

An imperfect past: The Truth and Reconciliation Commission in transition

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On 30 October 1998, a five-volume report from the TRC was handed over to then President Nelson Mandela. The handover came two and a half years after the first public hearings held by the TRC in April 1996, years marked by a public and emotional process of testimony, disclosure, and investigation. This marked the end of the human rights violations work of the TRC, while the amnesty and reparations components were to continue for a further three years.

Yet the ceremonial report handover, instead of being the culmination of an internationally acclaimed process, saw TRC commissioners, reporters and victim representatives anxiously assembled awaiting the outcome of a court case. The ANC sought a last-minute interdict against the handover, claiming that the TRC had 'grossly misdirected itself in its findings on the role of the African National Congress' (ANC 1998). The ANC's legal effort was unsuccessful, and the handover ceremony took place, albeit in a rather grim and tense atmosphere.

The TRC, one of the flagship institutions created during the Mandela presidency to effect transition from an unjust past, thus ended its most public phase in a fractious and hostile relationship with the ruling party. That the ANC itself had been the initiator and most consistent proponent of the TRC made this response to the TRC's findings all the more ironic.

After the October 1998 handover, the TRC largely sank from public view. This article provides an overview of the TRC from its origins to its present inconclusive circumstances. In doing so, it suggests a range of possible reasons for the slide into virtual oblivion that seems to characterise the current state of the TRC project.

Genesis: national and international contexts

The genesis of the TRC in the early 1990s has been described by various commentators (Asmal, Asmal & Roberts 1997; Boraine 2001; De Lange 2000).

In 1993, the ANC appointed the Motsuenyane Commission to investigate allegations of abuse of ANC members in its exile camps, subsequently accepting its findings and collective responsibility for the abuses that the commission confirmed. At the same time, it reiterated an earlier call by NEC member, Professor Kader Asmal, for the establishment of a commission to investigate and report on human rights abuses committed by all parties during the apartheid era.

The call for a commission was consonant with broader international developments at the time as a number of countries, most notably in Latin America and Eastern Europe, searched for mechanisms to deal with the transition from authoritarian pasts to a democratic present. Truth commissions emerged as one possible route in dealing with the legacies of authoritarianism. Although the truth commissions in Argentina, Chile and El Salvador had received much international attention, a range of similar initiatives had also been undertaken in numerous other countries, including some in Africa (Hayner 1994, 2001). While these initiatives all had specific mandates, usually relating to disappearances and extra-judicial killings, they were also framed with broader concerns such as how to deal with contested and conflictual versions of the past with an ongoing pursuit on the psyche of major protagonists, as well as how to confront issues of impunity and accountability. This move to truth commissions accompanied the growing strength of human rights discourses internationally. The ANC, with its well-developed international networks, also absorbed these impulses, although primarily at a leadership level. Following two conferences sponsored by Idasa (then called the Institute for a Democratic Alternative in South Africa) on truth commissions and issues of transitional justice in 1993 and 1994, these debates began to percolate into local human rights and NGO circles.

Neither the ANC nor the NGO community was able to model the truth commission on their own terms. As several analysts have pointed out, the TRC was part of the broader set of compromises wrought through the process of negotiation (Bundy 2000; Simpson 2002). The agreement to grant amnesty for politically-motivated acts was forged in the very last stages of negotiations, so late that the declaration containing this obligation was tacked on as a 'post-amble' to the Interim Constitution. In some ways, this concession – largely made to satisfy the security forces and right wing – provided a second impetus for the establishment of the TRC. Rather than simply providing a framework for amnesty, the ANC took this concession and linked it to its own earlier call for a truth commission. As Simpson points out, not only was the linking of

amnesty with the broader project of truth recovery and reparations unique in the history of truth commissions, but '[by] foregrounding the interests of victims, the TRC would attempt to restore the moral balance to an amnesty agreement born of political compromise' (Simpson 2002: 223).

The establishment of a truth commission continued to be hotly contested by those from the former apartheid regime who saw it as a thinly disguised witch-hunt, despite the provision for amnesty and the agreement to include all parties to the conflict, including liberation movements. The legislation finally adopted in 1995 was at the time the longest debated piece of legislation and underwent numerous adaptations. There was also considerable input from various NGOs and interest groups. It was primarily these interventions that ensured that the amnesty process would be held in public rather than behind closed doors.

The TRC's enabling legislation, the *Promotion of National Unity and Reconciliation Act* (No. 34 of 1995), was thus a hybrid document reflecting different concerns and concessions. On the one hand, largely to allay fears of a witch-hunt and consonant with the conciliatory nature of the Mandela presidency, the TRC was framed in terms of national unity and reconciliation. The conciliatory impulse also reflected the highly charged and bloody four years preceding the 1994 elections, during which more people died than in the 30 years preceding 1990. In its final form then, it is unsurprising that issues of national unity and reconciliation loomed large.

On the other hand, another line of thought both from within the ANC and NGO sector was more concerned with the issue of accountability and of challenging impunity. Thus, the legislation specifically instructed the TRC to establish responsibility for gross human rights violations at both an individual and institutional level. These two points of emphasis were also reflected in the selection of commissioners. Some, particularly those drawn from the religious sector, tended to be drawn strongly to the discourse of reconciliation, while others, often from a legal background, were more concerned with determining responsibility and making perpetrator findings. The exercise of this latter aspect of the TRC's mandate led to significant discord with political parties (du Toit 1999).

An important strand of critical thinking around the TRC has pointed to the way in which truth commission-type mechanisms cannot simply be concerned with issues of justice, but are intricately involved in and reflective of broader

processes of nation building. In this regard, they are seen as mechanisms to legitimise new governments. By effecting a notional break from the past, they enable the 're-visioning' of a new nation or order. As such, truth commissions and other transitional justice mechanisms do not exist impartially outside of power, but are deeply part of the broader lines of contestation within society.

