

# NO REST WITHOUT THE WICKED

## ASSESSING THE TRUTH COMMISSION

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*Half way through its term, the Truth and Reconciliation Commission has achieved much given its complex task. The TRC's uniquely public and democratic nature accounts for some strengths but also many weaknesses. Dealings with victims have been successful. But if substantial numbers of perpetrators, particularly prominent security force and ANC figures, do not apply for amnesty, the TRC will have failed in one of its main objectives.*

A novel and controversial experiment in public political morality, many questions remain about the Truth and Reconciliation Commission (TRC). How has it set about defining its task? What content is being given to 'truth' and 'reconciliation'? Can it possibly achieve its daunting objectives? It is a measure both of the scope and the complexity of the TRC project that these questions remain as perplexing and elusive now as when the idea of a truth commission was first debated.

The TRC has not been slow off the mark. The Commission itself was appointed in December 1995 and by April 1996 was already staging its first public hearings. During the second half of the year it sustained a weekly schedule of concurrent hearings in urban centres as well as rural towns around the country – and these were only one part of its activities (TRC *Interim Report*, June 1996).

This is impressive, if only in organisational and logistical terms. The general political significance should also not be underestimated. Prior to its launch, fears were expressed that the resulting individual hurts and collective passions would be difficult to control. Even sympathetic critics saw the TRC as a high risk operation that could endanger South

Africa's fragile democratic transition. It is significant that so far, these fears have proved entirely groundless.

Despite their highly volatile and controversial subject matter, few if any, hearings have been marked by public protests or visible opposition. At most, opponents have sought court injunctions to block the TRC's proceedings. This amounts to a general – and quite remarkable – acceptance of process far beyond earlier expectations.

Having achieved this impressive record of performance and a basic legitimacy, why is there still so much uncertainty regarding the main tasks and objectives of the TRC? This is partly because the process must still run its course: it is not easy to gain a proper perspective while being swept along the roller-coaster ride of new disclosures, on the one hand, and continuing cover-ups and stonewalling on the other.

But it is also a matter of the TRC's simultaneous pursuit of several different tasks and objectives which are difficult to balance and may even conflict with one another. An interim assessment requires taking stock of the process in a larger historical and comparative perspective.

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There is also a need to disaggregate the tasks and objectives of the TRC and gauge its progress, or lack thereof, with respect to different issues.

### Democratic process?

The South African Truth Commission was able to build on a range of comparable efforts and the architects of the TRC consciously set out to learn from these precedents. Eventually it was the Chilean model which influenced South African thinking most. But the TRC is actually unique.

Like the Chilean model, and unlike for example its Argentinean counterpart, the TRC does not seek criminal prosecutions for perpetrators: instead it is committed to amnesty for the sake of national reconciliation. Again like the Chilean model, the TRC sets out to balance amnesty for perpetrators with discovering and acknowledging the truth about the fate of the victims as a means of restoring their human and civic dignity.

But unlike the Chilean model, and uniquely in the comparative international experience, the TRC is essentially a public and democratic enterprise. This accounts for some of its strengths and also many of its greatest problems. The TRC is not, like many of its counterparts elsewhere, a Presidential Commission or even an international tribunal, but a parliamentary commission.

Not only was the establishment of the TRC uniquely preceded by an extended public debate concerning its objectives, but its specific terms of reference were fashioned through parliamentary hearings and debates with the participation of all major political parties. Even the appointment of the Commissioners themselves was subject to a similar process of hearings and public scrutiny.

Moreover, this democratic character has been sustained in the TRC's proceedings which, to an unusual degree, are happening in public. The Chilean commission also held public hearings, but crucially, without ongoing media coverage. The dramatic impact of the Chilean TRC's report, as of the Argentinean and Brazilian *Nunca Mas* reports, had largely to do with the public presentation of authoritative and well defined finished products. The Latin

American models only went public once they were ready to do so. More generally the TRC largely fashioned its own agenda through a process of highly publicised negotiations. The issue of amnesty is a case in point. The TRC has not been charged with investigating the cases of a predefined set of alleged perpetrators. Since amnesty is only granted on individual application conditional on full disclosure, the TRC has to persuade reluctant perpetrators to avail themselves of this opportunity – much of which is being played out in full public view.

