense of exclusion experienced by the victims who were not considered to be within the mandate. It would also have projected a more faithful impression of South Africa's history of victimisation into the public eye.

This criticism of the scope of the TRC's work is not made with comparative reference to trials, nor is it intended to reflect the potential of truth commissions generally. The South African model might have been more inclusive if granted more resources and time. While the Commission's interpretation of its mandate may have prevented it from presenting 'as complete a picture as possible' (PNURA, preamble) of Apartheid-era human rights violation, it must also be recognised that it was not possible for two and a half years of work by a truth commission to present anything approaching a complete picture of 40 years of oppression and struggle. Even so, by the time of its closure, the TRC had taken statements from some 21,000 victims in relation to around 38,000 separate incidents of human rights violation (1998a, 173). Formal trials, with their slow and exacting methods, would have captured far less.

Answering their questions

Two studies of victims who participated in the work of the TRC demonstrated the importance the victims placed upon gaining a greater understanding of the circumstances surrounding the violations they had suffered (Picker 2005; Crawford-Pinnerup 2000). This seemed to be significant at two interrelated levels: on a psychological level, the truth contributed to a process of healing (Hamber 1995), while at a material level, it facilitated the recovery of remains, exoneration of impugned loved ones, and so on.

Unfortunately, the inward process often requires more than simple knowledge of the truth. Mental health professionals stress the importance of the truth being explored and digested in a supportive environment (Hamber 1995; TRC 1998c, 355–56), yet the TRC did not adequately meet this need. The approach taken to support seems to have been one of ad hoc referrals to non-government organisations, with many victims suffering for the lack of consistency and coordination. Ruth Picker's study of participants in the Human Rights Violations Hearings found that most of them had not been offered counselling and support. Far from experiencing the truth as a palliative, a number of them reported that learning the fate of loved ones, or having those memories refreshed, was a traumatic experience (Picker 2005).

On the practical level, the TRC's work led directly to the exhumation and reburial of missing victims in over 50 cases. It also exonerated loved ones who had been killed on the mistaken assumption that they were police informers. For parents and other relatives who had been unaware of the political activities of now dead victims, the TRC was able to bring some context to what had otherwise seemed an entirely random act of violence (TRC 1998c, 356–65).

The downside of the prominent focus on learning the truth among TRC participants was that, as noted above, the TRC did not uncover the whole truth of Apartheid's violations — not even of those within its mandate. Thus, many victims remained ignorant of the circumstances of the violations they had suffered. To make matters worse, some of them reported that the TRC did not keep them apprised of their cases and it was left to them to continually make contact in an effort to find out what had been discovered (Picker 2005). Needless to say, this would have been an invalidating, marginalising experience.

Victim participation

A key advantage of the TRC's approach, particularly in comparison to traditional criminal justice processes, was the high level of participation it allowed for victims. Heather Strang notes that 'victims worldwide ... want a less formal process in which they can participate and their experience of victimisation be taken seriously' (2001, 79). The operative dynamic is no mystery. Victimisation involves being made subject to the will of another and can awaken highly personal feelings of anger, shame, guilt, grief and so on. Responses that accord victims a high level of involvement and a pivotal speaking role acknowledge the centrality of their experience and assist them to reclaim the locus of control in relation to the abuses they have suffered. The process of talking through the incident is also often experienced as therapeutic and is an essential element of most counselling and critical incident debriefing interventions.

Feedback from TRC participants was consistent with this hypothesis. Yvonne Khutwane spoke of her relief after talking for the first time of the sexual assault she suffered. Tim Ledgerwood, a torture victim, explained: 'It is almost as if the silence is ending, as if we are waking up from a long bad nightmare.' Lukas Sikwepere, who was rendered blind by police violence, talked of the sickness caused by his inability to tell his story (TRC 1998c, 352–55).