In the eyes of some of its critics, the TRC's nation-building agenda was essentially a nationalist project, an 'imagining' of the 'rainbow nation', that echoed the reconciliatory nature of the Mandela presidency (Bundy 2000; Mamdani 1998). Mamdani thus refers to the TRC as creating the 'founding myth of the new South Africa' (cited in Hayner 2001: 74). Similarly, elsewhere in this volume Mangu equates the TRC with the so-called 'sunset clauses'. The logic of this argument goes further in suggesting that the TRC was bound to produce a form of consensual and inclusive history. This view, to some extent, can be seen in Archbishop Tutu's 'Foreword' to the TRC report where he states 'we believe we have provided enough of the truth about our past for there to be a consensus about it. There is consensus that atrocious things were done on all sides' (TRC 1998 Vol. 1 Ch. 1: para. 70). However, this is in strong contrast to the rest of the report which establishes a strong hierarchy of responsibility for gross human rights violations.¹

This type of one-dimensional and sometimes instrumentalist reading reduces the TRC to a rather narrow nationalism and ignores the more transformative impulse that characterised at least part of South Africa's transition. The TRC formed part of a fleet of institutions of redress and transformation rapidly established after the May 1994 elections, including separate Land, Human Rights, Youth and Gender Commissions and a Reconstruction and Development Programme. This battery of organs of change reflected the exuberant ethos of social justice and restitution that is as much enshrined in the Constitution as are individual property rights. Each was tasked with addressing particular sites of the legacy of apartheid. In addition, there were diverse voices and positions within the TRC, several with an uneasy and more critical relationship with the consensual and reconciliatory thrust, identifying the TRC within an activist agenda of social change.

Appraising the TRC

In terms of sheer publicity, impact and drama, the TRC was arguably the flagship of the fleet. Unlike the other bodies, which were to be permanent institutions, the TRC had a limited time frame of two years.² Yet its achieve-

ments were substantial. Internationally, the TRC was feted as a success story of massive proportions, acting as a precipitant to several other countries adopting truth commissions.

The TRC began its work in early 1996, commencing with statement-taking and 'victim' hearings that continued into 1997 in urban and rural locations across the country. This was accompanied by an array of both public and less visible activities relating to the different aspects of its mandate. These included the questioning of political parties and their officials regarding their policies and practices, sector hearings that examined the complicity of social institutions with apartheid, amnesty hearings, investigation and scrutiny of surviving state documentation, a range of specialised investigations, exhumations, and Section 29 in-camera investigative hearings. This was accompanied by an ongoing arduous process of investigation and corroboration of each individual victim statement. All these activities culminated in the five-volume report released in October 1998.

The TRC's public processes and modes of operation were among its more notable attributes. Its work was blazoned across the national media over a two-year period. In terms of sheer reach, there can be few South Africans who did not hear and grasp something of its import.

Although in fact only a limited number of cases were 'solved' by the TRC, mainly through amnesty applications, these revelations acted as symbolic reference points for the definitive confirmation of violent concealed practices. Often highly dramatic, involving shockingly gruesome and callous details – such as the description of perpetrators drinking and 'braaing' (barbecuing) while the victims were incinerated on a neighbouring fire – these perpetrator accounts extinguished the possibility of ongoing denials. The expressions of human pain in the faces, voices and images of victim testimony, the bleak accounts from perpetrators of torture and killings, the images of exhumed skeletons bearing bullet holes, marked a distinct rupture of the highly segregated forms of historical knowledge that characterised South African citizens. An important component of this rupture was the decimation of the moral underpinning of the NP and white right wing, the associated delegitimisation of the entire apartheid project and the destruction of the façade of legalism to which the apartheid state clung.

Amongst these various activities in the first two years, the TRC strove to achieve a strong orientation towards victims, not always with great success.

Probably the most lasting images and voices from this period remain those of the victims. Further, these were not on the whole the voices of political activists, who in some senses already constituted a 'voiced' segment through organisational channels, but of ordinary citizens who formed the overwhelming bulk of those who came to the TRC and who paid the price of political violence.

Alongside this centering of victims came official acknowledgement by the state (in the form of the TRC) and public acknowledgement of the wrong done. This official validation of experience was, before all else, the fundament of the TRC and the heart of its mission to wrest those physically and psychologically bearing the scars of the past out of the peripheral and isolated spaces they occupied. Reparations were to be the most concrete expression of this official acknowledgement, in line with international human rights law.

Despite the initial centering of victims' voices, they were largely displaced in the amnesty process which pivoted around perpetrators. In addition, victims ended up at the end of the queue in terms of concrete material benefits. At the time of writing, no reparations have been forthcoming for victims, some six years after they made statements to the TRC. This is the central criticism directed at the TRC, although in truth it is misdirected – the TRC did not have the powers to allocate reparations, but only to make recommendations on reparations to government. For victims this distinction is confusing and immaterial, and the pain and sense of betrayal engendered by this debacle has at worst poisoned and at best soured their interaction with the TRC. Many who felt positive about their choice to participate in the work of the TRC now feel justifiably bitter and angry. For TRC staff and commissioners this post-TRC legacy is a painful nullification of the value and values of the TRC.

The TRC also tended to pander somewhat to political schisms and hostile political groupings, this propensity being reflected in its handling of the IFP, the South African Defence Force (SADF) and the NP. Internal dynamics within the TRC played some part in this, along with a failure of political will. In addition, the reconciliation mandate was articulated by some commissioners in a simplistic and naïve fashion, often loaded with Christian sentiment, that showed little complex reflection on the variousness of responses from and needs of victims.

Undoubtedly, the TRC failed to adequately situate the gross human rights violations that it addressed in the wider context of apartheid. One of the most

searing criticisms of the TRC concerns its narrow focus on direct acts of political repression, to the exclusion of the far more widespread and numerous abuses of apartheid, including forced removals and the expropriation of land, the pass laws, racial classification and the whole host of legislative cruelties imposed upon millions of citizens in the name of apartheid. Some of these violations arguably constituted gross violations of human rights as internationally defined and thus fell within the TRC's mandate (see Asmal, Asmal & Roberts 2000). While the TRC would have been hard pressed in 18 months³ to address these issues, and was of the view that they were being partly addressed by other institutional initiatives such as the Land Commission and the RDP, nonetheless it failed to deal with them even in a symbolic manner. The sector hearings were an inadequate and partial nod towards this important critique.