All parties are aware that this is likely to be a self-reinforcing process: if some key perpetrators apply for amnesty, their disclosures may set off a domino effect. Effectively this means that the TRC has to operate as a quasi-political agency interacting with a range of other forces – depending on alliances with some while having to demonstrate to others that it is a force to be reckoned with. In a sense this is the stuff of democratic politics; but for the TRC it is also a high stakes game of which the outcome is by no means assured.

Moreover, the TRC is not necessarily of a single mind itself. Indeed, it is possible to trace how – as different actors became involved – its character and objectives changed. To begin with it was bound up with the negotiated settlement reached at Kempton Park in late 1993 to clear the way for democratic transition. As the 'post-amble' to the Interim Constitution spelled out, national reconciliation was the highest priority which meant the issue of amnesty had to be settled, at least in principle.

It was left to human rights NGO's and others from civil society to develop the idea of a truth commission as a means of 'dealing with the past'. This was taken up by Minister of Justice Dullah Omar who, charged with giving effect to the amnesty provision, saw that if combined with the notion of a truth commission, the focus would shift from the perpetrators only, to acknowledgement of the victims as well.

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professions, saw another change of actors leading to a new and increasing stress on a religious discourse and symbolism of 'healing' and 'reconciliation'.

## Victims focus

The Commission set about getting its work under way, leaving the more theoretical issues concerning its main objectives – truth or justice, amnesty and reconciliation – for later. The TRC was also determined to see its tasks not only in human rights terms but rather in a developmental and representative context: priority was given to affirmative action appointments of support staff at every level possible.

The Commission's initial focus was around victims, in the form of the Human Rights Violations Committee's public hearings. The one part of the TRC process which, so far, has had the greatest public impact is undoubtedly the hearings at which victims could tell their own stories. The Commission created a sympathetic and caring setting for the bereaved – quite different from the adversarial procedures of a court of law, with assistants on hand to comfort those in distress. In this way a diverse range of individual testimonies could be taken up in a general discourse of forgiveness and reconciliation.

How much truth did these hearings uncover? In the more high profile cases, such as that of Goniwe or the 'Pebo three', and where there had been previous inquests, the hearings probably did not offer much new evidence. Their 'truth' function was essentially different – it was a matter of public and official acknowledgement of the victims' own stories and of the many atrocities which had so long been denied.

Still, the impact of the hearings lay primarily in the numbers who came forward, demonstrating the sheer scope and impact of political atrocities which occurred over the past decades. The cumulative effect as witness followed witness, was not so much to add insight about how and why all these terrible things had happened. On the one hand it was not possible to provide the full context for each story. On the other, the different stories did not add up to a single main narrative. It remains to be seen how

the Commission will eventually incorporate all this into its final report.

In the mean time, however, the ongoing process of hearings has established a new historical benchmark in terms of public knowledge: in whatever way they may still be interpreted or explained, the sheer number and gravity of political atrocities in our recent past can no longer be doubted or ignored. This is already a historical achievement for the TRC.

## Amnesty

Although the public hearings dominated the early stages of the TRC's work, this relates to only one part of its official brief. By the latter part of 1996 the TRC began to shift the focus of attention away from the victims. Here its record is mixed and its aims still unclear.

Little has been heard of the Reparation and Rehabilitation Committee, which is responsible for recommending appropriate means of restitution to victims. The Amnesty Committee too, has been much slower off the mark. This committee has a complex relation to the TRC: in some ways it is semi-autonomous, reporting directly to the President, while its judges are not themselves Commissioners.

Its procedures are more formal. Compared to the caring discourse of the victims' hearings, the Amnesty Committee is closer to the adversarial approach of criminal trials, while the judges also had some difficulty coming to terms with media coverage. It was only in October 1996 that the first major cases of former police officers applying for amnesty were brought before the Amnesty Committee.

Although the deadline for such applications has been extended to early this year, it is still an open question whether substantial numbers of perpetrators – and in particular prominent security force and ANC figures – will in fact apply for amnesty. If not, the TRC will have failed in one of its main objectives.

If the TRC was established to deal with amnesty and with the participation of all the political parties, why is this issue still unresolved? Part of the answer lies in the complex history of amnesty negotiations preceding the TRC. At one stage –

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following the breakdown of Codesa, and in the context of the bilateral rapprochement between the ANC and National Party (NP) leaderships which resulted in the Record of Agreement of September 1992 – the idea of a mutual bilateral amnesty was apparently mooted and some implicit understanding reached.