The participation afforded to victims by the TRC was qualitatively and quantitatively of a much higher standard than would have been offered by trials. In criminal trials the victim's testimony is useful for its evidentiary weight in determining whether a particular perpetrator can be said to be responsible for a particular offence, while the TRC provided a forum in which victims could speak of their subjective experience of victimisation substantially free from the potentially invalidating effects of vigorous cross-examination (at least until the ruling in *Du Preez v Truth and Reconciliation Commission*, 1997, which granted those implicated by victim testimony the right to attend hearings with their legal representative and cross-examine victims). The TRC's hearings accommodated what Constitutional Court Judge Albie Sachs described as 'experiential truth' — the kind of profound personal truth that is of overwhelming importance to victims, but which 'embarrasses us in courts of law ... we see it as subjective, irrelevant' (Schiff 2002, 334).

Reparations

Finally, reparations were to be an important part of the TRC's contribution to the needs of victims. Unfortunately, they turned out to be a festering sore point that undermined the legitimising impact of other TRC activities. The TRC's Committee for Reparations and Rehabilitation compiled a list of victims of gross violations of human rights and a set of recommendations concerning appropriate monetary and symbolic compensation. The sum to be received by victims was based on the needs of a family of five and was set at 21,700 rand (A\$3271) per year for six years (Makhalemele 2004). This was understood to serve a material purpose, as survivors had often lost their homes and their earning capacity, and an emotional purpose, acknowledging that victims had been wronged and were deserving of reparation.

A duty to effect reparation is also the legal consequence of an internationally wrongful act (ILC Draft Articles, Art 31). As noted above, South Africa was not a party to the major human rights conventions during the Apartheid era, yet a duty to refrain from torture and extra-judicial execution is imposed upon states by customary international law. Where restitution is 'materially impossible', which is clearly the case when dealing with torture and execution, the law of state responsibility holds that the responsible state must provide compensation (ILC Draft Articles, Arts 35(a)

and 36). It follows that when the South African government had failed to provide reparations to victims up to five years after the closure of the TRC, aside from 'Urgent Interim Reparations' of 2500–6000 rand (A\$377–904) paid to around 12,000 victims (Makhalemele 2004), it was in dereliction of its international duties.

It took years of civil agitation before the government finally paid victims the significantly reduced once-only sum of 30,000 rand (A\$4522). Understandably, victims were not only left materially short, but were also made to feel cheated, betrayed and marginalised. This impact was exacerbated by some of the public/political commentary that accompanied the reparations debate, including President Thabo Mbeki's implication that those seeking reparation had engaged in the independence struggle for personal financial gain (Hamber 2005, 144). In essence, the mishandling of reparations served to directly counteract many of the participatory benefits outlined above by reducing victims to the status of impotent petitioners rather than deserving claimants (Picker 2005). This created a sorry contrast between the treatment of victims and their abusers: eligible perpetrators were rewarded for their participation with immediate amnesty, while victims were left with broken promises.

Fault for the failure of South Africa's reparations program fairly lies with the government that failed to implement the recommendations of the Committee for Reparation and Rehabilitation. In this respect, South Africa followed in the footsteps of El Salvador and Guatemala, where reparations were similarly dishonoured despite the recommendations of truth commissions (Seils 2002, 775–95). Given this historical international context, the TRC should have been empowered to make final, binding decisions with respect to victim reparation, rather than relying upon the government to implement its recommendations. The emotional and material welfare of victims might thus have been protected from the vagaries of political will.

Reconciliation

Reconciling a diverse population following an extensive history of oppression, exploitation and abuse is not something that can be achieved by two and a half years of work by a truth commission. Nor can it be achieved by a series of trials of select perpetrators. The multiple personal and collective combinations of suspicion, grievance, anger and prejudice among the population will not so easily respond to a one-size-fits-all social remedy.

The TRC contributed to reconciliation by focusing a spotlight on the recent past and providing a significant body of information to feed debate and serve as a springboard for transformation. The high level of public exposure immersed the population in

the workings of the commission through four hours of radio coverage each day; a weekly televised report, which became the most-watched program in the country; and publication of perpetrators' names in the *Government Gazette* (Garkawe 2003, 356). This is significant, given the risk of irrelevance illustrated by the Bosnian experience, where the International Criminal Tribunal for the Former Yugoslavia was so far removed from popular consciousness that the culpability it exposed had little impact upon Bosnian society and voting patterns (Kritz 2002, 60–65). It is difficult to imagine an end to hostility and suspicion and the development of stronger levels of social integration in the absence of acknowledgement of the suffering brought by some social groups upon others. The TRC was able to project such acknowledgement into the public domain, thereby curtailing any scope for a continuation of the *status quo ante* and making the task of any would-be denialists/revisionists more difficult to sustain.