Similarly, the vast number of violations that occurred outside the borders of South Africa in the southern African region during the apartheid government's efforts to remain in power received only a modicum of investigative attention. Few statements were taken and no hearings were organised in any neighbouring countries, although the TRC's mandate included these 'external' violations. As the report points out, more people died as a result of apartheid outside South Africa's borders than inside, through the direct wars in South West Africa/Namibia and southern Angola, through state sponsorship of rebel groupings such as Renamo (Mozambique National Resistance) and Unita (National Union for the Total Independence of Angola), and through policies of destabilisation. Only one chapter in the report pays attention to these atrocities.⁴

The TRC's most explicit product, its 1998 five-volume report, was somewhat more controversial than its processes. The 1998 report elicited domestic protest and even legal action by several political groupings implicated in gross human rights violations.⁵ While former President FW de Klerk, former Intelligence boss Niel Barnard and the IFP were amongst the organisations and individuals who protested the findings against them, it was the opprobrium of the ANC that had lasting consequences.

Although the TRC had accepted that apartheid was a crime against humanity and that the ANC had fought a just war against it, it also found that certain limited aspects of the ANC's armed struggle constituted gross human rights violations. These findings were based upon the principle that even when fighting a just war, just means must be employed. That the ANC had, in 1980,

acceded to the Geneva Convention, indicated their willingness to adhere to such conventions and principles (TRC 1998, Vol. 1 Ch. 4: para. 64-81).

The ANC, however, took the view that the TRC's findings 'criminalised' the liberation movement and equated their actions with those of the state, an unacceptable form to it of 'moral equivalence'.⁶ The ANC declared that it would:

fight using all legitimate means, to defeat any effort which seeks to denounce the noble struggle the people waged, on the basis that it constituted a gross violation of human rights. (ANC 1998: para. 3.1)

This was despite the fact that the TRC found the primary perpetrator to have been the South African state, followed by the IFP. The findings against the ANC were modest and were not expected to elicit any controversy. As Archbishop Tutu commented:

I must say that some of us were taken aback, since we had believed that the notice would be a mere formality with the ANC. The contemplated finding had been based on the ANC's own very substantial, full and frank submissions ... (Tutu 1999: 208)

Regrettably, the October 1998 report handover coincided with the departure from the TRC of most of its leadership figures. Indeed, even prior to the handover of the report, the TRC leadership was dispersing. This dispersal probably contributed to the breakdown of relations with the ANC over the findings issue.

With the handover of the report, the TRC went into suspension. Three commissioners were retained with responsibilities for the human rights violations (HRV), amnesty and reparations components, along with the Amnesty Committee. The others, notably its leadership of Chairperson Desmond Tutu and Deputy Chairperson Alex Boraine, departed to pursue other activities overseas, among them the promotion of the South African TRC model.

The consequence of this downscaling was a leadership vacuum and the TRC became almost entirely a bureaucratic agency for the next three years, administering amnesty applications, outstanding HRV and reparations matters. The Amnesty Committee placed great store on its independence from the rest of the TRC and confined its role exclusively to adjudicating applications. The collective institutional ability to argue and engage with the broader TRC

project was no longer present and the public pronouncements of the TRC became almost exclusively bland announcements regarding the outcome of amnesty applications. At the crucial moment when the identity, value and mandate of the TRC was under critical scrutiny, the ship was rudderless.

The TRC was never able to repair its troubled relationship with the ANC and gradually became viewed with suspicion and some contempt by leading ANC officials. While there is evidence that this view was not universally shared by all in the ANC – many feeling that the accomplishments of the TRC were substantial and its findings appropriate – this antagonism became a powerful public expression. The parliamentary debate on the report in February 1999 built public perceptions that the TRC had misdirected itself. Few voices were heard to counter this. The TRC's remaining administrative shell could offer no input on the debate. Du Toit has commented:

Within South African politics and public life, the TRC has not only effectively disappeared from the national agenda ... but the TRC process is widely assumed to have been less than successful, if not basically misconceived. (2002: 1)

After the parliamentary debate, the report and its recommendations sank like a stone into virtual oblivion in South Africa, although continuing to receive great acclaim and awards abroad. All of the above has resulted in a situation where a number of outstanding matters relating to the TRC, chief amongst them reparations, have fallen by the wayside.

Reparations

While the TRC had the power to grant amnesty, it had no similar power with respect to reparations. Instead, it was confined to placing recommendations before government (as it did in its 1998 report) and the payment of small 'urgent interim reparation' amounts to victims.

Although in the popular mind and ensuing controversies final reparations have become focused on individual monetary compensation, the TRC's recommendations were far wider.⁷ The whole reparations package was devised in accordance with internationally-accepted approaches to reparations and rehabilitation and included different dimensions. In the first place, *individual reparation grants* were to be paid to victims or their surviving relatives/dependants. These grants would be paid by the President's Fund in

six-monthly instalments for a period of six years. The amount would vary up to a maximum of R23 023 per annum.⁸ *Symbolic reparations* were aimed at restoring the dignity of victims and survivors, and incorporated both legal/administrative measures as well as more commemorative aspects.⁹ *Community rehabilitation* would give attention to those communities that were subjected to systemic abuse, most notably, although not exclusively, areas of KwaZulu-Natal.¹⁰ In terms of the internationally recognised right to a guarantee of non-repetition of such violations, these measures were to be accompanied by *legal and institutional reform*.¹¹

From the outset, government expressed caution regarding the individual monetary component. Some government figures rebuffed the notion of individual payments, stating that those who joined the struggle against apartheid did not do so for monetary gain. During the parliamentary debate, Dullah Omar, then Minister of Justice, reflected this unease with what was seen as 'financial reward':

We will also bear in mind that our gallant sons and daughters did not participate in the struggle and did not sacrifice their lives for monetary compensation ... We must not reduce the victims of apartheid tyranny to beggars pleading for a hand-out of mercy. (Joint Sitting of the National Assembly and the NCOP, 1999: columns 64–65)

After the February 1999 debate, a long period of official silence ensued, broken only by intermittent verbal exchanges between government officials and increasingly anxious victim organisations, such as the Khulumani Victim Support Group.¹² While a committee was established consisting of directors/generals of government ministries expected to contribute in some form to a reparations programme, no visible progress was reported. The TRC's official reparations policy gathered dust while its reparations' staff continued to be inundated by confused and desperate victims, who blamed the TRC for the silence.