Arguably it was this that the NP representatives and the security forces had in mind when they pressed for inclusion of amnesty in the Interim Constitution. From their perspective it is contrary to this earlier agreement that the TRC Act made amnesty conditional on individual application and on the Norgaard criteria for political offences. On the ANC side too, serious reservations remain regarding the TRC as the vehicle for amnesty.

Many would prefer to see the perpetrators – both the operatives and their political masters – be prosecuted in the criminal courts. Ironically, the litany of atrocities presented to the Human Rights Violations Committee can only strengthen the call for justice, not amnesty. Moreover, many in the ANC dispute the need for alleged perpetrators of atrocities in the course of the anti-apartheid struggle to apply for amnesty. Whatever the history of the TRC's establishment, it cannot count on the key perpetrators from both sides coming forward with individual applications for amnesty.

### **Legal inducement**

The main inducement for perpetrators to apply for amnesty is the prospect that they might otherwise be prosecuted in court – or, in the case of those on the side of the ANC, that civil actions might be brought against them. However, as the case of former Defence Minister, Magnus Malan has shown, the odds may favour those prepared to take their chances in court rather than applying for amnesty.

In court the onus of proof – beyond a reasonable doubt – is on the prosecution. The granting of amnesty by the TRC by contrast, is conditional on full disclosure by the applicants themselves. There can be little doubt that the acquittal of all the accused in the KwaMakhutha-Malan trial will weigh heavily with any security force agents who must decide whether or not to apply for amnesty.

Public proof of this was provided by the content and tenor of the submission made on

behalf of the former South African Defence Force (SADF). The military was clearly closing ranks; did not see the need to apply for amnesty and was not proposing to volunteer any disclosures. Dr Boraine and other Commissioners expressed their ire over this approach and indicated that the TRC would use its powers to subpoena and investigate alleged perpetrators.

However, it is by no means clear that the TRC – faced with persistent stonewalling and legalistic manoeuvres – is in any better position than the courts to mount 'prosecutions' of suspected perpetrators on an adversarial basis.

It is thus clear why Tutu threatened to resign in November 1996 unless both the ANC and NP together with its former allies in the security forces, assist with the amnesty process – meaning that perpetrators from both sides submit their individual applications and volunteer disclosures. If this does not happen on a substantial scale, the TRC will not be able to resolve the amnesty issue. And if a different 'political' solution may have to be found, there are certain to be those on both sides who will press, once more, for a general bilateral amnesty.

### **Courts vs amnesty**

But the TRC's role in amnesty may yet be different. On the same day that the military so blandly declined to make any real disclosures, the police took a very different approach. The former Commissioner of Police, General van der Merwe, testified before the Amnesty Committee on behalf of six senior police officers who had actually applied for amnesty. For several reasons this was significant.

First, Van der Merwe had previously played a leading role in presenting a united front on behalf of the security forces in their dealings with the TRC – one clearly designed to prevent individuals making amnesty applications. The six officers had done just that, but instead of disowning them, he appeared on their behalf, announced that he would be applying for amnesty himself, and even volunteered the disclosure that he had been involved in a 'dirty tricks' operation.

Second, at one stage there were efforts to prepare a joint submission by the NP and the security forces. But there must have been a parting of ways, as in August FW de Klerk

presented the NP's disappointingly thin submission, while Van der Merwe went on record to implicate his political masters, even pointing to PW Botha as responsible for such outrages as the bombing of Khotso House. Evidently these police generals had concluded that the politicians could not be trusted to take co-responsibility with those who had carried out their policies in fighting a 'dirty war'.

If this surprising change of tack by the police constitutes the breakthrough on the amnesty issue needed by the TRC, then no doubt it can also be explained as an attempt to pre-empt the threat of imminent prosecution. Gauteng Attorney General D'Oliveira – following the conviction of Eugene de Kock for atrocities committed in the course of the Vlakplaas operations – was preparing further prosecutions against De Kock's superiors, such as general Basie Smit and others close to Van der Merwe.