In addition to illuminating culpability, the TRC's work fostered some specific, concrete instances of reconciliation between perpetrators and victims. Examples include the town of Esikawini's forgiveness of an Inkatha Freedom Party hit squad that was responsible for a spate of local killings, and Brian Mitchell's agreement to assist the Trust Feed community with reconstruction and development in an effort to make amends for murdering a number of local people (TRC 1998c, 392–400).

At the other end of the spectrum, the TRC's final report noted the white community's indifference or hostility towards the TRC, the evasion and obfuscation by officials in their formal submissions, and an 'overarching sense of denial' (TRC 1998c, 198) among Apartheid leaders and beneficiaries. Reconciliation was clearly far from realised in 1998.

Concluding remarks

The South African Truth and Reconciliation Commission sacrificed a limited amount of justice on the altar of truth and a wider accountability. It cannot truly be described as a vehicle for impunity, as it led to the attribution of personal and institutional responsibility for gross violations of human rights. While it was undeniably the fruit of a political compromise, compromising some justice in the interest of the peaceful substitution of an unjust regime with a more just and representative one is a defensible decision.

Was the TRC a good option for victims? It addressed their desire to know the truth far better than trials could have done by engaging with a larger section of the population; by providing an incentive for perpetrators to come forward; and by illustrating broader social and institutional responsibility and complicity.

By providing victims with a respected speaking role, it also offered a greater degree of inclusion and acknowledgement and conferred upon them the status of a dignified primary actor. The commission was able to identify and provide reparations to a larger group of victims than might have been achieved by trials. Had it been equipped with greater resources and more time, it could have extended these benefits to more victims. Had it been empowered to finalise reparations rather than merely recommend them, and had it offered mediated meetings between interested victims and offenders, it would have been more restorative.

Does this mean that states in transition should opt for truth commissions over trials, incorporating the recommended revisions? No. The two approaches deliver different results. Truth commissions can establish a historical record; provide victims and perpetrators with a speaking platform; catalyse debate; formulate restorative recommendations; establish broader social patterns of culpability and complicity; and conduct inquiries into events and organisations of specific concern, even in the absence of allegations of criminal misconduct. Trials are better placed to make a final determination on the culpability of individuals for highly specific pre-defined crimes and to mete out the appropriate punishment. Trials can also generate a large amount of information, and of a more reliable standard given the more restrictive rules of evidence, but they can be expected to do this much more slowly and at great expense. The approach adopted in Sierra Leone was perhaps a good marriage of the two models. The Special Court was set up to prosecute an anticipated 15 to 20 of the leaders and most responsible perpetrators over three years, at a cost of US\$56 million, while the Truth Commission was expected to attend to the bigger picture with no amnesties (Kritz 2002, 72). Trials and truth commissions are both significant tools in the transitional justice shed.

Is truth a better proposition than justice? Truth is important to social healing, reconciliation and accountability, and it is essential to justice. It legitimises the experience of victims, frustrates would-be denialists and, it is hoped, does something towards preventing a repeat of the same abuses. It would be ideal to have both truth and justice. In the absence of the former, the latter becomes impossible. This was the situation in South Africa. Justice would not have been served by failed trials; truth would not have been known without the incentive of amnesty; and neither would have been realised by the continuation of conflict and oppression. The South African approach to amnesty made sense under the circumstances. It was a significant advance on previous Latin American truth commissions, which were instituted alongside a general amnesty, did not provide for accountability by naming perpetrators, and eschewed broader

social relevance by conducting private hearings. On the other hand, it could have learnt from the Chilean approach to reparation, which included prompt and ongoing payments, free medical and psychological care, and free secondary and tertiary education until their 35th birthdays for the children of victims (Makhalemele 2004).

Ultimately, I agree with Paul Van Zyl that truth commissions can only ever be part of a 'justice policy ... [and] only ever make a partial contribution to the complex and contested processes of dealing with a legacy of abuse and building a rights-respecting culture' (2002, 745). The same is true of trials. ●

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