Finance Minister Trevor Manuel's 2001 budget speech finally included some concrete financial indicators. He stated that allocations would bring the amount available for reparations in the President's Fund to about R800 million. These would be paid in once-off settlements and the process would be concluded within two years (Budget Speech 2001). The R800 million was not seen as a finite amount as government would seek additional funding

from the business and civil society. This suggested that the reparations policy of a biannual pay-out over six years would not be adopted, but a smaller-scale single payment was preferred. If the full R800 million was used for individual payments alone, this would amount to approximately R40 000 per person.¹³

All subsequent references by Government to reparations indicated that only when the TRC's final volumes were handed over would it issue any further official announcements on its proposed reparations policy. This handover was first scheduled for late 2001, a date that continued to shift later and later, until being placed on hold in mid-2002 by the IFP's legal challenge to the findings made against it in the 1998 report. Following an out-of-court settlement in January 2003, the final report was set for handover on 21 March 2003, Human Rights Day.

The Khulumani Victim Support Group in the Western Cape attempted to force government to disclose its reparations proposals by using the *Access to Information Act*. The matter was still pending in court at time of writing. This did little to improve the poor relationship existing between the ANC or Government and victim-support groups. In one incident during a June 2000 visit by President Mbeki to Soweto township to commemorate June 16, members of Khulumani holding placards calling for the implementation of the TRC's reparations proposals, were manhandled and their placards destroyed by ANC supporters.

Although the Government pegged its prevarication on the delayed handover of the report, the TRC made it clear that the reparations proposals submitted in 1998 were its final recommendations. However, it was not only the reparations proposals that were ignored by Government.¹⁴ None of the recommendations made in the October 1998 report have received official attention.

Some may argue that Government prefers to consider reparations as a broader social and economic development issue as opposed to individual compensation. Government has always articulated a preference for community and symbolic rather than individual reparations. This type of broader apartheid restitution framework was illustrated by a speech by Finance Minister Trevor Manuel at an NGO-hosted debate on reparations. His speech, which outlined the development challenges facing the country in the context of the legacy of apartheid, mentioned reparations but once, as follows:

To promote sustainable but rapid development must be the most meaningful form of reparations for the vast havoc that apartheid wreaked on the lives of our people. (Manuel 2000)

While this is no doubt a paramount reparations approach for the country as a whole, the provision of electricity and water (which is in any event the function of a government) cannot be construed as reparations for a person paralysed by a police bullet – a person possibly mobilised into the streets by Minister Manuel himself in his earlier persona as UDF General Secretary! Furthermore, Government has not been consistent in this stance. Despite this apparent distaste for individual payments, Government has seen fit to compensate financially certain of its constituents via its veteran special pensions scheme, which provided for the payment of pensions to persons who, in the establishment of a democratic constitutional order, made sacrifices or served the public interest; and the dependants of those persons (*Special Pensions Act* [No. 69 of 1996]).¹⁵

Unlike the TRC reparations proposals that suggest biannual payments for a period of six years, no such time limit exists for those eligible for special pensions. The special pension annual amounts range from R24 000 to a maximum of R84 000, according to criteria of age and length of organisational service. The amount required for these pensions would clearly far exceed the annual amount required for the TRC reparations payments, where the maximum annual payment for a rural family with nine dependants is some R23 000. While the TRC reparations would involve some 22 000 victims,¹⁶ just under 30 000 applications for special pensions had been received by December 2000. Furthermore, a recent proposed amendment to the special pensions legislation would allow for late applications to be received. According to the Chairperson of the Portfolio Committee, Barbara Hogan, 'we owe it to history to set up a record of everyone that was part of the struggle' (Finance Portfolio Committee and Select Committee Joint Meeting 21-08-02).

The special pensions process primarily privileges those who were members of organisations, as opposed to those who were engaged and even injured or killed in the political conflict in non-organisational ways. It is the latter group that came to the TRC. Whatever the specifics of the special pensions are (and the many problems associated with its implementation),¹⁷ the principle of individual recompense by government for 'losses' suffered as a result of political involvement is clear. The difference in approach is stark. Perhaps this can be

explained by the lack of political standing of the TRC victims, who are not on the whole a strong pressure or lobby group within the ANC. While former exiles, political prisoners, and Umkhonto we Sizwe (MK) combatants have also had a difficult journey to obtain and access what they saw as their just dues, they constitute groups with far greater access to the portals of power. As fairly organised groupings with pre-existing relationships with MPs, MPLs, Ministers and high-ranking officials, these ANC 'constituents' are able to lobby for their interests and mobilise a stronger sense of obligation in the ANC's conscience. By contrast, those who came to the TRC were not organised political activists in the main, but were mostly ordinary and often very poor township residents swept up in the conflicts of the mid-1980s and 1990s, with little more than a sense of identification with political movements.

Only a minority of TRC victims can be described as the organised membership of political parties. Even fewer high-profile activists and almost no parliamentarians made statements to the TRC. As Commissioner Hlengiwe Mkhize noted, TRC victims 'are mostly unemployed people with little education – not high profile or visible political people, but those who made sacrifices at a local level but are unknown and seen as insignificant' (*Cape Argus* 17.01.02).