If this points to a double track strategy, with the threat of prosecutions aiding the TRC in getting perpetrators to apply for amnesty, then it also indicates ways in which the two processes could interfere with each other. On the one hand, the prosecution of some perpetrators requires dispensing indemnity to others whose cooperation is needed as state witnesses. Some of the key individuals whose disclosures the TRC needs to get further applications for amnesty might choose indemnity in exchange for turning state witnesses in a criminal prosecution.

Conversely, the chances of an Attorney General mounting a successful prosecution may be scuppered by key state witnesses opting to apply for amnesty. In theory the two tracks could and should be coordinated in the interests of both justice and amnesty. In practice, it may well lead to battles over terrain and prerogatives between the TRC and the Attorneys General, providing opportunities for the targeted perpetrators to play them off against each other. For the time being it remains unclear whether the TRC will be able to resolve the amnesty issue satisfactorily.

## Reconciliation

The TRC must be considering how its final report should present its findings.

The Act charges it to prepare a 'comprehensive report' of political atrocities from 1960 to the end of 1993, which should include the perspectives of victims and the motives and views of perpetrators.

In one sense the public nature of the hearings means there is no strong separation between process and product as with other truth commissions. In telling their stories, the victims have already put their perspectives on record in ways which will have to be accommodated by the eventual report. On the other hand, the diverse stories do not readily combine in a common narrative of reconciliation. And as long as the perpetrators are not coming forward, an essential part of that larger narrative remains outstanding (Krog 1996).

A critical issue is the relevant senses of 'truth' as the commission goes from the stories told by victims and perpetrators towards its own report. Inevitably it must be concerned with the factual truth of any statements and develop appropriate procedures for corroborating these. However, there is a danger that in reducing individual stories to manageable 'cases' based on verifiable statements, the personal and narrative truth crucial to these stories will be lost.

Some observers have already been critical of how individuals' stories are framed by the TRC, and how subtle yet significant nuances are lost in translation; sub-texts ignored and dissenting voices silenced. All this is bound to apply even more to the bald factual case summaries which might result from the information management process set up by the TRC (Research Department, TRC 1996). Case summaries alone – however well corroborated for their factual truth – will not generate the larger narrative of reconciliation.

More generally, the TRC still seems surprisingly uncertain regarding its basic conceptual framework. Public statements by some commissioners as well as TRC study documents remain remarkably open ended and sometimes even sceptical on such fundamental issues as the TRC's commitment to justice and/or truth and the tensions between amnesty and prosecution (Villa-Vicencio and Verwoerd).

The commission seems so overwhelmed by the sheer practical details of getting the

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public hearings under way, together with the complications of its other diverse tasks, that it has not reflected and reached consensus on the basic moral and political issues at stake. This may be due to the democratic character of the TRC as suggested above, and the extent to which it conducts its business in public. Even so, the problem has been compounded by the invitation to political parties to make formal submissions to the TRC in August 1996.

These submissions were disappointing and the political parties were variously blamed for this. But such blame is misdirected. The representatives of political parties could not realistically be expected to make disclosures which could be damaging to their own political interests. If the idea was that the parties should assist the TRC in developing a conceptual framework for its task of national reconciliation, then this also backfired. Almost inevitably all parties were concerned not with the mandate of the TRC, but rather with how best to protect their own interests in relation to the TRC.

### **'Just war' doctrines**

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The ANC in particular proposed an approach which is in serious tension with the TRC's own mandate. Invoking traditional just war theories, the ANC essentially argued that its armed struggle against the apartheid government had been in a just cause and thus could not be equated with the gross violations of human rights committed in defence of an unjust order.

But this confuses the traditional just war doctrines: it is a basic tenet of just war theory to distinguish between the justice *of* war as against justice *in* war. Crucially it does not follow that if your cause is just, the rules of justice in war do not apply. The principles of justice in war – such as the rule that noncombatants may not be killed – apply equally to those fighting in a just cause as to those fighting in an unjust cause (see Adam in this issue). This is a cardinal principle for any criterion which the TRC develops to deal with gross violations of human rights.

This unresolved issue of how the TRC's basic normative framework applies to the main protagonists in the earlier political conflicts is closely connected to the contested issue of an implicit agreement on the amnesty issue. An enormous amount of work awaits the TRC in its final year – but in a broad political sense, these remain the key challenges on which its overall success or failure will depend. [PSA]

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