Amnesty and prosecutions

The corollary of the amnesty process was the implicit assurance of prosecutions for those who did not apply, as well as those applicants refused amnesty for failing to meet the requirements.¹⁸ To this end, shortly after the handover of the 1998 report, a unit was established in the National Directorate of Public Prosecutions. This was perhaps somewhat premature given that the amnesty process itself was far from complete and TRC records had yet to be handed over to the National Archives. It is thus unsurprising that the unit made little headway and not a single prosecution has been launched by it to date. There are also difficult questions to be addressed surrounding prosecutions. As an unnamed source in the Justice Department noted:

Government has a very serious dilemma. You do not want the next five years of South African politics to be dominated by sensationalist trials of high-profile figures. This country is hard enough to govern without opening up old fault lines. You do not want the politics of the future to be monopolised by the past. Yet you

cannot do nothing. If everybody denied amnesty walks free, the Truth Commission turns into a mockery. The Commission was acclaimed across the world. It cannot end in ignominy... (*Business Day* 21.06.01)

Should prosecutions target the politicians, the generals or the footsoldiers? While evidence may be more easily available for the prosecution of footsoldiers, charging only those who pulled the trigger is hardly a satisfactory option.¹⁹ David Unterhalter, director of the Nelson Mandela Institute at the Wits University Law School, highlighted this dilemma:

The crucial choice is whether to go for those who were politically responsible on one hand, or highly placed officials on the other.

The morally sound choice is surely to go for those who were politically accountable. It establishes principles germane to the present and the future – questions of moral responsibility for those who wield power. That's where Nuremberg was successful... The Goebbelses, the Speers were brought to justice. Yet if the decision is a pragmatic rather than moral one, I guess government will go for officials instead of politicians. (*Business Day* 21.06.01)

The article suggested that one of the likely prosecution scenarios would be 'taking a few high-profile, symbolic cases to trial and letting the rest gather dust' and asks who the 'sacrificial lambs' in such showcase trials are likely to be. The same unnamed source in the Justice Department offered a response:

A pretty cynical set of decisions will probably be made. Who is high profile enough for the trial to be a real showcase, but does not garner enough current support to provoke too many shock waves? Expect government to ask some pragmatic questions. (*Business Day* 21.06.01)

Justice Richard Goldstone, a Constitutional Court judge and an international prosecutor, has also suggested that widespread prosecutions may not be possible in transitional societies:

All victims are entitled to full justice through trial and if proven guilty, then the punishment of perpetrators must follow. In transitional societies the problem is that there are too many victims and too many perpetrators for the latter to be tried. (*Cape Times* 04.10.01)

He further suggested that carefully-chosen prosecutions should follow according to three criteria:

- o The victim's desire to proceed.
- o The availability of sufficiently compelling evidence.
- o The heinousness of the crime.

The second dilemma confronting the prosecution authorities is the question of impartiality. Should prosecutions proceed against both state and liberation movements? Is it viable for prosecutions only to proceed only against those linked to the former state, and would this unleash a wave of protest? Rumblings from lawyers representing security-force interests, as well as victims of ANC bombs, suggest that should prosecutions proceed against former state operatives alone, a concerted effort will be made to counter this, including, for example, bringing civil claims against both ANC leadership and operatives.

At a more pragmatic level, the cost of such prosecutions is clearly an important factor in Government's considerations. In his budget speech in June 2001, Minister Maduna raised the question he claimed many South Africans would ask: whether to spend millions or even billions on prosecutions or whether to deploy scarce resources on pressing social needs such as housing and health? Responding to the issue of the costs of prosecutions, Venitia Govender, national director of the SAHRC, raises the danger of going the pragmatic route: 'How can we expect ordinary citizens to respect and uphold the law ... if no real effort is made to deal with elements that snubbed the [TRC] process?' (*Mail & Guardian* 15.06.01).

Further, any post-TRC prosecution begins with a legacy of failure. Following the successful conviction in 1994 of Colonel Eugene de Kock, subsequent large-scale prosecutions of apartheid-era perpetrators have failed to secure convictions. In both instances, the failure of these prosecutions was blamed on an untransformed judiciary. In the case of former Defence Minister Magnus Malan and his co-accused, the prosecution's failure was widely blamed on prosecutor Tim McNally's alleged deliberate sabotage of the case. In the case of chemical biological warfare programme head, Brigadier Wouter Basson, the prosecutorial team (the same team which had been responsible for the conviction of de Kock) confronted a hostile apartheid-era holdover in Judge Willie Hartzenburg (Burger & Gould 2002).

While the failure of these prosecutions has been seen more as the result of unfortunate courtroom circumstances than the strength of the cases them-

selves, Judge Hartzenburg's refusal to grant key state witnesses immunity from prosecution is likely to have a more lasting negative impact. It is rumoured that several former security force operatives who had been co-operating with the Attorney General's office became reluctant to consider giving evidence in future trials as a result of this ruling. Two other local prosecutions, neither of which was initiated by the post-TRC prosecution unit, have also ended in acquittals.²⁰

In the absence of effective prosecutions it may be said that a *de facto* general amnesty has been declared. Does this reflect a failure on the part of the national prosecutorial authority or does it reflect a broader lack of political will on the part of government itself?

Commentary by Government on the question of prosecutions has been somewhat contradictory in recent years. The *TRC Act* was almost certainly promulgated with the intent of prosecutions following the amnesty process. Yet as time has passed, hints of other amnesty options have continually surfaced, primarily in the form of debate around a special amnesty for KwaZulu-Natal, where political violence continued after 1994, and ongoing amnesty calls by former SADF generals.

During the February 1999 parliamentary debate on the TRC report, both Mandela and Mbeki refuted the possibility of a general amnesty, but suggested that future prosecutions would be limited. Then-President Mandela stated:

Accountability does need to be established, and where evidence exists of a serious crime, prosecution should be instituted ... Yet a timeframe for this process is necessary, for we cannot afford, as a nation and government, to be saddled with unending judicial processes which can easily bog down our current efforts to resolve problems of the present. [The National Director of Prosecutions] will take into account not only the critical need to establish accountability and the rule of law, but also the need to advance reconciliation and the long-term interests of the country. (Joint sitting of the National Assembly and NCOP, 25.02.99: col. 55)

In the debate, then-Deputy President Mbeki concurred with much of this, adding that at the same time Government would need to address the situation in KwaZulu-Natal and the proposals put forward by former SADF generals. Another issue of concern alluded to by President Mandela was the troublesome question of organisational liability that was not addressed by the amnesty provisions.²¹

These issues continued to surface with media suggestions that an elite pact might be underway to secure both the SADF and ANC leadership from prosecution.²² Newspaper reports indicated that a working group consisting of Justice Minister Maduna and Deputy President Zuma, former generals of the SADF (including Generals Geldenhuys, Malan, Viljoen and Meiring), was established on Mbeki's initiative sometime in the period following the handover of the TRC report in 1998 (*Rapport* 10.06.01; *Business Day* 13.06.01). The group is said to have drafted a document in which they recommend the granting of amnesty to SADF generals and ANC leadership.²³ The proposal would not apply to persons who acted outside the normal recognised conventions of war and outside of a political framework. It also sought to secure SADC co-operation in preventing any prosecutions for incidents in neighbouring states.

The fragmented details of these meetings caused alarm when they came to public attention. Both the government and the former SADF generals hastened to reassure their subordinates that they too would be included in this amnesty proposal. For example, General Malan stated that this general amnesty would not be selective and it would include everyone involved before 8 May 1994 across the board. He argued that 'people desire the closing of the books' so that they can proceed without fear of prosecution, and he did not wish to see ANC leadership prosecuted (*Rapport* 17.06.01). In his budget speech in June 2001, Justice Minister Maduna stressed that these meetings were merely consultative and did not aim at securing a secret deal. He also gave an assurance that 'that there will be no blanket amnesty' (*SABC Pressclips* 19.05.02).

Despite the Minister's assurances, the presidential pardons granted in May 2002 to 33 prisoners in the Eastern Cape, including a significant number who had been denied amnesty by the TRC's Amnesty Committee,²⁴ fuelled speculation that these limited pardons were a precursor to a wider amnesty. Archbishop Tutu said if those pardoned included several people refused amnesty by the TRC, it would seem to be 'the thin end of a general amnesty wedge ... It would make a mockery of the TRC and eviscerate the entire process' (*SABC Pressclips* 19.05.02). The pardons promptly elicited pardon applications from other serving political prisoners such as Eugene de Kock, Janusz Walusz and Clive Derby-Lewis, and a range of other right-wing prisoners, most of whom had been refused amnesty by the TRC. Newspaper reports suggested that the IFP and the Freedom Front had drafted lists of

'their' prisoners and were pressurising government with the hope of securing similar pardons. Indeed, it was reported at the time that the IFP had developed its own amnesty application form and that this form had been shown and approved by the Justice Department.

In the ensuing furore around these pardons, and in contrast to earlier statements, Cabinet confirmed that the possibility of a further amnesty for politically-related crimes was being considered, and that Government's view on the matter would be made known following the release of the TRC's final report. Indeed, it was rumoured at the time that following the submission of this report, Cabinet would announce its reparation programme and, at the same time, announce the parameters of such an amnesty.

A closer examination of the process leading up to the pardons suggests that they were possibly more of a local regional solution to a problem than an indicator of a future national amnesty. The pardons were the initiative of Eastern Cape Premier Makhenkesi Arnold Stofile who, more than a year before the pardons were announced, had criticised the TRC for leaving these amnesty applicants to 'rot in jail' and had publicly called for presidential pardons for all former Azanian Peoples' Liberation Army (APLA) and MK operatives.

At the time of writing, the final volumes of the TRC report are yet to be handed to Government. It is unlikely that Government will proceed with discussions around a further amnesty before their publication. At the same time, there have been renewed efforts by the National Prosecuting Authority to identify possible prosecutions. However, the unit responsible for this remains extremely modest and it is believed that even the most optimistic foresee only a handful of prosecutions materialising. Thus, even if a second form of amnesty does not come to pass, it is unlikely that prosecutions will occur on anything like the scale that human rights groups would deem desirable.

Yet without such prosecutions, those who snubbed the TRC will be vindicated. One such element was the SADF, and this is perhaps the most disturbing aspect of the discussions between Government and the SADF regarding further amnesty arrangements. If the efforts by the SADF and IFP to secure a further amnesty or pardons for their members are successful, it will in effect reward and endorse the contempt that both organisations displayed towards the TRC, and by extension to Parliament and the legal process that put the TRC in place.

Other unfinished business

While reparations and prosecutions are the two issues that loom largest on the post-TRC horizon, there are several others that should not be forgotten. The limited life span of the TRC inevitably constrained its ability to tackle and complete a host of investigations and activities that were terminated in October 1998 with the formal suspension of the Commission.

Most pertinent amongst these unfinished tasks has been the TRC's failure to provide any feedback concerning individual case investigations to the victims or their families. Of all requests made to the Commission, the most common was to find out what had happened, by whom, and so on? In many cases, families were not even aware of the publicly-available documentation that could have provided some information, such as police case dockets, post-mortem and inquest reports, as well as newspaper reports and NGO data. Neither these types of documents nor the final outcome of the TRC's investigation were made available to the victims.

Few victims have ever seen their own case file. All victims ever received from the TRC in the way of feedback was a *pro forma* letter with a ticked box indicating that they had/had not been declared a victim of a gross HRV, and that those declared to be victims could apply for reparations. In several cases involving amnesty hearings, the shortage of investigative capacity and the pressures of time meant that the relevant victims could not be traced and informed about the amnesty hearing. These victims have thus never heard the details of the perpetrator's account of the incident.

Two other areas of outstanding obligations relate to missing persons and the exhumations of human remains. Several hundred missing persons were reported to the TRC and most of these cases remain unsolved. The TRC conducted a limited exhumation programme of some 50 persons, primarily in the former Transvaal and Natal regions. All of these cases involved MK operatives killed in combat or ambush situations by the security forces. These exhumations were undermined by irregular procedures in certain cases, and potentially faulty identifications. Aside from the necessity of resolving these errors, there remain a significant number of anonymously buried combatants and civilians who have yet to be exhumed. There are, in addition, a large number of exiles who died on foreign soil in a variety of circumstances.

The return of human remains was one of the most emotive and tangible endeavors undertaken by the TRC. The heartfelt appeal by families for the

bones of their loved ones remains a small but critical arena where real restitution and reparations can take place.

Conclusion

This article has positioned the TRC as one of the raft of institutions established post-1994 to redress past injustices and build a human rights culture. Whatever its shortcomings, the TRC is surely one of the most successful. While its impact on the public psyche was immense at the height of its operations, today its defendants are scattered and few, confined largely to sectors of the NGO community. Despite international acclaim, Government's response has been tardy and critical. This in turn has resulted in a widening sense of criticism and injustice from victims and the broader South African public, which has arguably squandered the potential energy of the TRC process to deepen the commitment to justice and end to impunity enshrined in the Constitution.

Various reasons have been suggested for Government's stance. First among these would be the tensions arising from the TRC's findings on the liberation movements. Beyond this, as the debate on prosecutions illustrates, Government is faced with competing agendas and limited resources, often drawing it towards other priorities. To what extent the lack of progress in expediting the TRC's unfinished business is a product of hostility to its findings, or a result of more urgent priorities, or even a more general muting of the more transformative impulses of the period, is unclear. Whatever the reasons may or may not have been, it undoubtedly remains a Government choice to keep the TRC on the backburner.

In his most recent 'State of the Nation' address to Parliament on 14 February 2003, President Mbeki referred to the prospect of future discussions on the way forward:

It is in this spirit that we should engage in a national dialogue on how we take forward the report and recommendations of the TRC, which we hope will be presented to government in the next few months. This will afford us the opportunity to understand a critical part of our past and join hands in forging a people's contract for a better tomorrow.

It is as yet unclear as to whether this represents any significant commitment by Government to forefront the unfinished business of the TRC. Notably, the TRC was entirely absent from Minister Manuel's 2003 budget speech made

two weeks later. Victim groups were dismayed to see no further financial provision made for reparations.

This article has perhaps unfairly focused on the shortfalls of Government. Yet others have pointed to the TRC's own abandonment of its project. Addressing a Chile/South Africa conference, Antjie Krog, an admirer of the TRC process, commented:

As the process peters out and seems to leave hardly a ripple, I cannot help but question the commissioners' lack of foresight. If indeed, it rests with the ANC-led government to carry out reparations, sue perpetrators, implement prevention measures for foreign abuses and cultivate a human rights culture, then it is crucial to get it to understand what is at stake ... The truth commission should have spoken to it, not once but a thousand times if necessary. Its failure to do so has done the process more harm than all the other criticisms and mistakes put together. (*Sunday Independent* 02.12.01)

Du Toit also argues that responsibility for the negative outcomes in the TRC aftermath, should not only be placed on the ANC government:

These unfortunate results are as much the responsibility of the TRC itself. With its formal disbandment in 1998 the Commission has taken the view that its task had been completed and that the implementation of its recommendations now was a matter for the state. Technically this is correct ... But, just as at the inception of the TRC process, civil society-based ways and means could have been found to ensure that the key issues remained on the national political agenda and were brought to the attention of the key political decision-makers. Instead it would seem that key figures in the TRC leadership have chosen to facilitate the export of the South African TRC model abroad in a range of international contexts while the local product has languished at home. (2002: 6)

Postscript

President Thabo Mbeki finally presented the Government's position on reparations and amnesty in Parliament on 15 April 2003, shortly after receiving the final two volumes of the TRC report. He announced a:

'once-off grant of R30 000 to those individuals or survivors designated by the TRC. Combined with community reparations, and assistance through opportunities and services ... [medical and educational], we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief'. (Mbeki 2003)

Even while announcing individual payments, President Mbeki continued to express Government's misgivings: 'We do so with some apprehension, for no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves were for monetary gain' (Mbeki 2003). He also rejected the wealth tax proposal made by the TRC.

While there was relief that Government had finally outlined its reparations plan, there was widespread disappointment and anger amongst victims that the individual reparations were only about one-quarter of what the TRC had proposed. There may be further problems emerging from the proposed payouts. Only those who made statements to the TRC and were found to be victims are eligible for individual reparations. Yet, thousands of victims did not come to the TRC for many reasons: inaccessibility, lack of information, the brief life span of the TRC, or political objections. The 22 000 TRC victims by no means constitute the entire victim pool. It remains to be seen whether victims or groups representing their interests will challenge either of these issues.

Mbeki and other Cabinet members also took the opportunity to lambast efforts currently underway in courts in the United States to force certain multinational companies to pay 'apartheid reparations'. Mbeki stated that 'we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts' (Mbeki 2003). In 2002, two class-action lawsuits were filed in the USA against nearly 30 multinational corporations and international banks for their role in helping the apartheid government 'do its dirty work' through the provision of finances, oil and technology. The lawsuits, filed in the name of clusters of apartheid victims and the Khulumani Support Group, sought individual compensation as well as broader social development contributions. No doubt private initiatives such as these and the prospect of investor unhappiness played some role in urging Government to agree to some form of monetary compensation. At the

time of writing, initiatives brokered by Anglican Archbishop Ndungane are commencing to negotiate a settlement.

Government also put an end to further speculation around the issue of a general amnesty. President Mbeki stated unequivocally that:

Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past, but also in the creation of a new ethos within our society. (Mbeki 2003)

The decision to pursue prosecutions would thus be left to the discretion of the National Directorate of Public Prosecutions (NDPP). At the same time, Mbeki continued, the NDPP would 'leave its doors open for those who are prepared to divulge information they have and to co-operate in unearthing the truth (Mbeki 2003)', thus opening the way to further disclosure by perpetrators in exchange for immunity from prosecution. At the same time, Government did not increase the resources of the NDPP unit working on TRC-related cases, thus signaling that it is unlikely that large numbers of perpetrators will be brought to book.

Somewhat surprisingly, neither President Mbeki nor the various ANC representatives who spoke during the ensuing parliamentary debate raised the issue that had previously caused so much ire and had bedeviled relations between government and the TRC, namely, the TRC's findings on the ANC. This was despite the fact that the TRC's final volumes confirmed its earlier findings on the ANC.

In the end, the final balance sheet will show that Government, while not wholeheartedly embracing the TRC's recommendations, stepped back from previously disputed terrain. Aside from symbolic reparations, identified TRC victims can expect to receive very modest monetary reparation, while a handful of perpetrators may find themselves facing criminal charges. With regards to the contested findings of the TRC, these have been left – arguably where they properly belong – to current and successive generations of South Africans and others to debate and research.

Notes

- 1 See for example the chapter on Findings and Conclusions, Vol. 5 Ch. 6.

2 After October 1998, the Amnesty Committee was enabled to continue its unfinished work, wrapping up its last amnesty hearings and decisions in 2001.

3 The life span of the TRC was originally set for 18 months, but this was extended to October 1998.

4 See TRC (1998), Vol. 2 Ch. 1.

5 The TRC found that three types of actions undertaken by the ANC constituted gross violations of human rights. These were the landmine campaign and the placing of certain bombs where civilians were killed or injured, attacks on suspected collaborators and state witnesses in trials, and the torture, severe ill-treatment and executions of ANC members in exile. There was also a finding that held the ANC accountable for the killing of political opponents in the 1990s period, primarily through its role in arming and training self-defence unit members without adequate structures of command and control, all of which contributed to the 'spiral of violence' engulfing areas of the country in that period. See TRC (1998), Vol. 5 Ch. 6, especially paras 130–138.

6 For a more detailed discussion of this issue see Cherry (2000), du Toit (1999) and Asmal, Asmal & Roberts (2000).

7 See TRC (1998), Vol. 5 Ch. 5.

8 The amount to be paid would be calculated according to three components: (1) an amount that acknowledged the suffering caused by the violation; (2) an amount that enabled access to requisite services and facilities; and (3) an amount to subsidise daily living costs according to socio-economic circumstances. Victims living in the rural areas would receive a slightly higher grant as the cost of living is higher there. The amount also varied according to the number of dependants.

9 The legal/administrative measures included, for example, the issuing of death certificates, expunging of criminal records for politically related offences and other outstanding legal matters. Commemorative aspects included exhumations, tombstones, memorials or monuments and renaming of streets or public facilities.

10 These included programmes to demilitarise youth who had been involved in or witnessed political violence over decades; programmes to resettle the many thousands displaced by political violence; mental health and trauma counselling; as well as programmes to rehabilitate and reintegrate into normal community life perpetrators of gross violations of human rights.

11 These included recommendations by the TRC as a whole relating to the judiciary, security forces and correctional services, as well as other sectors in society such as education, business and media.

12 While the Khulumani group was originally only active in the Gauteng area, a Cape Town group of victims also later affiliated to Khulumani. Other pockets of victim organisation also exist in other regions of the country, such as the Uitenhage Victims' Support Group in Uitenhage, Eastern Cape. Other NGOs such as the Healing of

Memories Institute, Khumbula and the Trauma Centres are also active in this area. An NGO Working Group on Reparations has also spearheaded pressure on reparations.

13 This was calculated in terms of some 17 000 victims. However the number of victims has grown substantially since then, which would lower the amount.

14 Even where Government has enacted measures in line with the TRC recommendations, such as the reform of public-order policing procedures, these have been done without reference to the TRC recommendations.

15 See the minutes of the relevant joint meetings between the Finance Portfolio Committee and Select Committee at the website of the Parliamentary Monitoring Group (PMG): <http://www.pmg.org.za/>.

16 The issues, problems and fairness concerning the TRC's 'closed list' of victims have not been canvassed in this article, yet will surely fall under the spotlight if and when actual payments become a reality. In short, the list of TRC victims who qualify for reparations is made up only of persons who were identified as victims either through HRV statements or through the amnesty process.

17 There are reportedly a host of problems associated with the implementation of the special pensions. In addition, according to Human Rights Media Watch, only some 9 500 of the 30 000-odd applicants have been accepted. Also see the minutes of the relevant parliamentary committees, available from the PMG at <http://www.pmg.org.za/>.

18 These requirements included: full disclosure, political objective, proportionality, and acting within the orders of a known political organisation.

19 The so-called 'German border guard cases' are intriguing examples of prosecution across hierarchies and functions. The Defence Minister and his deputy, members of the National Defence Council, as well as border guards themselves were convicted and sentenced for fatal shootings of persons who attempted to flee from East to West Germany. See Arnold, Karsten & Kreicker (2002).

20 Two members of the Ciskei Defence Force who were involved in the Bisho Massacre and who had been refused amnesty were charged in respect of this event. The second trial involved a Western Cape policeman who was denied amnesty for killing a teenage protestor in Worcester in 1985.

21 For a discussion on the question of organisational and leadership liability and the problems of the South African amnesty process, see Klaaren & Varney (2000).

22 This was not the first time that rumours of secret negotiations regarding amnesty for the SADF have surfaced. Suggestions of such a deal brokered perhaps by Joe Modise or other leading MK personnel with the SADF have persisted. Modise is said to have assured SADF generals during bilateral discussions between the SADF and MK in 1993 that 'Nuremberg-style' trials were not on the cards and both sides are said to have been in agreement on the 'absolute necessity of a general amnesty'. (See Frankel 2002: 23–25.)

23 The SADF generals had refused to seek amnesty as they were of the view that they had fought a legitimate war, while a number of ANC leadership figures had been refused

amnesty as their applications were for general political accountability, rather than specified incidents or operations. The ANC amnesty decisions were the subject of a TRC-initiated court review. (See TRC 1998, Vol. 1 Ch. 7: 193–194.)

24 The 33 pardoned included various APLA operatives involved in attacks in the Eastern Cape in the early 1990s, a group of 12 UDF/ANC supporters from Mdantsane involved in 'community justice' killings and a UDF supporter refused amnesty for a farm killing in 1989. Also granted pardon was former Ciskei strongman and one-time South African security force agent, Kwane Sebe, jailed for attacks on two properties in 1989. The number of amnesty applicants is variously cited. Some had been granted amnesty for some offences or for certain aspects of the offence for which they applied.

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